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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

Flawed - 1st Amend/civil rights

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.

there is no intent → to "shut down" so that is some-what irrelevant

Murphy?

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. (like Juice bars)

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.

I agree you have to be kidding me.

yeah what else is there to this? what's the point?

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)[1] 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 6th 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 (6th Cir 1994). A copy of the opinion is attached, EXHIBIT 9. The 6th 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

[1] 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 (7th 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. [2] **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 Unites 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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[2] Because *Ben's Bar* is a 7th Circuit decision, it is not binding precedent in the 6th 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 an 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 (7th 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

IX

PROPOSED RESOLUTION
LINCOLN PARK CITY COUNCIL

Date:

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

****

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.

****

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

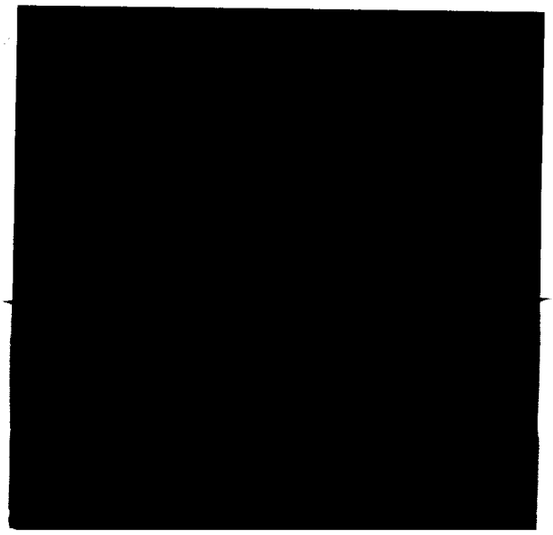

Exhibit 8

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

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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.

****

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

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

ABSTAINED: COU

[redacted]

[redacted]

Exhibit B

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

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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.

[redacted]

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

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

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

Pornographic means relating to pornography.

Pornographic means any material or performance when all the following element 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 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 **MAYOR** Brown.	Brady,	DiSanto,	Higgins,	Kandes,	Murphy,	Vasio,
NAYS:	COUNCILPERSONS **MAYOR** Brown	Brady,	DiSanto,	Higgins,	Kandes,	Murphy,	Vasio,
ABSTAINED:	COUNCILPERSONS,	Brady,	DiSanto	Higgins			

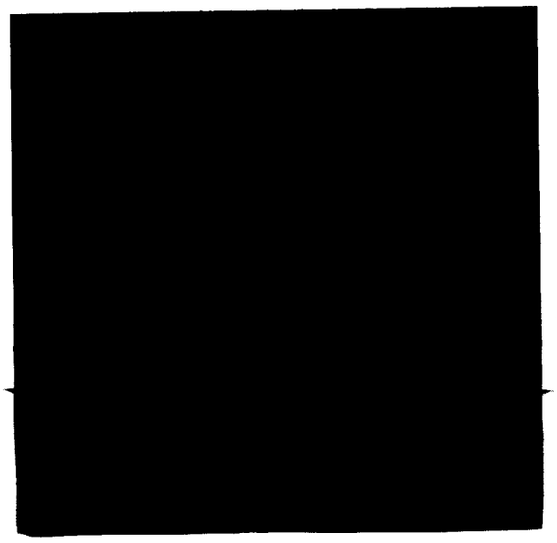
SAMPLE

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.

What are the crime statistics for "Juice bars"
VS
Crime Statistics for topless bars / Alcohol.

Thought: Why cant the age restriction for Adult Entertainment facilities be raised to 21 as liquor is?



M.C.L.A. 436.1916

Exhibit 5

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

[redacted]

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:

SAME AS THIS Resolution

(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

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

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

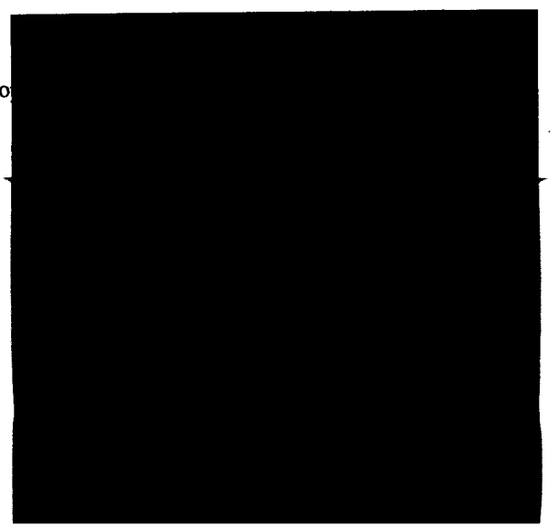
2004 Electronic Update

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



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

[redacted]

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** 111(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 thorofare [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 thorofare.
> (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 ex
described in subparts a throu
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 AACS, 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

END OF DOCUMENT

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.

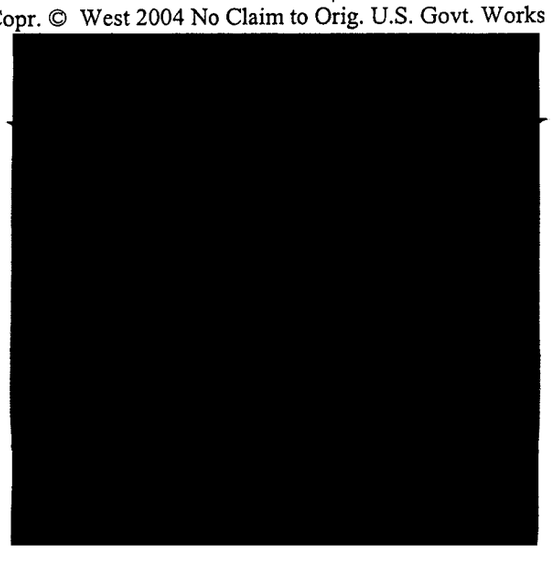
[5] **Judges** 49(1)
227k49(1) Most Cited Cases

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 *Jott*, 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 AACS, 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 AACS, 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." *611Id. 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. Iacobucci, 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

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 cites 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 *Grayned, 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 ***632** 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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West Reporter Image (PDF)

63 USLW 2313, 1994 Fed.App. 0386P

Exhibit 9

United States Court of Appeals,
Sixth Circuit.
TRIPLETT GRILLE, INC., d/b/a The Back Door, Plaintiff-Appellee,
v.
CITY OF AKRON, Defendant-Appellant.
No. 93-3418.
Argued May 2, 1994.
Decided Nov. 14, 1994.

Operator of club brought action against city, challenging constitutionality of public indecency ordinance. The United States District Court for the Northern District of Ohio, Sam H. Bell, J., 816 F.Supp. 1249, held that ordinance was substantially overbroad and violated First Amendment. City appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that: (1) indecency ordinance did not violate First Amendment as applied to prohibit nude dancing at club, despite claim that ordinance was not enacted to combat secondary effects of adult entertainment, but (2) ordinance, facially banning all nudity in public places, was facially unconstitutional under First Amendment overbreadth doctrine, as city had failed to demonstrate link between nudity in nonadult entertainment and secondary effects.
Affirmed.

Ed's ordinance

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations. Most Cited Cases

City's public indecency ordinance, facially banning all nudity in public places, did not violate First Amendment as applied to prohibit nude dancing at club, despite claim that ordinance was not enacted to combat secondary effects of adult entertainment; in requiring evidence of secondary effects motivation, district court imposed burden on city which governing Supreme Court precedent appeared designed to avoid, ordinance was virtually identical to statute upheld by Supreme Court and, moreover, evidence suggested that number of city councilmen actually supported ordinance in part because they wished to prevent occurrence of harmful secondary effects. U.S.C.A. Const.Amend. 1; Akron, Ohio, City Code § 133.06.

[2] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(2) k. Sex and Nudity in General. Most Cited Cases

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations

[redacted]

☞281k2.5 k. Particular Regulations. Most Cited Cases

City ordinance facially banning all nudity in public places was facially unconstitutional under First Amendment overbreadth doctrine, as city had failed to demonstrate link between nudity in nonadult entertainment and secondary effects; no evidence linked expressive nudity in "high-culture" entertainment to harmful secondary effects, and court was unable to supply limiting construction for regulation. U.S.C.A. Const.Amend. 1; Akron, Ohio, City Code § 133.06.

***130** J. Michael Murray (argued and briefed), Steven D. Shafron, Berkman, Gordon, Murray, Palda & DeVan, Cleveland, OH, Lawrence J. Whitney, Sr., and Burdon & Merlitti, Akron, OH, for plaintiff-appellee.

David A. Muntean, Director of Law, and Deborah M. Forfia (argued and briefed), City of Akron Law Dept., Akron, OH, for defendant-appellant.

Spencer Neth (briefed), Cleveland, OH, for amicus curiae.

Before: MARTIN, NORRIS, and DAUGHTREY, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

Concluding that the First Amendment's guarantee of freedom of expression prevents the City of Akron from enforcing its public indecency ordinance, the district court granted Triplett Grille's prayer for a permanent injunction. The City now appeals.

I

Triplett Grille, Inc. operates a club called The Back Door on Triplett Boulevard in Akron, Ohio. At 4:00 p.m. on October 12, 1992, The Back Door began to present entertainment that included nude dancing. Just over an hour later, the Akron Police Department's vice squad, accompanied by City Councilman John Otterman, raided the bar. The officers immediately shut down The Back Door pursuant to Akron City Code Section 111.579, which provides in pertinent part:

The Police Chief or the Fire Chief, or their designated officers, shall without written notice cause the immediate cessation of any activity described in § 111.570 which is being conducted without benefit of a city license as required in § 111.570 for the reason of improper and illegal operation.

Section 111.570 details Akron's theatrical licensing scheme, which requires all individuals and organizations to obtain a license from the Mayor before presenting "entertainment ... for which money or other reward is in any manner demanded or received." The ***131** performance was not illegal under the public indecency law then in effect. [FN1]

FN1. Section 133.06 of the Akron City Code provided:

(A) No person shall recklessly do any of the following, under circumstances in which his or her conduct is likely to be viewed by and affront others, not members of his or her household:

(1) Expose his or her private parts, or engage in masturbation;

(2) Engage in sexual conduct;

(3) Engage in conduct which to an ordinary observer would appear to be sexual conduct or masturbation.

Over the next few weeks, the club's doors stayed shut as its managers endeavored to obtain the necessary theatrical license. The City's lawmakers, meanwhile, reacted to the public outcry over the presentation of nude dancing at The Back Door. During a citizens' meeting called to discuss the situation, various Councilmen and the City Prosecutor addressed community concerns regarding nude dancing in Akron. Meanwhile, Councilman Otterman explored, with the assistance of the City's law department, possible legal avenues for outlawing nude dancing.

Shortly thereafter, the City Council supplanted the long-standing public indecency ordinance with an Otterman-sponsored ordinance, which on its face bans all nudity in public places. Nudity is broadly defined as "the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state." A.C.C. § 133.06(B).[FN2] Adopted as an emergency measure, the ordinance took effect immediately after the Mayor signed it on October 21. The provision clearly prohibits nude dancing at The Back Door.

FN2. Akron's public indecency ordinance now provides:

(A) No person shall knowingly or intentionally, in a public place:

(1) Engage in sexual intercourse;

(2) Engage In deviant sexual conduct;

(3) Appear in a state of nudity; or

(4) Fondle the genitals of himself or another person.

(B) For the purpose of this section only, the following definitions shall apply:

"*Nudity* " means the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

"*Public Place* " means any street, sidewalk, right of way and any public or private building or place where the general public is invited.

A.C.C. § 133.06.

II

On November 23, Triplett Grille filed suit in federal district court seeking to enjoin the City from enforcing its revised public indecency ordinance to prevent the performance of nude dancing at The Back Door. The plaintiff claimed that Akron's ordinance was facially unconstitutional and, as applied to nude dancing, improperly infringed on expression protected by the First Amendment. Triplett Grille also challenged the constitutionality of the City's theater licensing scheme.

Triplett Grille's First Amendment claims were tried by the district court on February 10 and March 4, 1993. During the two-day trial, Triplett Grille presented testimony from each member of the City Council and from the Mayor regarding the passage of the public indecency ordinance. The lawmakers explained that they had enacted the provision because a block of constituents voiced moral opposition to The Back Door's nude dancing presentation and also testified that the ordinance was designed to eliminate all public nudity in Akron, including theatrical performances and barroom dancing. None of the witnesses cited the prevention of prostitution or other criminal activity as one of the ordinance's goals, and none was able to specify any problems with public nudity in Akron under the previous public indecency ordinance. Succinctly summing up the City's intent, the Mayor testified that the City Council enacted the ordinance to establish "a community standard."

In a carefully detailed opinion dated March 17, the district court concluded that Akron's public

indecency ordinance violated the First Amendment. 816 F.Supp. 1249. While acknowledging that the Supreme Court recently ***132** upheld an Indiana statute with virtually identical language in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the court determined that the fractured nature of the Court's decision made necessary an analysis of the Akron ordinance as applied to The Back Door. As the district court noted, three opinions make up the majority in *Barnes:* Chief Justice Rehnquist wrote for Justices O'Connor and Kennedy, while Justices Souter and Scalia each concurred separately, taking pains to disavow at least portions of the Rehnquist opinion. The Chief Justice's opinion, which upholds the Indiana public indecency statute, is built around the four-part test developed by the Court in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968): "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest". Although Justice Souter agreed with the plurality that nude dancing enjoys First Amendment protection, and also agreed that the statute should be analyzed under the *O'Brien* test, he disagreed as to the interest justifying restriction of First Amendment rights of expression. Justice Scalia, on the other hand, rejected altogether the contention that nude dancing is entitled to First Amendment protection.

In light of the Supreme Court's instruction that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,' " *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976)), the district court closely examined the three opinions making up the *Barnes* majority. After reviewing the holding of each, and the legal context in which each opinion's analysis is grounded, the court concluded that Justice Souter ruled on the narrowest grounds. As the district court summarized:

Justice Scalia very broadly denies all First Amendment protection to nude dancing. The plurality dramatically expands the scope of the *O'Brien* test by allowing morality concerns to justify local legislation. Justice Souter, in contrast, bases his application of the *O'Brien* test on assumptions previously upheld in *Renton.*

The court thus reviewed the Akron ordinance under Justice Souter's analytical framework. In doing so, the district court reasoned that the Akron ordinance could survive scrutiny only if it was designed to prevent the occurrence of harmful secondary effects associated with adult entertainment, including crime and prostitution. *See Barnes*, 501 U.S. at 582-86, 111 S.Ct. at 2469-70 (Souter, J., concurring) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). As the City's lawmakers claimed during trial that they were moved to enact the ordinance only by morality concerns and failed to dwell on an interest in combatting secondary effects, the district court concluded that the ordinance is constitutionally deficient as applied to prohibit nude dancing. While acknowledging that Justice Souter simply assumed that members of the Indiana legislature considered secondary effects when enacting the statute at issue in *Barnes*, the district court found such a presumption inapplicable here because "every Akron law maker testified concerning Council's deliberation before enacting the new public indecency law. There are no anonymous law makers to whom the court can attribute a secondary effects concern." In reaching this conclusion, the district court rejected the City's objections to the use of the lawmakers' testimony, finding instead that the testimony was properly considered for the purpose of determining what evidence was before the City Council when the Akron ordinance was adopted. The district court went on to find that the Akron ordinance was facially invalid. As the district court recognized, there was no overbreadth claim before the Supreme Court in *Barnes* because the Seventh Circuit had earlier ***133** held that the Indiana public indecency statute at issue had been sufficiently limited by judicial construction. *See Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 288 (7th Cir.1986) (concluding that "Indiana Supreme Court adequately narrowed the statute"). Nevertheless, the district court found it necessary to look to *Barnes* to determine whether the Akron ordinance regulated expression protected under the First Amendment. Relying again on Justice Souter's secondary effects analysis, the district court concluded that because "[t]he broad range of expressive conduct which is potentially prohibited by Akron's ordinance has not been shown to be harmful," the public indecency provision "goes significantly beyond its only legitimate sweep, combatting the secondary effects of adult entertainment." To hold otherwise, the district court observed, would give the City the right to ban live performances with serious literary, artistic, or political value. As the City could point to no link between nudity in non-adult entertainment and secondary effects, the district court found that the Akron ordinance necessarily proscribed protected expression and was thus overbroad.

Having concluded that the Akron ordinance violates the First Amendment, the district court enjoined the City from enforcing its public indecency statute. This timely appeal followed.

III

At the outset, we are presented with the vexing task of divining which of the varied standards enunciated in *Barnes* is the law of the land. As noted earlier, *Barnes* engendered four separate opinions, none of which commanded a majority of the Justices. *See* *Barnes*, 501 U.S. at 561-63, 111 S.Ct. at 2458 (opinion of Rehnquist, C.J.) (joined by O'Connor and Kennedy, JJ.); *id.* at 571-72, 111 S.Ct. at 2463 (Scalia, J., concurring); *id.* at 580- 82, 111 S.Ct. at 2468 (Souter, J., concurring); *id.* at 587, 111 S.Ct. at 2471 (White, J., dissenting) (joined by Marshall, Blackmun, and Stevens, JJ.). Chief Justice Rehnquist's attempt to win acceptance for the proposition that the enforcement of morality is a proper basis for limiting the freedom of speech did not win majority support: only Justices O'Connor and Kennedy joined the Rehnquist opinion. *Barnes*, 501 U.S. at 561-63, 111 S.Ct. at 2458. While Justice Souter agreed with the Chief Justice that the Indiana statute was properly analyzed under the four-part *O'Brien* test, he identified material harms, not moral concerns, as the basis for restricting First Amendment protection for expressive conduct. *Id.* at 582, 111 S.Ct. at 2468-69 ("I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments."). Justice Scalia, the fifth Justice concurring in the result, concluded that nude dancing is not inherently expressive activity entitled to First Amendment protection. *Id.* at 561, 111 S.Ct. at 2458 (concluding that "[m]oral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed"). Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented. Although binding on this Court, this splintered decision provides little clear guidance for resolving the question of whether the Akron ordinance at issue here impermissibly infringes expressive conduct protected by the First Amendment.

Well aware of the difficulties created by fractured decisions, the Supreme Court counseled in *Marks* that, when the Court issues such a decision, the opinion of the Justice concurring in the judgment on the "narrowest grounds" should be regarded as the Court's holding. *Marks*, 430 U.S. at 193, 97 S.Ct. at 993 (citation omitted). As the Third Circuit has cogently observed:

The principal objective of this *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent. This objective requires that, whenever possible, there be a single legal standard for the lower courts to apply in similar cases and that this standard, when properly applied, produce results with which a majority of the Justices in the case articulating the standard ***134** would agree.... [W]here no single rationale 'enjoys the assent of five Justices,' the situation becomes more complex, but the controlling principle is the same. Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.

Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 693 (3d Cir.1991) (citation omitted), *aff'd in part and rev'd in part*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *see also* *Lundblad v. Celeste*, 874 F.2d 1097, 1101-02 & n. 4 (6th Cir.1989) (following Justice Stewart's concurring opinion in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)), *modified on other grounds*, 924 F.2d 627 (1991). Admittedly, the *Marks* rule is less useful where, as here, no opinion, however narrowly construed, may be said to embody a position that enjoys the support of at least five Justices who concurred in the judgment. Nevertheless, our obligation to follow the Supreme Court's decision coupled with the fact that *Marks* remains the Court's only guidance on how lower courts should comply with this duty leads us to rely upon the rule for instruction in reading the tea leaves of *Barnes*.

Applying the *Marks* rule, the district court correctly concluded that Justice Souter's concurring opinion resolved the question before the Supreme Court on the narrowest grounds. Justice Souter's opinion, which was necessary to uphold the Indiana statute, set forth as its standard a coherent subset of the principles articulated in the plurality opinion. As a logical consequence of their approval of morality justifications for regulations of speech, Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy implicitly agreed with Justice Souter that governmental efforts to control the harmful secondary effects associated with adult entertainment can serve as a basis for restricting activities that enjoy First Amendment protection. In fact, the Chief Justice's opinion specifically detailed material harms as one of the legitimate governmental interests justifying the regulation of speech:

This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.... Thus, the public indecency

statute furthers a substantial government interest in protecting order and morality. *Barnes*, 501 U.S. at 569, 111 S.Ct. at 2462 (citations omitted). Because Justice Souter's opinion articulates a common underlying approach, it may be said to decide the question presented to the Court in *Barnes* on the "narrowest grounds."

Given this conclusion and the lower court's obligation to adhere to the Supreme Court's decision, the district court did not err in regarding Justice Souter's opinion in *Barnes* as binding precedent. *See International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (11th Cir.1991) (concluding, based on Souter opinion, that "in order to uphold a statute regulating nude dancing, it is still necessary after *Barnes* that the statute meet the secondary effects test of *Renton* "), *cert. denied*, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992); *see also Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.) ("Despite the inarguable fact that only *four* justices in *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)] would have imposed a 'direct evidence' requirement for 'mixed-motives' cases, most circuits have engrafted this requirement into caselaw."), *cert. denied*, --- U.S. ----, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). While "there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion." *Blum v. Witco Chemical Corp.*, 888 F.2d 975, 981 (3d Cir.1989) (following Justice O'Connor's concurring opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987)). The unique approach taken by Justice Scalia does not, in this singular situation, alter our conclusion. In light of the Supreme Court's failure to agree upon a rationale for the ***135** result in *Barnes*, the badly splintered nature of the Court's decision, and the lack of prior controlling precedent from this Court, we agree with the district court that Justice Souter's opinion may properly be regarded as providing the proper framework for addressing the question presented here.

[1] The district court's reliance on Justice Souter's opinion to strike down the Akron ordinance as applied to nude dancing at the Triplett Grille is, however, misplaced. By requiring affirmative evidence of a secondary effects motivation, the district court imposes a burden on the City that Justice Souter's opinion seems designed to avoid. As Justice Souter observed:

> In light of Renton's recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes.... I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case.

Barnes, 501 U.S. at 584-85, 111 S.Ct. at 2470. Moreover, there is evidence in the record suggesting that a number of Akron City Councilmen actually supported the public indecency ordinance in part because they wished to prevent the occurrence of harmful secondary effects. *See* Joint Appendix at 156 (Councilman Sommerville testified ordinance was passed because constituents were concerned that "nude dancing brought a certain element to the neighborhood"); J.A. at 182 (Councilman Bolden testified that he supported ordinance because constituents felt there were "problems in neighborhoods and they asked for help"). Finally, because the Akron public indecency ordinance is virtually identical to the Indiana statute considered in *Barnes*, the district court was bound to adhere to the specific result of that case, even though the Supreme Court failed to agree on governing standards. *See Casey*, 947 F.2d at 691-92 ("As a lower court, we are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test."). Given the language of Justice Souter's opinion, the evidence presented at trial, and the requirement of judicial fealty to the result reached by the Supreme Court in *Barnes*, the district court erred in concluding that the Akron ordinance was unconstitutional as applied because it was not enacted to combat the secondary effects of adult entertainment.

[2] Because the City has failed to demonstrate a link between nudity in non-adult entertainment and secondary effects, we do agree with the district court that the Akron ordinance must be struck down as facially unconstitutional under the First Amendment overbreadth doctrine. As this Court has recognized, the "overbreadth doctrine constitutes an exception to traditional rules of standing and is applicable only in First Amendment cases in order to ensure that an overbroad statute does not act to 'chill' the exercise of rights guaranteed protection." *Leonardson v. City of East Lansing*, 896 F.2d 190, 195 (6th Cir.1990) (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963)). Under the doctrine, "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court--those who desire to engage in legally protected expression but who

may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.' " *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985)). While the overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973), a plaintiff may prevail on a facial attack by demonstrating there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984).

***136** The Akron public indecency ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes. As Justice Souter acknowledged in *Barnes:*

It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of Renton-type adult entertainment was correlated with such secondary effects. *Barnes*, 501 U.S. at 585 n. 2, 111 S.Ct. at 2470 n. 2. [FN3] Because the City failed to present evidence linking expressive nudity in "high-culture" entertainment to harmful secondary effects, we conclude that the ordinance infringes speech protected by the First Amendment.

FN3. As noted earlier, the Supreme Court did not confront a First Amendment overbreadth challenge in *Barnes* because the Indiana Supreme Court supplied a limiting construction for the particular statute at issue. *See Glen Theatre, Inc.*, 802 F.2d at 289-90 (concluding that "Indiana Supreme Court adequately narrowed the statute").

While loath to find that the Akron public indecency ordinance violates the First Amendment, this Court is unable to supply a limiting construction for the regulation. It is well recognized that federal "courts do not rewrite statutes to create constitutionality." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir.1991). As this Court recently emphasized:

A federal court must always be aware of the federalism concerns that arise whenever it deals with state statutes. 'The principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance.'

Id. at 1125 (citation omitted). It would therefore be improper for this Court to supply limiting language for Akron's public indecency ordinance in order to preserve its constitutionality.

IV

As the Akron public indecency ordinance is substantially overbroad, and is not fairly subject to a saving construction, we conclude that the ordinance violates the First Amendment. The judgment of the district court is affirmed.

C.A.6 (Ohio),1994.

Triplett Grille, Inc. v. City of Akron

40 F.3d 129, 63 USLW 2313, 1994 Fed.App. 0386P

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United States Court of Appeals,
Seventh Circuit.
BEN'S BAR, INC., Plaintiff-Appellant,
v.
VILLAGE OF SOMERSET, Defendant-Appellee.
No. 01-4351.
Argued May 30, 2002.
Decided Jan. 17, 2003.

Tavern and two of its nude dancers brought § 1983 action against city, seeking declaratory and injunctive relief against enforcement of ordinance that prohibited sale, use, or consumption of alcohol on premises of "Sexually Oriented Businesses," alleging violation of their right to freedom of expression under First and Fourteenth Amendments. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, granted judgment for city. Plaintiffs appealed. The Court of Appeals, Manion, Circuit Judge, held that municipal ordinance was reasonable attempt to reduce or eliminate undesirable "secondary effects" associated with barroom adult entertainment.
Affirmed.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) k. Limitations on Doctrine in General. Most Cited Cases

A governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, 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 speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

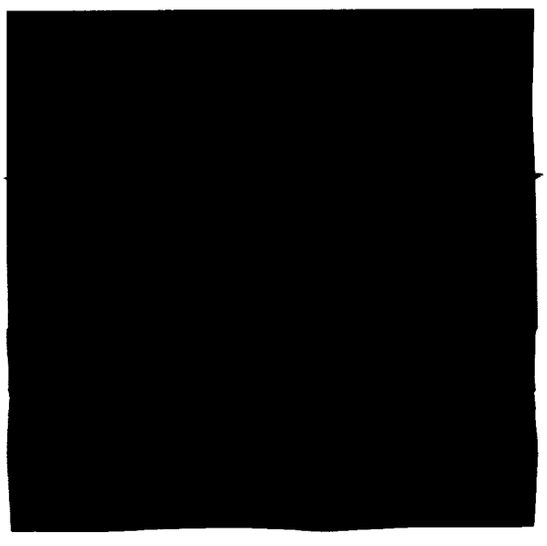
[2] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

A time, place, and manner regulation of adult entertainment will be upheld under the First Amendment if it is designed to serve a substantial government interest and reasonable alternative avenues of communication remain available; additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's interest. U.S.C.A. Const.Amend. 1.

[3] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights



92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

The analytical frameworks and standards utilized in evaluating adult entertainment regulations under the First Amendment, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

A liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments does not violate the First Amendment if: (1) the state is regulating pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, 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. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

223 Intoxicating Liquors
223II Constitutionality of Acts and Ordinances
223k15 k. Licensing and Regulation. Most Cited Cases

Municipal ordinance, that restricted sale or consumption of alcohol on premises of businesses that served as venues for adult entertainment, was reasonable attempt to reduce or eliminate undesirable "secondary effects" associated with barroom adult entertainment, in § 1983 lawsuit under free speech clause of First Amendment; regulation of alcohol was within city's general police powers, regulation did not have any impact on tavern's ability to offer nude or semi- nude dancing to its patrons, and liquor prohibition was no greater than was essential to further city's substantial interest in combating secondary effects resulting from combination of nude and semi-nude dancing and alcohol. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

[6] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

The level of First Amendment scrutiny a court uses to determine whether a regulation of adult

entertainment is constitutional depends on the purpose for which the regulation was adopted; if the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny, if, on the other hand, the regulation was adopted for a purpose unrelated to the suppression of expression, e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct, a court must apply a less demanding intermediate scrutiny. U.S.C.A. Const.Amend. 1.

[7] KeyCite Notes

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak412.1 k. In General. Most Cited Cases

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k120 k. Construction and Operation. Most Cited Cases

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware.

[8] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

Regulations of adult entertainment receive intermediate scrutiny under the First Amendment if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. U.S.C.A. Const.Amend. 1.

[9] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and, therefore, are treated as if they were content-neutral under the First Amendment. U.S.C.A. Const.Amend. 1.

[10] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

In the context of the First Amendment, whether an adult entertainment liquor regulation is treated as a time, place, and manner regulation, or as a regulation of expressive conduct, a court is required to ask whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. U.S.C.A. Const.Amend. 1.

[11] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) k. Limitations on Doctrine in General. Most Cited Cases

In order to justify a content-based time, place, and manner restriction under the First Amendment, or a content-based regulation of expressive conduct, a municipality must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact; the regulation may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside, and, furthermore, a municipality may not assert that it will reduce secondary effects by reducing speech in the same proportion. U.S.C.A. Const.Amend. 1.

[12] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

The First Amendment does not entitle a tavern, its dancers, or its patrons, to have alcohol available during a "presentation" of nude or semi-nude dancing; even though the First Amendment does require that such establishments be given a reasonable opportunity to disseminate the speech at issue, a "reasonable opportunity" does not include a concern for economic considerations. U.S.C.A. Const.Amend. 1.

***704** Matthew A. Biegert (argued), Doar, Drill & Skow, New Richmond, WI, for Plaintiff-Appellant.

Ted Waskowski, Meg Vergeront (argued), Stafford Rosenbaum, Madison, WI, for Defendant-Appellee.

Before FLAUM, Chief Judge, and WOOD, Jr. and MANION, Circuit Judges.

MANION, Circuit Judge.

Ben's Bar, Inc. operates a tavern in the Village of Somerset, Wisconsin, that formerly served as a venue for nude and semi-nude dancing. After the Village enacted an ordinance that, in part, prohibited the sale, use, or consumption of alcohol on the premises of "Sexually Oriented Businesses," Ben's Bar and two of its dancers filed suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the enforcement of the ordinance. The plaintiffs' complaint alleged, among other things, that the ordinance's alcohol prohibition violated their right to freedom of expression under the First and Fourteenth Amendments to the United States Constitution. Shortly

thereafter, plaintiffs filed a motion for a preliminary injunction, which the district court denied. The Village then filed a motion for summary judgment, which the district court granted. Ben's Bar appeals this decision. Because we conclude that the record sufficiently supports the Village's claim that the liquor prohibition is a reasonable attempt to reduce or eliminate the undesirable "secondary effects" associated with barroom adult entertainment, rather than an attempt to regulate the expressive content of nude dancing, we affirm the district court's judgment.

I.

On October 24, 2000, the Village of Somerset, a municipal corporation located in St. Croix County, Wisconsin ("Village"), enacted Ordinance A-472, entitled "Sexually ***705*** Oriented Business Ordinance" ("Ordinance"), for the purpose of regulating "Sexually Oriented Businesses and related activities to promote the health, safety, and general welfare of the citizens of the Village of Somerset, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of Sexually Oriented Businesses within the Village of Somerset." The Ordinance regulates hours of operation, location, distance between patrons and performers, and other aspects concerning the operations of Sexually Oriented Businesses.

In the legislative findings section of the Ordinance, the Village noted that:

Based on evidence concerning the adverse secondary effects of Sexually Oriented Businesses on the community in reports made available to the Village Board, and on the holdings and findings in [numerous Supreme Court, federal appellate, and state appellate judicial decisions], as well as studies and summaries of studies conducted in other cities ... and findings reported in the Regulation of Adult Entertainment Establishments in St. Croix County, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses ... the Village Board finds that:

(a) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.

(b) Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.

(c) Sexually oriented businesses may contribute to an increased public health risk through the spread of sexually transmitted diseases.

(d) There is an increase in the potential for infiltration by organized crime for the purpose of unlawful conduct.

(e) *The consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community.*

(Emphasis added.)

On February 2, 2001, two months before the Ordinance's effective date of April 1, 2001, Ben's Bar, Inc. ("Ben's Bar"), a tavern in the Village featuring nude and semi-nude barroom dance, [FN1] and two of its dancers, Shannen Richards and Jamie Sleight, filed a four-count complaint against the Village, pursuant to 42 U.S.C. § 1983 and Wis. Stat. § 806.04 (the State's "Uniform Declaratory Judgments Act"), in the United States District Court for the Western District of Wisconsin. The plaintiffs' complaint alleged that portions of the Ordinance were unconstitutional and preempted by Wisconsin law, sought a declaratory judgment resolving those issues, and requested permanent injunctive relief. Specifically, the plaintiffs argued that the Ordinance: (1) violated their right of free expression under the First and Fourteenth Amendments to the United States Constitution and Article I, § 3 of the Wisconsin Constitution; [FN2] (2) violated their right to ***706*** equal protection under the Fourteenth Amendment to the United States Constitution and Article 1, § 1 of the Wisconsin Constitution; [FN3] (3) was an illegal "policy or custom" of the Village within the meaning of *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Owen v. City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); and (4) was an *ultra vires* legislative act in violation of Wis. Stat. § 66.0107(3). [FN4]

FN1. Ben's Bar holds a liquor license issued by the Village.

FN2. Article 1, § 3 of the Wisconsin Constitution provides, *inter alia,* that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." Wis. Const., art. I, § 3.

FN3. Article 1, § 1 of the Wisconsin Constitution provides that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const., art. I, § 1.

FN4. Wis. Stat. § 66.0107(3) provides that "[t]he board or council of a city, village or town may not, by ordinance, prohibit conduct which is the same as or similar to conduct prohibited by § 944.21 [i.e., the state's obscenity statute]."

On March 19, 2001, the plaintiffs moved for a preliminary injunction against the enforcement of Sections 5(a) and (b) of the Ordinance. Section 5(a) provides that "[i]t shall be a violation of this ordinance for any Person to knowingly and intentionally appear in a state of Nudity in a Sexually Oriented Business." [FN5] Section 5(b) of the Ordinance provides that "[t]he sale, use, or consumption of alcoholic beverages on the Premises of a Sexually Oriented Business is prohibited." Plaintiffs argued that under § 66.0107(3) the Village was prohibited from enacting these regulations of adult entertainment because such conduct is already covered by the state's obscenity statute--i.e., Wis. Stat. § 944.21. They also contended that, notwithstanding § 66.0107, Sections 5(a) and (b) violated their right to free expression under the First and Fourteenth Amendments.

FN5. Under Section 3(*o*) of the Ordinance, "Nudity" or "state of nudity" is defined as "the appearance of the human bare anus, anal cleft or cleavage, pubic area, male genitals, female genitals, or the nipple or areola of the female breast, with less than a fully opaque covering; or showing of the covered male genitals in a discernibly turgid state."

On April 17, 2001, the district court denied plaintiffs' motion for preliminary injunctive relief, holding that they did not have a reasonable chance of succeeding on the merits of their complaint. The district court, utilizing the test established by this circuit in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir.2000), held that Section 5(a)'s complete prohibition of full nudity in Sexually Oriented Businesses was constitutional under the First Amendment because " 'limiting erotic dancing to semi-nudity [i.e., pasties and G-strings] represents a *de minimis* restriction that does not unconstitutionally abridge expression.' " (quoting *Schultz*, 228 F.3d at 847). The district court also concluded that Section 5(b) passed constitutional muster under *Schultz* because it: (1) was justified without reference to the content of the regulated speech; (2) was narrowly tailored to serve a significant government interest in curbing adverse secondary effects; and (3) left open ample alternative channels for communication. Finally, the district court ruled that the Ordinance was not subject to preemption under Wis. Stat. § 66.0107(3) because the plaintiffs had conceded that: (1) the Ordinance only regulates non-obscene conduct; and (2) they were seeking only to provide non-obscene barroom dancing.

Following unsuccessful attempts at settlement, on August 20, 2001, the Village moved for summary judgment of plaintiffs' complaint. On November 23, 2001, the district court granted the Village's motion, concluding that the Ordinance was constitutional for the reasons expressed in its ***707** April 17, 2001 order. The court also addressed plaintiffs' equal protection claim, noting that they had waived the argument by failing to develop it in their briefs. A judgment in conformity with that order was entered on November 26, 2001. Ben's Bar appeals the district court's decision granting summary judgment, [FN6] arguing that the court erred in concluding that Section 5(b) does not constitute an unconstitutional restriction on nude dancing under the First Amendment. *See DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 827 n. 2 (7th Cir.1999) (holding that corporations may assert First Amendment challenges). We review the district court's grant of summary judgment *de novo*, construing all facts in favor of Ben's Bar, the non-moving party. *Commercial Underwriters Ins. Co. v. Aires Envtl. Services, Ltd.*, 259 F.3d 792, 795 (7th Cir.2001).

FN6. Plaintiffs Shannen Richards and Jamie Sleight did not appeal the district court's judgment.

II.

The First Amendment provides, in part, that "Congress shall make no law ... abridging the freedom of speech ...." U.S. Const. amend. I. The First Amendment's Free Speech Clause has been held by the Supreme Court to apply to the states through the Fourteenth Amendment's due process clause. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *DiMa Corp.*, 185 F.3d at 826 (acknowledging the applicability of the Supreme Court's "incorporation doctrine" in the First Amendment context). The Supreme Court has further held that "nude dancing ... is expressive conduct *within the outer perimeters of the First Amendment,* though we view it as only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) (emphasis added). *See also Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir.2001) (noting that "[t]he impairment of First Amendment values is slight to the point of being risible since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value ...."). Thus, while few would argue "that erotic dancing ... represents high artistic expression," *Schultz v. City of Cumberland*, 228 F.3d 831, 839 (7th Cir.2000), the Supreme Court has, nevertheless, afforded such expression a diminished form of protection under the First Amendment. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion) (holding that " 'even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, *it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate* ....' ") (citation omitted) (emphasis added).

This case requires us to determine whether a municipality may restrict the sale or consumption of alcohol on the premises of businesses that serve as venues for adult entertainment without violating the First Amendment. On appeal, Ben's Bar's primary argument is that Section 5(b) is unconstitutional because the regulation has the "effect" of requiring its dancers to wear more attire than simply pasties and G-strings. [FN7] This argument ***708** may be summed up as follows: (1) Section 5(b) prohibits the sale, use, or consumption of alcohol on the premises of Sexually Oriented Businesses; [FN8] (2) Ben's Bar is an "Adult cabaret," a sub-category of a Sexually Oriented Business under the Ordinance, [FN9] if it features nude or semi-nude dancers; (3) Section 3(*o*) of the Ordinance defines "seminude or semi-nudity" as "the exposure of a bare male or female buttocks or the female breast below a horizontal line across the top of the areola at its highest point with less than a complete and opaque covering"; and (4) Ben's Bar's dancers must wear more attire than that required by the Ordinance's definition of "semi-nude or semi-nudity" in order for the tavern to be able to sell alcohol during their performances and comply with Section 5(b)--i.e., more than pasties and G-strings. Ben's Bar contends that Section 5(b) significantly impairs the conveyance of an erotic message by the tavern's dancers [FN10] and is not narrowly tailored to meet the Village's stated goal of reducing the adverse secondary effects associated with adult entertainment. [FN11]

FN7. The Supreme Court has, on two separate occasions, held that requiring nude dancers to wear pasties and G-strings does not violate the First Amendment. *Pap's A.M.*, 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion), *id.* at 307-10, 120 S.Ct. 1382 (Scalia, J., concurring); *Barnes*, 501 U.S. at 571-72, 111 S.Ct. 2456 (plurality opinion), *id.* at 582, 111 S.Ct. 2456 (Souter, J., concurring).

FN8. Section 3(w) of the Ordinance defines "Sexually Oriented Business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency or sexual encounter center."

FN9. Section 3(c) of the Ordinance is the definition for "Adult cabaret," which "means a nightclub, dance hall, *bar,* restaurant, or similar commercial establishment that regularly features: (1) persons who appear in a state of Nudity or Semi-nudity; or (2)

live performances that are characterized by 'specified sexual activities'; or (3) films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of 'specified sexual activities' or Nudity or 'specified anatomical areas.' " (Emphasis added.)

FN10. According to Ben's Bar, Section 5(b) goes far beyond the pasties and G-strings regulation upheld by the Supreme Court in *Barnes* and *Pap's A.M.*, prohibiting "any display of the buttocks or of breast

below the top of the areola"--i.e., "conservative two piece swimsuits, moderately low-cut blouses, short shorts, sheer fabrics and many other types of clothing that are regularly worn in the community and are in mainstream fashion."

FN11. It is not entirely clear whether Ben's Bar is arguing that Section 5(b) is facially unconstitutional or merely unconstitutional as applied. To the extent Ben's Bar seeks to bring a facial challenge, it faces an uphill battle. Ben's Bar does not argue that the regulation is vague or overbroad, and therefore may only prevail if it can demonstrate "that no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). *See also Horton v. City of St. Augustine, Florida*, 272 F.3d 1318, 1331 (11th Cir.2001) (noting exception to the *Salerno* rule; that, in the limited context of the First Amendment, a plaintiff may also bring a facial challenge for overbreadth and/or vagueness).

The central fallacy in Ben's Bar's argument, however, is that Section 5(b) restricts the sale and consumption of alcoholic beverages in establishments that serve as venues for adult entertainment, not the attire of nude dancers. In the absence of alcohol, Ben's Bar's dancers are free to express themselves all the way down to their pasties and G-strings. The question then is not whether the Village can require nude dancers to wear more attire than pasties and G-strings, but whether it can prohibit Sexually Oriented Businesses like Ben's Bar from selling alcoholic beverages in order to prevent the deleterious secondary effects arising from the explosive combination of nude dancing and alcohol consumption.

While the question presented is rather straightforward, the issue is significantly complicated by a long series of Supreme Court decisions involving the application of the First Amendment in the adult entertainment***709*** context. Because these decisions establish the analytical framework under which we must operate, our analysis necessarily begins with a comprehensive summary of the Supreme Court's jurisprudence in this area.

A. *California v. LaRue*

Initially, we note that the Supreme Court addressed the precise issue before us in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), when it considered the constitutionality of regulations promulgated by California's Department of Alcoholic Beverages ("Department") that prohibited bars and nightclubs from featuring varying degrees of adult entertainment. [FN12] The Department enacted the regulations, after holding public hearings, because it concluded that the consumption of alcohol in adult entertainment establishments resulted in a number of adverse secondary effects--e.g., acts of public indecency and sex-related crimes. As in this case, adult entertainment businesses filed suit alleging that the regulations violated the First Amendment. *Id.* at 110, 93 S.Ct. 390.

FN12. The regulations at issue in *LaRue* prohibited:

(a) 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;

(b) The actual or simulated touching, caressing or fondling on the breast, buttocks, anus or genitals;

(c) The actual or simulated displaying of the pubic hair, anus, vulva or genitals;

(d) The permitting by a licensee of any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus; and, by a companion section;

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.

409 U.S. at 411-12.

The Supreme Court began its analysis in *LaRue* by stressing that "[t]he state regulations here challenged come to us, not in the context of a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink." 409 U.S. at 114, 93 S.Ct. 390. For this reason, the vast majority of the Court's opinion addressed the States' power to regulate "intoxicating liquors" under the Twenty-first Amendment. [FN13] *See generally id.* at 115-19, 93 S.Ct. 390. Specifically, the *LaRue* Court concluded that:

> FN13. The second section of the Twenty-first Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, 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. 409 U.S. at 114, 93 S.Ct. 390.
In doing so, the *LaRue* Court rejected the plaintiffs' contention that the state's regulatory authority over "intoxicating beverages" was limited, as applied to adult entertainment establishments, to "either dealing with the problem it confronted within the limits of our decisions as to obscenity [i.e., *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and its progeny] or in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)]," 409 U.S. at 116, 93 S.Ct. 390, reasoning " '[w]e ***710** cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.' " *Id.* at 117- 18, 93 S.Ct. 390 (citation omitted). The Court found that "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." *Id.* at 118, 93 S.Ct. 390. The Court also concluded that although "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 ... [but] has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id.* The *LaRue* Court ended its analysis by noting that "[t]he Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one," and that "[g]iven 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 118-19, 93 S.Ct. 390. [FN14]

> FN14. *See also* *City of Newport v. Iacobucci*, 479 U.S. 92, 95, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986) (upholding the constitutionality of a city ordinance prohibiting nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (holding that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (noting that under *LaRue* states may ban nude dancing as part of their liquor licensing programs); *City of Kenosha v. Bruno*, 412 U.S. 507, 515, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973) (noting that "regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances [are] facially constitutional").

B. *44 Liquormart, Inc. v. Rhode Island*

After the Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), however, the precedential value of the reasoning anchoring the Court's holding in *LaRue* was severely diminished. In *44 Liquormart*, the Court held that Rhode Island's statutory prohibition against advertisements providing the public with accurate information about retail prices of alcoholic beverages was "an abridgement of speech protected by the First Amendment and that is not shielded from constitutional scrutiny by the Twenty-first Amendment." *Id.* at 489, 116 S.Ct. 1495. In reaching this conclusion, the Court noted:

Rhode Island argues, and the Court of Appeals agreed, that in this case the Twenty-first Amendment tilts the First Amendment analysis in the State's favor [of the advertising ban] .... [T]he Court of Appeals relied on our decision in *California v. LaRue* ... [where] five Members of the Court relied on the Twenty-first Amendment *to* buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity. ***711** *We are now persuaded that the Court's analysis in* LaRue *would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the* LaRue *opinion regardless of whether alcoholic beverages are involved.... See, e.g.,* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). As we recently noted: "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin v. Coors Brewing Co.*, 514 U.S., at 483, n. 2, 115 S.Ct. 1585. Without questioning the holding of *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment.

Id. at 515-16, 116 S.Ct. 1495 (emphasis added).

The foregoing makes clear that *LaRue*'s holding remains valid after *44 Liquormart*, but for a different reason. The *44 Liquormart* Court concluded that "the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment," 517 U.S. at 515, 116 S.Ct. 1495 because "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* In making this assertion, the *44 Liquormart* Court relied on the *LaRue* Court's conclusion that: "the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power ... [i.e.,] the normal state authority over public health, welfare, and morals." 409 U.S. at 114, 93 S.Ct. 390. But in recent years, the Supreme Court has held, on a number of occasions, that "non-obscene" adult entertainment is entitled to a minimal degree of protection under the First Amendment, even in relation to laws enacted pursuant to a State's general police powers. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 1739, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring) (noting that "if a city can decrease the crime and blight associated with [adult entertainment] speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First

Amendment objection"); *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (holding that city's public indecency ordinance, enacted to "protect public health and safety," must be analyzed as a content-neutral regulation of expressive conduct); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

Given the foregoing, it is difficult to ascertain exactly what "analysis" the *44 Liquormart* Court was referring to as having persuaded it that the *LaRue* Court would have reached the same result even without the "added presumption" of the Twenty-first Amendment. We find noteworthy, however, the *44 Liquormart* Court's citation of the post-*LaRue* decisions of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), in support of its assertion that "the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' ***712** described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *44 Liquormart*, 517 U.S. at 515, 116 S.Ct. 1495. In *American Mini Theatres* and *Barnes*, the Supreme Court held that the adult entertainment regulations at issue were subject to intermediate scrutiny for purposes of determining their constitutionality under the First Amendment. *American Mini Theatres*, 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) ("it is appropriate to analyze the permissibility of Detroit's action [zoning ordinance separating adult theaters from residential neighborhoods and churches] under the four-part test of *United States v. O'Brien* ...."); *Barnes*, 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) ("I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four- part enquiry described in *United States v. O'Brien* ....").

Like the Fourth and Eleventh Circuits, we conclude that after *44 Liquormart* state regulations prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments must be analyzed in light of *American Mini Theatres* and *Barnes*, as modified by their respective progeny. *See Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 513 n. 2 & 519 (4th Cir.2002) (noting the *44 Liquormart* Court's reliance on *American Mini Theatres* and *Barnes* and holding that "the result reached in *LaRue* remains sound not because a state enjoys any special authority when it burdens speech by restricting the sale of alcohol, but rather because the regulation in *LaRue* complied with the First Amendment"); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir.1998) (holding that "the Supreme Court [in *44 Liquormart*] ... reaffirmed the precedential value of *LaRue* and the *Barnes*-O'Brien *test .... [and] reaffirmed that the* Barnes- *O'Brien* intermediate level of review applies to [adult entertainment liquor regulations]"). *But see BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 608 (8th Cir.2001) (upholding the constitutionality of an adult entertainment liquor regulation solely on the basis of *LaRue*'s holding).

We reach this conclusion notwithstanding the fact that in *LaRue* the Supreme Court upheld the constitutionality of the adult entertainment liquor regulations using the rational basis test, *see* 409 U.S. at 115-16, 93 S.Ct. 390, and explicitly refused to subject the regulations to *O'Brien*'s intermediate scrutiny test. *Id.* at 116, 93 S.Ct. 390 ("We do not believe that the state regulatory authority in this case was limited to ... dealing with the problem it confronted ... in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*O'Brien*]"). We do so because the *44 Liquormart* Court's reference to *American Mini Theatres* and *Barnes* makes clear that the Court is of the opinion that adult entertainment liquor regulations, like the ones at issue in *LaRue*, will pass constitutional muster even under the heightened intermediate scrutiny tests outlined in those cases.

In making this determination, we are by no means suggesting that the Supreme Court's decisions in *American Mini Theatres* and *Barnes* are of greater precedential value than *LaRue*. On the contrary, as noted *infra*, our decision in this case is largely dictated by *LaRue*'s holding. At the time *LaRue* was decided, however, the Supreme Court had not yet established a framework for analyzing the constitutionality of adult entertainment regulations. This changed with the Court's subsequent decisions in *American Mini Theatres* and *Barnes*, cases that serve as a point of origin for two distinct, yet overlapping, lines of jurisprudence that address the degree of First Amendment ***713** protection afforded to adult entertainment. Given the significant development of the law in this area since *LaRue*, as well as the Court's refashioning of *LaRue*'s reasoning in *44 Liquormart*, we conclude that it is necessary to apply *LaRue*'s holding in the context of this precedent.

C. The *44 Liquormart* "road map"

The *44 Liquormart* decision established a road map of sorts for analyzing the constitutionality of adult entertainment liquor regulations, i.e., the Supreme Court's decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), providing two separate but similar routes. [FN15] First, the *American Mini Theatres* decision, as modified by the Court's subsequent decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d

670 (2002), delineates the standards for evaluating the constitutionality of *adult entertainment zoning ordinances.* Second, the *Barnes* decision, as modified by the Court's recent decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), provides guidelines for analyzing the constitutionality of *public indecency statutes.*

FN15. *See J & B Social Club No. 1, Inc. v. City of Mobile*, 966 F.Supp. 1131, 1136 (S.D.Ala.1996) (Hand, J.).

[1] The analytical frameworks utilized in both lines of jurisprudence can be traced back to the four-part test enunciated by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the Court held that a statute prohibiting the destruction or mutilation of draft cards was a content-neutral regulation of expressive conduct. *American Mini Theatres*, 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) (applying *O'Brien* test); *Barnes*, 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) (same). Under the *O'Brien* test, a governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, 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 speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

[2] While the *O'Brien* test is still utilized by the Supreme Court in analyzing the constitutionality of public indecency statutes, *see Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part), the Court currently evaluates adult entertainment zoning ordinances as time, place, and manner regulations. *Alameda Books*, 122 S.Ct. at 1733 (plurality opinion); *id.* at 1741 (Kennedy, J., concurring); *Renton*, 475 U.S. at 46-47, 106 S.Ct. 925. A time, place, and manner regulation of adult entertainment will be upheld if it is "designed to serve a substantial government interest and ... reasonable alternative avenues of communication remain[ ] available." *Alameda Books*, 122 S.Ct. at 1734. Additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's ***714** interest. *Schultz*, 228 F.3d at 845. [FN16]

FN16. In *Renton*, the Supreme Court created some confusion as to the appropriate test for analyzing time, place, and manner regulations by asserting that "time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." 475 U.S. at 47, 106 S.Ct. 925. However, as we emphasized in *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir.1986), "[t]he Supreme Court does not always spell out the 'narrowly tailored' step as part of its standard for evaluating time, place, and manner restrictions." *Id.* at 1553. Moreover, a close examination of *Renton*

reveals that the Court did consider whether the zoning ordinance at issue was narrowly tailored. 475 U.S. at 52, 106 S.Ct. 925 ("[t]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects ...."). In any event, both the Supreme Court and this circuit have continued to apply the "narrowly tailored" step to time, place, and manner regulations. *See Ward v. Rock Against Racism*, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1000 (7th Cir.2002).

[3] In this case, however, we are not dealing with a zoning ordinance or a public indecency statute. Instead, we are called upon to evaluate the constitutionality of an adult entertainment liquor

regulation. Therefore, it is not entirely clear whether Section 5(b) should be analyzed as a time, place, and manner restriction or as a regulation of expressive conduct under *O'Brien*'s four-part test; or for that matter whether the tests are entirely interchangeable. *See LLEH, Inc. v. Wichita County, Texas,* 289 F.3d 358, 365 (5th Cir.), *cert. denied,* --- U.S. ----, 123 S.Ct. 621, 154 L.Ed.2d 517 (2002) (noting uncertainty as to which test courts should use in analyzing the constitutionality of adult entertainment regulations: "the test for time, place, or manner regulations, described in *Renton* ... or the four-part test for incidental limitations on First Amendment freedoms, established in *O'Brien* ...."). For all practical purposes, however, the distinction is irrelevant because the Supreme Court has held that the time, place, and manner test embodies much of the same standards as those set forth in *United States v. O'Brien. Barnes,* 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion) (relying on *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 298- 99, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)); *LLEH,* 289 F.3d at 365-66 (same). [FN17] Moreover, as explained *infra,* two of the Supreme Court's post-*44 Liquormart* decisions--*Pap's A.M.* and *Alameda Books*--make it abundantly clear that the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. We, therefore, conclude that it is appropriate to analyze the constitutionality of Section 5(b) using the standards articulated by the Supreme Court in the five decisions comprising the *American Mini Theatres* and *Barnes* lines of jurisprudence. Thus, before proceeding to the merits of Ben's Bar's argument, we begin our analysis by summarizing the reasoning and holdings of these decisions.

FN17. *But see Alameda Books,* 122 S.Ct at 1745 n. 2 (Souter, J., dissenting) (joined by Stevens, J. and Ginsburg, J.) (noting that

"[b]ecause *Renton* called its secondary-effects ordinance a mere, time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning ... I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the ... [*O'Brien*] formulation ... a closer relative of secondary effects zoning than mere time, place, and manner regulations, as the Court ... implicitly recognized [in *Pap's A.M.*].").

715 (1) *Young v. American Mini Theatres, Inc.

In *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court addressed, *inter alia,* whether a zoning ordinance enacted by the City of Detroit violated the First Amendment. [FN18] *Id.* at 58, 96 S.Ct. 2440. The "dispersal" ordinance at issue prohibited the operation of any adult entertainment movie theater within 1,000 feet of any two other "regulated uses" (e.g., adult bookstores, bars, hotels, pawnshops), or within 500 feet of a residential area. *Id.* at 52, 96 S.Ct. 2440. A majority of the Court upheld the constitutionality of the ordinance, but in doing so did not agree on a single rationale for the decision. *Id.* at 62-63, 96 S.Ct. 2440 (plurality opinion); *id.* at 84, 96 S.Ct. 2440 (Powell, J. concurring). The plurality concluded that "apart from the fact that the ordinance treats adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in respective theaters, *the regulation of the place where such films may be exhibited does not offend the First Amendment.*" *Id.* at 63, 96 S.Ct. 2440 (emphasis added). In reaching this conclusion, the plurality emphasized that "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Id.* at 70, 96 S.Ct. 2440. The plurality also found that the city's zoning ordinance was justified by its interest in "preserving the character of its neighborhoods," *id.* at 71, 96 S.Ct. 2440, and therefore "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* The plurality concluded its analysis by noting that "what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited ...." *Id.* [FN19]

FN18. The Court also concluded that the zoning ordinance did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, *American Mini Theatres,* 427 U.S. at 61, 72-73, 96 S.Ct. 2440; *see generally id.* at 73-84, 96 S.Ct. 2440 (Powell, J., concurring), issues that are not before us on appeal.

FN19. The *American Mini Theatres* plurality also noted, in a footnote, that the city had enacted the zoning ordinance because of its determination that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, *effects* which are not attributable to theaters showing other types of films," 427 U.S. at 71 n. 34, 96 S.Ct. 2440 (emphasis added), noting "[i]t is this *secondary effect* which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." *Id.* (emphasis added).

Justice Powell concurred in the judgment of the Court, agreeing with the plurality that the zoning ordinance "is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content." *Id.* at 78-79, 96 S.Ct. 2440. He disagreed, however, with the plurality's determination that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73 n. 1, 96 S.Ct. 2440. Instead, Justice Powell concluded that it was appropriate to analyze and uphold the constitutionality of the zoning ordinance under the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Id.* at 79, 96 S.Ct. 2440. [FN20]

FN20. Under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Powell's concurrence is the controlling opinion in *American Mini Theatres*, as the most narrow opinion joining four other Justices in the judgment of the Court. *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 504 (7th Cir.1980).

716 (2) *City of Renton v. Playtime Theatres, Inc.

The Supreme Court's decision in *American Mini Theatres* laid the groundwork for the Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). [FN21] In *Renton*, the Court considered the validity of an adult entertainment zoning ordinance virtually indistinguishable from the one at issue in *American Mini Theatres*. *Id.* at 46, 106 S.Ct. 925. Unlike the *American Mini Theatres* plurality, however, the *Renton* Court outlined an analytical framework for evaluating the constitutionality of these ordinances. The Court's analysis proceeded in three steps. First, the Court found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. *Id.* Next, the Court considered whether the ordinance was content-neutral or content-based. If an ordinance is content-based, it is presumptively invalid and subject to strict scrutiny. *Id.* at 46-47, 106 S.Ct. 925. On the other hand, if an ordinance is aimed not at the content of the films shown at adult theaters, but rather at combating the secondary effects of such theaters on the surrounding community (e.g., increased crime rates, diminished property values), it will be treated as a content-neutral regulation. *Id.* In *Renton*, the Court held that the zoning ordinance was a "content neutral" regulation of speech because while "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters .... [it] is aimed not at the *content* of the films shown ... but rather at the *secondary effects* of such theaters on the surrounding community." 475 U.S. at 47, 106 S.Ct. 925. Finally, given this finding, the *Renton* Court found that the zoning ordinance would be upheld as a valid time, place and manner regulation, *id.* at 46, 106 S.Ct. 925, if it "was designed to serve a substantial governmental interest and [did] not unreasonably limit alternative avenues of communication." *Id.* at 47, 106 S.Ct. 925. The Court concluded that the zoning ordinance met this test, noting that 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. 925 (quoting *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. 2440), [FN22] and that the ordinance allowed for reasonable alternative avenues of communication because there was "ample, accessible real estate" open for use as adult theater sites. *Id.* at 53, 96 S.Ct. 2440.

FN21. Falling in between *American Mini Theatres* and *Renton* is the Supreme Court's decision in *Schad v. Borough Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), where the Court struck down, on First Amendment grounds, a zoning ordinance that did not--like the ordinance in *American Mini Theatres*--require the

dispersal of adult theaters, but instead prohibited them altogether. *Id.* at 71-72, 96 S.Ct. 2440 (plurality opinion); *id.* at 77, 96 S.Ct. 2440 (Blackmun, J., concurring); *id.* at 79, 96 S.Ct. 2440 (Powell, J., concurring). The only significance of *Schad,* for purpose of our analysis, is that the holding of that case serves as the basis for the first step in the *Renton* framework--i.e., does the ordinance completely prohibit the expressive conduct at issue? *See Alameda Books,* 122 S.Ct. at 1733 (noting that the first step in the *Renton* framework was the Court's determination that "the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations"); *Renton,* 475 U.S. at 46, 106 S.Ct. 925.

FN22. *See also American Mini Theatres,* 427 U.S. at 80, 96 S.Ct. 2440 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial").

The Supreme Court's decision in *Renton* is also notable because in addition to upholding the constitutionality of the zoning ordinance, the Court also held that the ***717** First Amendment did not require municipalities, before enacting such ordinances, to conduct new studies or produce evidence independent of that already generated by other cities (whether summarized in judicial decisions or not), *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925, so long as "whatever evidence [a] city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

(3) *Barnes v. Glen Theatre, Inc.*

In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the Supreme Court was called upon to address the constitutionality of Indiana's public indecency statute. In a splintered decision, a narrow majority of the Court held that the statute--which prohibited nudity in public places--could be enforced against establishments featuring nude dancing, i.e., by requiring dancers to wear pasties and G-strings during their performances, without violating the First Amendment's right of free expression. *Id.* at 565, 111 S.Ct. 2456 (plurality opinion); *id.* at 572, 111 S.Ct. 2456 (Scalia, J. concurring); *id.* at 582, 585, 111 S.Ct. 2456 (Souter, J. concurring). Of that majority, however, only three Justices agreed on a single rationale.

The plurality--Chief Justice Rehnquist and Justices O'Connor and Kennedy-- began its analysis by emphasizing that while "nude dancing ... is expressive conduct within the outer perimeters of the First Amendment .... [w]e must [still] determine the level of protection to be afforded to the expressive conduct at issue, and ... whether the Indiana statute is an impermissible infringement of that protected activity." *Barnes,* 501 U.S. at 566, 111 S.Ct. 2456. The plurality noted that the public indecency statute did not "ban [ ] nude dancing, as such, but ... proscribed public nudity across the board," *id.,* and that "the Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation." *Id.* Next, the plurality concluded that the public indecency statute should be analyzed under *O'Brien's* four-part test for evaluating regulations of expressive conduct protected by the First Amendment. [FN23] Applying this test, the plurality found "that Indiana's public indecency statute [was] justified despite its incidental limitations on some expressive activity," *id.* at 567, 111 S.Ct. 2456, because: (1) the statute was "clearly within the constitutional power of the State and furthers substantial governmental interests [i.e., protecting societal order and morality]," *id.* at 568, 111 S.Ct. 2456; (2) the state's interest in protecting societal order and morality by enforcing the statute to prohibit nude dancing was "unrelated to the suppression of free expression" because "the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic [and] [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity," *id.* at 570-71, 111 S.Ct. 2456; (3) the incidental restriction on First Amendment freedom placed on nude dancing by the statute was no greater than essential to the furtherance of the governmental interest because "[t]he statutory prohibition is not a means to some greater end, but an end in itself," *id.* at 571-72, 111 S.Ct. 2456; and (4) the public indecency statute was narrowly tailored because "Indiana's requirement that the dancers wear pasties and G-strings is modest, and the *bare minimum necessary* ***718** *to achieve the State's purpose.*" *Id.* at 572, 111 S.Ct. 2456 (emphasis added).

FN23. In doing so, the *Barnes* plurality noted that the *O'Brien* test and the time, place, and manner test utilized by the Court in *Renton* have "been interpreted to embody

much the same standards ...." 501 U.S. at 566, 111 S.Ct. 2456.

Justice Scalia concurred in the judgment of the Court, but in doing so expressed his opinion that "the challenged regulation must be upheld not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. 2456. Justice Souter also concurred in the judgment of the Court, agreeing with the plurality that "the appropriate analysis to determine the actual protection required by the First Amendment is the four-part inquiry described in *United States v. O'Brien.*" *Id.* at 582, 111 S.Ct. 2456. He wrote separately, however, to rest his concurrence in the judgment, "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments ...." *Id.* [FN24] In doing so, Justice Souter relied heavily on the Court's decision in *Renton.* *Id.* at 583-87, 111 S.Ct. 2456.

FN24. Under *Marks,* 430 U.S. at 193, 97 S.Ct. 990, Justice Souter's concurrence is the controlling opinion in *Barnes,* as the most narrow opinion joining the judgment of the Court. *Schultz,* 228 F.3d at 842 n. 2; *DiMa Corp.,* 185 F.3d at 830.

(4) *City of Erie v. Pap's A.M.*

The Supreme Court revisited the *Barnes* holding in *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), where a majority of the Court upheld the constitutionality of a public indecency ordinance "strikingly similar" to the one at issue in *Barnes.* *Id.* at 283, 120 S.Ct. 1382. Unlike *Barnes,* however, in *Pap's A.M.* five justices agreed that the proper framework for analyzing public indecency statutes was *O'Brien's* four-part test. *Id.* at 289, 120 S.Ct. 1382 (plurality opinion) ("We now clarify that government restrictions on public nudity ... should be evaluated under the framework set forth in *O'Brien* for content- neutral restrictions on symbolic speech"); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) (agreeing with the "analytical approach that the plurality employs in deciding this case [i.e., the *O'Brien* test]"). *See also Ranch House, Inc. v. Amerson,* 238 F.3d 1273, 1278 (11th Cir.2001) (holding that "[a]lthough no opinion in [*Pap's A.M.*] was joined by more than four Justices, a majority of the Court basically agreed on how these kinds of statutes should be analyzed [i.e., *O'Brien's* four-part test]"). A majority of the Justices also agreed that combating the adverse secondary effects of nude dancing was within the city's constitutional powers and unrelated to the suppression of free expression, *Pap's A.M.,* 529 U.S. at 296, 301, 120 S.Ct. 1382 (plurality opinion) ("Erie's efforts to protect public health and safety are clearly within the city's police powers .... [and] [t]he ordinance is unrelated to the suppression of free expression ...."); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) ("Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression ...."), thus satisfying the first and third prongs of the *O'Brien* test.

A majority of the Justices in *Pap's A.M.* could not, however, agree on whether the public indecency statute furthered an important or substantial interest of the city (second prong of *O'Brien*), and if so whether the incidental restriction on nude dancing was no greater than that essential to the furtherance of this interest (fourth prong). The plurality--Chief Justice Rehnquist and Justices O'Connor, Kennedy, ***719** and Breyer--concluded that Erie's public indecency ordinance furthered an important or substantial government interest under *O'Brien* because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing [e.g., the increased crime generated by such establishments] are undeniably important." *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382. [FN25] The *Pap's A.M.* plurality also found that Erie's public indecency statute was no greater than that essential to furthering the city's interest in combating the harmful secondary effects of nude dancing because:

FN25. The *Pap's A.M.* plurality's reliance on *Renton's* secondary effects doctrine is significant because it marks a departure from the

Barnes plurality's determination that a public indecency ordinance may be justified by a State's interest in protecting societal order and morality, *Barnes,* 501 U.S. at 568, 111 S.Ct. 2456, and an adoption of the approach advocated by Justice Souter in his

concurrence in that case. *Id.* at 582, 111 S.Ct. 2456.

The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.
529 U.S. at 301, 120 S.Ct. 1382.
Justice Scalia, joined by Justice Thomas, agreed with the plurality that the ordinance should be upheld, but wrote separately to emphasize that " 'as a general law regulating conduct and not specifically directed at expression, [the city's public indecency ordinance] is not subject to First Amendment scrutiny at all,' " *Pap's A.M.*, 529 U.S. at 307-08, 120 S.Ct. 1382 (quoting *Barnes*, 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring)), and that "[t]he traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." *Id.* at 310, 120 S.Ct. 1382. Justice Souter concurred in part and dissented in part, stressing his belief that "the current record [does not] allow us to say that the city has made a sufficient evidentiary showing to sustain its regulation ...." *Id.* at 310-11, 120 S.Ct. 1382. Justice Stevens, joined by Justice Ginsburg, dissented, asserting that the ordinance was a "patently invalid" content-based ban on nude dancing that censored protected speech. *Id.* at 331-32, 120 S.Ct. 1382.
Because the plurality's decision offers the narrowest ground for the Supreme Court's holding in *Pap's A.M.*, we find the reasoning of that opinion to be controlling. *Marks*, 430 U.S. at 193, 97 S.Ct. 990.
(5) *City of Los Angeles v. Alameda Books, Inc.*
This past term in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the Supreme Court upheld, at the summary judgment stage, an ordinance prohibiting multiple adult entertainment businesses from operating in the same building. *Id.* at 1733. The Court reached this conclusion despite the fact that the city had not, prior to the enactment of the ordinance, conducted or relied upon studies (or other evidence) specifically demonstrating that forbidding multiple adult entertainment businesses from operating under one roof reduces secondary effects. *Id.* at 1736 (plurality opinion); *id.* at 1744 (Kennedy, J., concurring). Once again, however, a majority of the Court could not agree on a single rationale for this decision.
***720** The primary issue in *Alameda Books* was the appropriate standard "for determining whether an ordinance serves a substantial government interest under *Renton*." 122 S.Ct. at 1733. The plurality--written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Scalia and Thomas--concluded that whether a municipal ordinance is " 'designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication' ... requires [courts to] ... ask[ ] whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Id.* at 1737. According to the plurality, this requirement is met if the evidence upon which the municipality enacted the regulation " 'is reasonably believed to be relevant' for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest." *Id.* at 1736. The plurality stressed that once a municipality presents a rational basis for addressing the secondary effects of adult entertainment through evidence that "fairly support[s] the municipality's rationale for its ordinance," *id.*, the plaintiff challenging the constitutionality of the ordinance must "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." *Id.* If a plaintiff fails to cast doubt on the municipality's rationale, the inquiry is over and "the municipality meets the standard set forth in *Renton*." *Id.* If, however, a plaintiff succeeds "in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* Because the plurality concluded that the city, for purposes of summary judgment, had complied with the evidentiary requirement outlined in *Renton*, *id.*, it remanded the case for further proceedings. *Id.* at 1738.
Justice Scalia, in addition to joining the plurality opinion, wrote separately to emphasize that while the plurality's opinion "represents a correct application of our jurisprudence concerning the regulation of the 'secondary effects' of pornographic speech .... our First Amendment traditions make 'secondary effects' analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Alameda Books*, 122 S.Ct. at 1738-39.
Justice Kennedy concurred in the judgment of the Court, but writing separately because he

concluded, *inter alia,* that "the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur." *Id.* at 1739. He began, however, by expressing his agreement with the plurality that the secondary effects resulting from "high concentrations of adult businesses can damage the value and integrity of a neighborhood," *id.,* stressing "[t]he damage is measurable; it is all too real." *Id.* He also agreed with the plurality that "[t]he law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech," *id.,* emphasizing that "[a] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *Id.* (quoting *American Mini Theatres,* 427 U.S. at 71, 96 S.Ct. 2440). In Justice Kennedy's opinion, if a municipality ameliorates the secondary effects of adult entertainment through "the traditional exercise of its zoning power, and at the same time leaves the quantity and accessibility of the speech ***721** substantially undiminished, there is no First Amendment objection .... even if the measure identifies the problem outside by reference to the speech inside--that is, even if the measure is in that sense content based." [FN26] *Id.* Like the plurality, he concluded that "[a] zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it." *Id.* at 1740. He also expressed his belief that zoning regulations "do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use ... [and that] [t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Id.* at 1741.

> FN26. The plurality in *Alameda Books* characterized the second step of the *Renton* framework as follows: "[w]e next consider[ ] whether the ordinance [is] content neutral or content based." 122 S.Ct. at 1734. In his concurrence, Justice Kennedy joined the four dissenters, *id.* at 1744-45, in jettisoning the "content neutral" label, noting that the "fiction" of adult entertainment zoning ordinances being "content neutral ... is perhaps more confusing than helpful .... These ordinances are content based and we should call them so." *Id.* at 1741. In reaching this conclusion, Justice Kennedy emphasized that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.* Justice Kennedy concluded, however, that an adult entertainment zoning ordinance is not subject to strict scrutiny simply because it "identifies the problem outside by reference to the speech inside," *id.* at 1740, and, as such, "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather
>
> than strict scrutiny." *Id.* at 1741. Thus, while the label has changed, the substance of *Renton's* second step remains the same.

Based on the foregoing principles, Justice Kennedy believes that two questions must be asked by a court seeking to determine whether a zoning ordinance regulating adult entertainment is designed to meet a substantial government interest: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?", *Alameda Books,* 122 S.Ct at 1741; and (2) "how much evidence is required to support the proposition?" *Id.* According to Justice Kennedy, the plurality skipped the second question, giving the correct answer, but neglected to give sufficient "attention" to the first question, *id.,* i.e., "the claim a city must make to justify a content- based ordinance." *Id.* at 1742. In his view, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact," *Id.,* and "[t]he rationale of the ordinance must be that it will suppress secondary effects ... not ... speech." *Id.* Justice Kennedy's primary area of disagreement with the plurality's analysis was that, in his opinion, it failed to "address how speech [would] fare under the city's ordinance." *Id.*

The differences between Justice Kennedy's concurrence and the plurality's opinion are, however, quite subtle. Justice Kennedy's position is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects *prior to* implementation, as Justice Souter and the other dissenters would require, *see generally Alameda Books,* 122 S.Ct. at 1744-51; but that a municipality's *rationale* must be *premised* on the theory that it "*may* reduce the costs of secondary effects without substantially reducing speech." *Id.* at 1742 (emphasis added). Significantly, while Justice Kennedy believed that the plurality did not adequately address this aspect of the city's

rationale, he agreed ***722** with the plurality's overall conclusion that a municipality's initial burden of demonstrating a substantial government interest in regulating the adverse secondary effects associated with adult entertainment is slight, noting:

As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required .... As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; *and if its inferences appear reasonable,* we should not say there is no basis for its conclusion.

Id. at 1742-43 (emphasis added).

The dissenting opinion of Justice Souter, joined by Justices Stevens and Ginsburg in full and by Justice Breyer with respect to part II, asserted that the Court should have struck down the ordinance. *Alameda Books,* 122 S.Ct. at 1747 (Souter, J., dissenting).

Because Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court in *Alameda Books,* we conclude that it is the controlling opinion. *Marks,* 430 U.S. at 193, 97 S.Ct. 990.

D. Does Section 5(b)'s prohibition of alcohol on the premises of Sexually Oriented Businesses violate the First Amendment?

[4] 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'Brien,* 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; [FN27] 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).

> FN27. This prong is, for all practical purposes, identical to the *Alameda Books* plurality's inquiry into whether the zoning ordinance "was content neutral or content based." 122 S.Ct. at 1733-34. Although a majority of the Justices no longer employ the content neutral label when evaluating the constitutionality of a "secondary effects" ordinance, the ultimate inquiry remains the same. *See supra* n. 26.

[5] Applying the foregoing analytical framework here, we conclude that Section 5(b) does not violate the First Amendment. To begin with, the Village's regulation of alcohol sales and consumption in "inappropriate locations" is clearly within its general police powers. *44 Liquormart,* 517 U.S. at 515, 116 S.Ct. 1495; *LaRue,* 409 U.S. at 114, 93 S.Ct. 390. As such, the Village enacted Section 5 (b) "within the constitutional power of the Government." *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (holding that a municipality's efforts to protect the public's health and safety through its ***723** general police powers satisfies this requirement); *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673 (same).

[6] The next two prongs of our test concern the level of constitutional scrutiny that must be applied to Section 5(b). The level of First Amendment scrutiny a court uses to determine whether a regulation of adult entertainment is constitutional depends on the purpose for which the regulation was adopted. If the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny. *Texas v. Johnson,* 491 U.S. 397, 403, 411-12, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Renton,* 475 U.S. at 46-47, 106 S.Ct. 925. If, on the other hand, the regulation was adopted for a purpose unrelated to the suppression of expression--e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct--a court must apply a less demanding intermediate scrutiny. 491 U.S. at 406-07, 109 S.Ct. 2533; *Pap's A.M.,* 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in

part and dissenting in part).

[7] [8] The Supreme Court has held that regulations of adult entertainment receive intermediate scrutiny if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. *Alameda Books,* 122 S.Ct. at 1733-34 (plurality opinion), *id.* at 1741 (Kennedy, J., concurring); *Renton,* 475 U.S. at 48, 106 S.Ct. 925. Here, Section 5(b), like the liquor regulations at issue in *LaRue,* 409 U.S. at 118, 93 S.Ct. 390, does not completely prohibit Ben's Bar's dancers from conveying an erotic message; it merely prohibits alcohol from being sold or consumed on the premises of adult entertainment establishments. *See, e.g., Wise Enterprises, Inc. v. Unified Gov't of Athens-Clarke County, Georgia,* 217 F.3d 1360, 1365 (11th Cir.2000) (holding that "[t]he ordinance does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise"); *Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993, 998 (11th Cir.1998) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments did not ban nude dancing, but merely restricted "the place or manner of nude dancing without regulating any particular message it might convey"). Moreover, it is clear that the "predominant concerns" motivating the Village's enactment of Section 5(b) " 'were with the secondary effects of adult [speech], and not with the content of adult [speech].' " *Alameda Books,* 122 S.Ct. at 1737 (plurality opinion) (quoting *Renton,* 475 U.S. at 47, 106 S.Ct. 925); *id.* at 1739-41 (Kennedy, J., concurring). [FN28] The Village enacted the Ordinance because it believed "there is convincing documented evidence that Sexually Oriented Businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values." Specifically, the Village concluded that "the consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community." Additionally, in passing the Ordinance, the Village emphasized (in the text of the Ordinance) that its intention was not ***724** "to suppress any speech activities protected by the First Amendment, but to enact a[n] ... ordinance which addresses the secondary effects of Sexually Oriented Businesses," and that it was not attempting to "restrict or deny access by adults to sexually oriented-materials protected by the First Amendment ...."

> FN28. Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware. *Ranch House,* 238 F.3d at 1280.

[9] For all of the foregoing reasons, Section 5(b) is properly analyzed as a content-based time, place, and manner restriction, or as a content-based regulation of expressive conduct, and therefore is subject only to intermediate scrutiny. *Alameda Books,* 122 S.Ct. at 1733-36 (plurality opinion), *id.* at 1741 (Kennedy, J. concurring); *Pap's A.M.,* 529 U.S. at 294-96, 120 S.Ct. 1382 (plurality opinion), *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). [FN29] *See also Artistic Entm't, Inc. v. City of Warner Robins,* 223 F.3d 1306, 1308-09 (11th Cir.2000) (holding that "a prohibition on the sale of alcohol at adult entertainment venues ... [is] content-neutral and subject to the *O'Brien* test"); *Wise Enterprises,* 217 F.3d at 1364 (holding that "[i]t is clear from these [legislative] statements the County's ordinance is aimed at the secondary effects of nude dancing combined with the consumption of alcoholic beverages, not at the message conveyed by nude dancing .... [T]he district court was [therefore] correct in [applying] ... intermediate scrutiny ...."). Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and therefore are treated as if they were content-neutral. *Wise Enterprises,* 217 F.3d at 1363.

> FN29. *Compare G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark, Missouri,* 83 S.W.3d 98, 103 (2002) (holding that because the city presented no evidence that its purpose in enacting an ordinance restricting nudity in establishments where alcoholic beverages are sold "was to prevent the negative secondary effects associated with erotic dancing

establishments, and, thus, that the ordinance was unrelated to the suppression of expression, the City had the heavy burden of justifying the ordinance under the strict scrutiny standard").

[10] This brings us to the heart of our analysis: whether Section 5(b) is designed to serve a substantial government interest, narrowly tailored, and does not unreasonably limit alternative avenues of communication, *or,* alternatively, furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. As previously noted, it is not entirely clear whether an adult entertainment liquor regulation is to be treated as a time, place, and manner regulation, or instead as a regulation of expressive conduct under *O'Brien. See, e.g., LLEH, Inc.,* 289 F.3d at 365. But in either case, we are required to ask "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books,* 122 S.Ct. at 1737 (plurality opinion). At this stage, courts must "examine evidence concerning regulated speech and secondary effects." *Id.* In conducting this inquiry, we are required, as previously noted, to answer two questions: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Id.* at 1741 (Kennedy, J. concurring). [FN30]

FN30. As noted *supra,* under *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Kennedy's concurrence is the controlling opinion, as the most narrow opinion joining the judgment of the Court.

***725** [11] At the outset, we note that in order to justify a content- based time, place, and manner restriction or a content-based regulation of expressive conduct, a municipality "must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects [i.e., is designed to serve, or furthers, a substantial or important governmental interest], while leaving the quantity and accessibility of speech substantially intact [i.e., that the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication, or, alternatively, that the restriction on expressive conduct is no greater than is essential in furtherance of that interest]." [FN31] *Alameda Books,* 122 S.Ct. at 1741 (Kennedy, J. concurring). The regulation may identify the speech based on content, "but only as a shorthand for identifying the secondary effects outside." *Id.* A municipality "may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* Thus, the rationale behind the enactment of Section 5 (b) must be that it will suppress secondary effects, not speech. *Id.*

FN31. In this case, it is unnecessary to conclusively resolve which of these two standards is applicable. As explained *infra,* Section 5(b)'s alcohol prohibition is, as a practical matter, the least restrictive means of furthering the Village's interest in combating the secondary effects resulting from the combination of adult entertainment and alcohol consumption, and therefore satisfies either standard.

The Village's rationale in support of Section 5(b) is that the liquor prohibition will significantly reduce the secondary effects that naturally result from combining adult entertainment with the consumption of alcoholic beverages without substantially diminishing the availability of adult entertainment, in this case nude and semi-nude dancing. In enacting the Ordinance, the Village Board relied on numerous judicial decisions, studies from 11 different cities, and "findings reported in the Regulation of Adult Entertainment Establishments of St. Croix, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses (June 6, 1989, State of Minnesota)," to support its conclusion that adult entertainment produces adverse secondary effects.
Ben's Bar argues that the Village may not rely on prior judicial decisions or the experiences of other municipalities, but must instead conduct its own studies, at the local level, to determine whether

adverse secondary effects result when liquor is served on the premises of adult entertainment establishments. This view, however, has been expressly (and repeatedly) rejected by the Supreme Court. *Alameda Books,* 122 S.Ct. at 1743 (Kennedy, J. concurring) (holding that " '[t]he First Amendment does not require a city, before enacting ... an [adult entertainment secondary effects] 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.' ") (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925); *Barnes,* 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J. concurring) (same).

Ben's Bar also contends that the Village failed to meet its burden of demonstrating the constitutionality of Section 5(b) because "the Village's evidentiary record did not include any written reports relating specifically to the effects of serving alcohol in establishments offering nude and semi-nude dancing." In *LaRue,* however, the Supreme Court explicitly held that a State's conclusion that "certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational ***726** one." 409 U.S. at 118, 93 S.Ct. 390. Because the adult entertainment at issue in this case is of the same character as that at issue in *LaRue,* it was entirely reasonable for the Village to conclude that barroom nude dancing was likely to produce adverse secondary effects at the local level, even in the absence of specific studies on the matter. *Alameda Books,* 122 S.Ct. at 1736-37 (plurality opinion) (adopting view of plurality in *Pap's A.M.* as to the evidentiary requirement for adult entertainment cases), *id.* at 1741 (Kennedy, J., concurring) (agreeing with the plurality on this point, as a fifth vote); *Pap's A.M.,* 529 U.S. at 296-97, 120 S.Ct. 1382 (plurality opinion) (same); *Giovani,* 303 F.3d at 516 (same). In fact, the Supreme Court has gone so far as to assert that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca,* 452 U.S. at 718, 101 S.Ct. 2599. *See also Blue Canary,* 251 F.3d at 1124 (noting that "[l]iquor and sex are an explosive combination"); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. of California,* 99 Cal.App.4th 880, 121 Cal.Rptr.2d 729, 737 (2002) (same). For these reasons, we conclude that the evidentiary record fairly supports the Village's proffered rationale for Section 5(b), and that Ben's Bar has failed "to cast direct doubt on this rationale either by demonstrating the [Village's] evidence does not support its rationale or by furnishing evidence that disputes the [Village's] factual findings ...." *Alameda Books,* 122 S.Ct. at 1736.

Ben's Bar also contends that Section 5(b) is not narrowly tailored because the Village offered no evidence that "the incidental restrictions placed on Ben's [Bar], over and above the pasties and G-strings requirement, ameliorate any purported negative secondary effects." This argument, however, is problematic for several reasons, two of which we will address briefly.

[12] First, as previously noted, Section 5(b) does not impose any restrictions whatsoever on a dancer's ability to convey an erotic message. Instead, the regulation prohibits Sexually Oriented Businesses like Ben's Bar from serving alcoholic beverages to its patrons during a dancer's performance. This is not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct. The First Amendment does not entitle Ben's Bar, its dancers, or its patrons, to have alcohol available during a "presentation" of nude or semi-nude dancing. *See Gary v. City of Warner Robins, Georgia,* 311 F.3d 1334, 1340 (11th Cir.2002) (holding that ordinance prohibiting persons under the age of 21 from entering or working at "any establishment ... which sells alcohol by the drink for consumption on premises" did not violate an underage nude dancer's First Amendment right to free expression because she "remains free to observe and engage in nude dancing, but she simply cannot do so ... in establishments that primarily derive their sales from alcoholic beverages consumed on the premises"); *Sammy's of Mobile,* 140 F.3d at 999 (holding that while nude dancing is entitled to a degree of protection under the Supreme Court's First Amendment jurisprudence, "we are unaware of any constitutional right to drink while watching nude dancing"); *Dept. of Alcoholic Beverage Control,* 99 Cal.App.4th at 895, 121 Cal.Rptr.2d 729 (noting that "[t]he State ... has not prohibited dancers from performing with the utmost level of erotic expression. They are simply forbidden to do so in establishments which serve alcohol, and the Constitution is thereby not offended"). What the First Amendment does require is that establishments like Ben's Bar be given "a ***727** 'reasonable opportunity' to disseminate the speech at issue." *North Ave. Novelties, Inc. v. City of Chicago,* 88 F.3d 441, 445 (7th Cir.1996). A "reasonable opportunity," however, does not include a concern for economic considerations. *Renton,* 475 U.S. at 54, 106 S.Ct. 925. [FN32]

FN32. In an affidavit filed with the district court, Barry Breault, part-owner of Ben's Bar, stated that:

> The bulk of Ben's Bar's revenues are derived from beverage sales and associated food sales. Revenues from adult entertainment ... account for only about one-third of Ben's revenues. *Ben's Bar cannot operate at a profit without the revenue from the sale of alcoholic beverages, and the*
>
> *business such sales bring in.*
>
> (Emphasis added.)

Second, Section 5(b)'s alcohol prohibition, like the one in LaRue, is limited to adult entertainment establishments, and does not apply to:

[T]heaters, performing arts centers, civic centers, and dinner theaters where live dance, ballet, music, and dramatic performances of serious artistic merit are offered on a regular basis; and in which the predominant business or attraction is not the offering of entertainment which is intended for the sexual interests or titillation of customers; and where the establishment is not distinguished by an emphasis on or the advertising or promotion of nude or semi-nude performances. [FN33]

> FN33. This section of the Ordinance also emphasizes that "[w]hile expressive live nudity may occur within these establishments [those noted in section (6)], this ordinance seeks only to minimize and prevent the secondary effects of Sexually Oriented Businesses on the community. Negative secondary effects have not been associated with these establishments."

Ordinance A-472(6). *Compare* Giovani, 303 F.3d at 515 (noting that lack of evidentiary support for adult entertainment liquor regulations "might not pose a problem if the challenged restrictions applied only to bars and clubs that present nude or topless dancing").

Finally, we note that Section 5(b)'s liquor prohibition is no greater than is essential to further the Village's substantial interest in combating the secondary effects resulting from the combination of nude and semi-nude dancing and alcohol consumption because, as a practical matter, a complete ban of alcohol on the premises of adult entertainment establishments is the *only* way the Village can advance that interest. As the Supreme Court recognized in LaRue,

Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self- regulation on the part of the bartender could have been relied upon by the Department to secure compliance with ... [the] regulation[s]. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one ....

409 U.S. at 116, 93 S.Ct. 390. *See also* Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County, Georgia, 217 F.3d 1360, 1364-65 (11th Cir.2000) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments satisfied O'Brien's requirement that restriction on First Amendment rights be no greater than necessary to the furtherance of the government's interest because "[t]here is no less restrictive alternative"). Indeed, unlike the zoning ordinance at issue in Alameda Books, there is no need to speculate as to whether Section 5(b) will achieve its stated purpose. Prohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary ***728** effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing.

Given the foregoing, we conclude that Section 5(b) does not violate the First Amendment. The regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either. The citizens of the Village of Somerset may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. Gary, 311 F.3d at 1338 (holding that there is no generalized right to associate with other adults in alcohol-purveying establishments with other adults). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might

therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its patrons. But the First Amendment rights of each are not offended when the show goes on without liquor.

III.

For the reasons expressed in this opinion, Section 5(b)'s prohibition of alcohol on the premises of adult entertainment establishments does not violate the First Amendment. We, therefore, affirm the district court's decision granting the Village's motion for summary judgment.

C.A.7 (Wis.),2003.
Ben's Bar, Inc. v. Village of Somerset
316 F.3d 702

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West Reporter Image (PDF)

Exhibit 11

United States Court of Appeals,
Seventh Circuit.
R.V.S., L.L.C., Plaintiff-Appellant,
v.
CITY OF ROCKFORD, Defendant-Appellee.
No. 03-2772.
Argued Dec. 9, 2003.
Decided March 17, 2004.

Background: Company that sought to operate business that arguably was an "exotic dancing nightclub" sought to enjoin enforcement of city ordinance requiring such non-nude and non-semi-nude nightclubs to obtain special use permits, and precluding issuance of permits to clubs located within 1000 feet of churches, schools, residential districts or other such nightclubs. Following bench trial, the United States District Court for the Northern District of Illinois, 266 F.Supp.2d 798, Philip G. Reinhard, J., entered judgment for city. Company appealed.

Holdings: The Court of Appeals, Flaum, Chief Judge, held that:
(1) ordinance was subject to intermediate rather than strict scrutiny;
(2) insufficient nexus was shown between exotic dancing nightclubs and undesirable secondary effects used to justify ordinance; and
(3) ordinance was not narrowly tailored.

Reversed and remanded.

West Headnotes

[1] KeyCite Notes

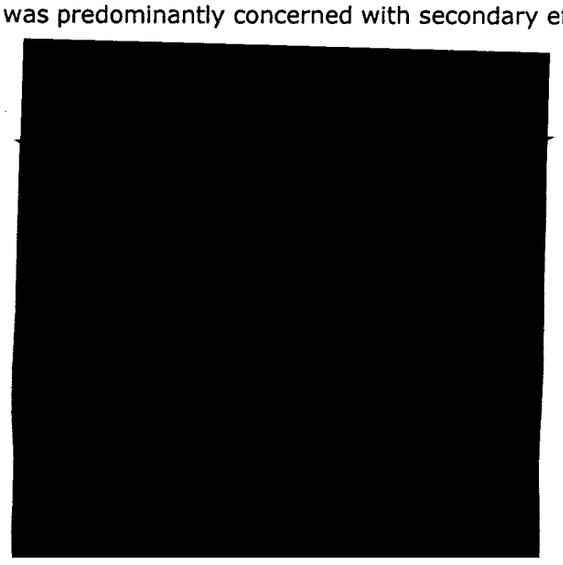
92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

Court reviewing regulation of adult entertainment establishments considers: (1) whether regulation constitutes invalid total ban or merely time, place and manner regulation; (2) whether regulation is content-based or content-neutral, and accordingly, whether strict or intermediate scrutiny is to be applied; and (3) if content-neutral, whether regulation is designed to serve substantial government interest and allows for reasonable alternative channels of communication. U.S.C.A. Const.Amend. 1.

[2] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

On judicial review of ordinance regulating adult entertainment establishment, inquiry into "content-based" or "content-neutral" nature of ordinance, which determines whether strict or intermediate constitutional scrutiny is applied, is inquiry into purpose behind ordinance rather than evaluation of ordinance's form, i.e. whether ordinance was predominantly concerned with secondary effects of adult speech. U.S.C.A. Const.Amend. 1.



[3] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) k. Limitations on Doctrine in General. Most Cited Cases

92 Constitutional Law KeyCite Notes
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

In order to justify content-based time, place and manner restriction, e.g. zoning ordinance regulating adult entertainment establishments, municipality must advance some basis to show that its regulation has purpose and effect of suppressing undesirable secondary effects, and leaves quantity and accessibility of speech substantially intact. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

City zoning ordinance requiring "exotic dancing nightclubs" to obtain special use permits and restricting such permits to nonresidential areas was predominantly concerned with combating undesirable secondary effects such as prostitution and crime, and thus subject to intermediate rather than strict scrutiny; aldermen who helped pass ordinance testified that their intent was to combat negative effects produced by adult-oriented businesses. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

414 Zoning and Planning KeyCite Notes
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k86 k. Permits and Certificates. Most Cited Cases

Insufficient nexus was shown between "exotic dancing nightclubs," not featuring nude or semi-nude dancing, and undesirable secondary effects including prostitution cited as justification for city zoning ordinance requiring such clubs to obtain special use permits and tightly restricting geographic areas for such permits, and thus ordinance violated club owners' free speech rights; city proffered evidence of higher-than-average incidence of prostitution in area supposedly housing existing exotic dancing nightclubs, with no further causal connection and no supporting studies but only conclusory assumptions. U.S.C.A. Const.Amend. 1.

[6] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(5) k. Bars, Nightclubs, and Restaurants. Most Cited Cases

414 Zoning and Planning KeyCite Notes
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k86 k. Permits and Certificates. Most Cited Cases

City zoning ordinance requiring "exotic dancing nightclubs," not featuring nude or semi-nude dancing, to obtain special use permits, and tightly restricting geographic areas for such permits, was not narrowly tailored and violated First Amendment; ordinance had effect of, e.g., regulating all female persons performing erotic dance in equivalent of short shorts and opaque bra, potentially affecting mainstream performances, without offering justification for such broad regulation. U.S.C.A. Const.Amend. 1.

***404** Allan S. Rubin (argued), Southfield, MI, Wayne B. Giampietro, Stitt, Klein, Daday, Aretos & Giampietro, Arlington Heights, IL, for Plaintiff- Appellant.

Kathleen Elliott (argued), City of Rockford, Law Department, Rockford, IL, for Defendant-Appellee.

Before FLAUM, Chief Judge, and BAUER and ROVNER, Circuit Judges.

FLAUM, Chief Judge.

Plaintiff R.V.S., L.L.C. ("RVS") filed suit against the City of Rockford ("Rockford") seeking a temporary restraining order and to preliminarily and permanently enjoin Rockford from enforcing an ordinance regulating "Exotic Dancing Nightclubs." Rockford Ordinance 2002-308-0 ("the Ordinance") prohibits the operation of those businesses within 1000 feet of churches, schools, residences and other Exotic Dancing Nightclubs, and in addition, requires the issuance of a special use permit before such businesses may operate in nonproscribed locations. RVS argues that the Ordinance violates its rights under the First Amendment to the United States Constitution and appeals the district court's judgment in favor of Rockford. For the reasons stated herein, we reverse the judgment of the district court and remand the case for entry of judgment consistent with this opinion.

I. Background

A. The Ordinance

RVS leases commercial property on Auburn Street in Rockford, Illinois. RVS was preparing to open a business at the Auburn Street location called Moulin Rouge. According to RVS's owner, James Roddy, Moulin Rouge planned to be an "upscale" facility serving food along with "theme dancing" and "artistic performances." On December 12, 2002, in response to an application for a liquor license, RVS received a letter from the Rockford City Attorney explaining that a new ordinance enacted the previous day would prevent RVS from opening Moulin Rouge.

This newly passed ordinance defined, for the first time, a category of businesses known as Exotic Dancing Nightclubs and required that such businesses apply for a special use permit. By definition, the Ordinance only applies to dancers who are clothed--nude and semi-nude dancers are regulated by a separate Rockford ordinance that deals with "Sexually Oriented Businesses." It is undisputed that the business RVS planned to operate could fall within the Exotic Dancing Nightclub definition but not the Sexually Oriented Business definition. Under the Ordinance, an Exotic Dancing Nightclub is defined as:

A business establishment at which one or more exotic dancers perform or provide entertainment to a patron or patrons. Exotic dancer means any person, whether compensated or not, who dances, performs, or entertains by doing a "striptease" or performs an erotic dance or other movements which include the performer touching their breasts or pubic area, or performing any movements simulating sexual activity while wearing fully opaque clothing covering over primarily the genitalia, pubic region, buttocks and if the person is female, ***405** the portions of the breast below the top of the areola.

The Ordinance provides that Exotic Dancing Nightclubs are prevented from operating within 1000 feet "of a church, school, residential district or another exotic dancing nightclub." The Auburn Street property is positioned within 1000 feet of a residential area. Furthermore, even in those areas that are not within 1000 feet of the designated locations, an Exotic Dancing Nightclub must obtain a special use permit specifically allowing its operation at the location it has selected. [FN1]

> FN1. One seeking such a permit must apply to the Zoning Board of Appeals ("ZBA"), which is required to hold at least one public hearing on the application. ROCKFORD, ILL., ZONING ORDINANCE § 1603.3 (2002). In order to recommend to the City Council the granting of a special use permit, the ZBA must find, among other things, that the establishment of "the special use permit will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare." Once the hearing is
>
> held, the ZBA must transmit its decision to the Zoning Administrator who then transmits the ZBA's recommendation to the City Council. If the ZBA recommends the issuance of a special use permit, a majority of the City Council is required to approve the permit. If the ZBA has recommended denial of the permit, a super-majority (10 of 14 members) of the City Council is required for approval. ROCKFORD, ILL., ZONING ORDINANCE § 1603.6 (2002).

In August 2002, the Ordinance was first proposed at a meeting of the Rockford City Council. Alderman ("Ald.") Douglas Mark suggested the adoption of a resolution amending Rockford's Zoning Ordinance to add business establishments featuring exotic dancers to the existing land uses that require a special use permit. The matter was referred to the Council's codes and regulations committee. On September 30, 2002, the City Council adopted the codes and regulations committee's report recommending that Rockford file text amendments to the Zoning Ordinance regarding Exotic Dancing Nightclubs. Accordingly, the text amendments were filed with Rockford's zoning officer and a hearing was held on the proposed text amendments by the Zoning Board of Appeals ("ZBA"). On November 19, 2002, after hearing testimony on the matter from City Attorney Kathleen Elliott and Ald. Mark, the ZBA recommended approval of the text amendments. On November 27, 2002, the codes and regulations committee of the City Council voted to recommend sustaining the ZBA's decision to approve the text amendments. On December 9, 2002, the City Council approved the Ordinance.

In considering whether to pass the Ordinance, it is undisputed that the City Council did not rely on any studies from other towns or conduct any of their own studies regarding the relationship between Exotic Dancing Nightclubs and undesirable "secondary effects," such as decreased property values and higher incidence of crime, public health risks, and illegal sexual activities such as prostitution. The Ordinance does not contain any preamble or legislative findings and the journal of proceedings for the City Council meeting at which it was adopted does not state any findings. In fact, the legislative record reflects that the only evidence to support the Ordinance was the testimony offered by City Attorney Elliot and Ald. Mark at the November 19, 2002 ZBA meeting. The minutes from that meeting contain the following passage:

It is the City's experience that [Exotic Dancing Nightclubs] in a concentrated area or near residential uses attract[ ] prostitution and other problems that are part of this atmosphere. Alderman Mark stated there have been incidents where liquor sales were procured with the intent of establishing dancing clubs. The proposed text amendments would ***406*** allow the City more control over the location of these type of clubs to prevent adverse effects on adjoining neighborhoods.

Additionally, the minutes of the Council's codes and regulations meeting for November 27, 2002 contain the following statement: "Although they are not considered sexually oriented business[sic], strip clubs have similar secondary effects in the neighborhood as sexually oriented businesses."

B. Trial

In response to the action filed by RVS against Rockford, the district court denied RVS's request for a temporary restraining order and subsequently conducted a bench trial combining the preliminary and permanent injunction hearings. At trial, Ald. Mark testified that he drafted the Ordinance with the intent of creating three different categories of behavior that would fall within the definition of "exotic dancing." According to Ald. Mark, fully clothed individuals are considered "exotic dancers" *if* they (1) dance, perform, or entertain by doing a striptease, or (2) perform an erotic dance or other movements which include touching their breasts or pubic area. Under the third category, Ald. Mark testified, individuals are "exotic dancers" if they perform any movements simulating sexual activity

while wearing the specified limited clothing. Wayne Dust, Rockford's zoning manager, testified after Ald. Mark. He disagreed with Ald. Mark's interpretation of the Ordinance. Dust testified that he understands the clothing limitation to modify all three categories of conduct.

Rockford also introduced evidence to attempt to show that adverse secondary effects result from the operation of Exotic Dancing Nightclubs. Rockford police officer David Dominguez, who performs crime analysis for the police department, presented reports summarizing calls relating to prostitution for the years 2001 and 2002. The summaries showed that many calls originated from an area of Rockford known as 7th Street and Broadway. [FN2] Ald. Jeffrey Holt, whose ward includes the 7th Street and Broadway area, provided testimony pertaining to the conditions of his ward. He testified that the area is comprised of a commercial district in close proximity to a lower-income residential area. The neighborhood contains a community center, a homeless outreach center, a lower-income outpatient clinic, restaurants, furniture stores, rental properties, and adult establishments, including massage parlors, lingerie modeling shops, and dancing clubs. Ald. Holt testified that he received complaints from residents concerning sexually oriented businesses located in the area, relating to their advertising and signage, hours of operation, and density. In Ald. Holt's opinion, the presence of sexually oriented businesses in the 7th Street and Broadway area contributes to lower property values, deteriorated properties, difficulty in attracting development, and prostitution.

FN2. RVS's Auburn Street location is not in the 7th Street and Broadway area.

Ald. Nancy Johnson, whose ward is adjacent to Holt's, testified that she received calls from residents, complaining about noise, traffic, and litter caused by Bigfoot, an Exotic Dancing Nightclub in her ward. In her opinion, sexually oriented businesses create unattractive appearances due to neon lights, gaudy window displays, and unsavory clientele.

To refute the evidence presented by Rockford, RVS presented expert evidence from Dr. Daniel Linz. Linz testified that studies show that no adverse secondary effects are associated with establishments ***407** featuring nude or semi-nude dancing. Additionally, Linz found no studies concerning the secondary effects of establishments where performers wear clothing. RVS also presented testimony from Dr. Judith Hanna, an anthropologist who has conducted studies of dance and dancers. In Hanna's expert opinion, the definitions of "exotic dance" in the Ordinance are insufficient to define conduct in any meaningful way. She explained that it is common in many forms of mainstream dancing to touch parts of the body, including the breasts and pelvic area. It was also her opinion that the Ordinance's clothing definition encompasses a wide range of dance costumes, uniforms, and practice attire.

At the conclusion of the hearing, the district court issued an opinion finding in favor of Rockford, denying the injunction requests and dismissing the entire case with prejudice. The district court found that the Ordinance was not an unconstitutional prior restraint. Furthermore, the court found that the Ordinance was a proper time, place, and manner restriction because Rockford was entitled to rely on its experience that Exotic Dancing Nightclubs cause undesirable secondary effects. The district court also found that the Ordinance was not unconstitutionally vague or overbroad. RVS appeals the district court's decision with respect to its determination that the Ordinance is not a prior restraint and that sufficient evidence exists to uphold the Ordinance on a secondary effects rationale.

II. Discussion

A. Legal Framework

[1] In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Supreme Court applied a three-step analysis in reviewing the First Amendment validity of a municipal zoning ordinance that regulated adult movie theaters. The *Renton* analysis instructs courts reviewing regulations of adult entertainment establishments to consider: (1) whether the regulation constitutes an invalid total ban or merely a time, place, and manner regulation, (2) whether the regulation is content-based or content-neutral, and accordingly, whether strict or intermediate scrutiny is to be applied, and (3) if content-neutral, whether the regulation is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.

[2] In upholding a ban on multiple-use adult establishments, the plurality opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), adhered to the *Renton* framework. However, in his concurrence, Justice Kennedy joined the four dissenters, *id.*

at 455-56, 122 S.Ct. 1728, in eschewing the content-neutral "fiction" of adult entertainment zoning ordinances. *Id.* at 448, 122 S.Ct. 1728 ("These ordinances are content based and we should call them so."); *see also G.M. Enterprises v. Town of St. Joseph*, 350 F.3d 631, 637 (7th Cir.2003) (explaining that the content-based versus content-neutral inquiry is unnecessary). Generally, content based restrictions on speech are analyzed with the strictest scrutiny, but Justice Kennedy explained that content based zoning regulations can be exceptions to that rule. In so concluding, he agreed with the plurality that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Alameda Books*, 535 U.S. at 448, 122 S.Ct. 1728. Whatever the label, *Renton* 's second step is best conceived as an inquiry into the purpose behind an ordinance rather than an evaluation of an ordinance's form. *See Alameda Books*, 535 U.S. at 440-41, 122 S.Ct. 1728 (plurality opinion) (explaining *Renton* 's second step "requires courts to ***408** verify that the *predominant concerns motivating* the ordinance were with the secondary effects of adult [speech]") (emphasis added) (internal quotations omitted); *Ben's Bar v. Village of Somerset*, 316 F.3d 702, 723 (7th Cir.2003) ("regulations of adult entertainment receive intermediate scrutiny if they are *designed* not to suppress the 'content' of erotic expression, but rather to address the negative secondary effects caused by such expression") (emphasis added); *G.M. Enterprises*, 350 F.3d at 637-38 (noting that courts "must first determine whether the ordinances at issue are *motivated* by an interest in reducing the secondary effects associated with the speech, rather than an interest in reducing speech itself," before applying intermediate scrutiny) (emphasis added). [FN3] As we noted in *Ben's Bar*, "while the label has changed, the substance of *Renton* 's second step remains the same." 316 F.3d at 702, 721 n. 26.

> FN3. Justice Kennedy does not discuss the "predominant concerns" inquiry in his *Alameda Books* concurrence. As he notes that "zoning regulations ... have a prima facie legitimate purpose: to limit the negative externalities of land use," 535 U.S. at 449, 122 S.Ct. 1728, it is possible that he believes this inquiry to be unnecessary, as long as an ordinance may be characterized as a zoning regulation. However, as Justice Kennedy does not explicitly repudiate the "predominant concerns" inquiry and our cases subsequent to *Alameda Books* have continued to employ it, we will include it in our analysis.

[3] Accordingly, only after confirming that a zoning ordinance's purpose is to combat the secondary effects of speech do we employ *Renton* 's intermediate scrutiny test. Under this test, zoning regulations are constitutional "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47, 106 S.Ct. 925; *see also Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728. At this stage, courts are "required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' " *Ben's Bar*, 316 F.3d at 724 (quoting *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728). In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection, courts must "examine evidence concerning regulated speech and secondary effects." *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728. According to the *Alameda Books* plurality, the evidentiary requirement is met if the evidence upon which the municipality enacted the regulation "is reasonably believed to be relevant for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest." 535 U.S. at 438, 122 S.Ct. 1728 (internal quotations omitted). However, Justice Kennedy clarified that simply evaluating the strength of the connection is insufficient to pass intermediate scrutiny. It is essential, he explained, to consider the impact or effect that the ordinance will have on speech. That is, not only must the regulation have the "purpose and effect of suppressing secondary effects," it must also leave the "quantity and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring). This approach requires that two questions be asked and answered to resolve whether a content-based zoning ordinance is justified: (1) "what proposition does a city need to advance in order to sustain a secondary-***409** effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Id.*; *see also Ben's Bar*, 316 F.3d at 724. As Justice

Kennedy explained, "the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances ... may reduce the costs of secondary effects without substantially reducing speech." *Alameda Books*, 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring). Accordingly, only once a "cost effective" rationale has been identified to justify a regulation can the sufficiency of the evidence supporting that rationale be evaluated. [FN4]

> FN4. The *Alameda Books* plurality characterized Justice Kennedy's concurrence as "a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban." 535 U.S. at 443, 122 S.Ct. 1728. It appears to us that Justice Kennedy's contentions were not so limited. We will follow our Court's practice in cases applying *Alameda Books* and treat Justice Kennedy's concurrence as more demanding of the third step of the *Renton* analysis and not merely a restatement of the first step.

In sum, *Alameda* 's plurality opinion along with Justice Kennedy's concurrence establish that in order to justify a content-based time, place, and manner restriction, a municipality must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, (i.e., is designed to serve or furthers a substantial or important government interest), while leaving the quantity and accessibility of speech substantially intact (i.e., the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication). *Ben's Bar*, 316 F.3d at 725.

B. Application of *Renton/Alameda Books* to the Ordinance

1. Strict or Intermediate Scrutiny: Complete Ban or Time Place and Manner Regulation?

First, we note that the Ordinance is not a complete ban on Exotic Dancing Nightclubs, but a zoning regulation, which *Renton* and *Alameda Books* instruct us to consider as a time, place, and manner regulation. Rather than acting as an outright prohibition on "exotic dancing," the Ordinance regulates the locations where that activity may occur. However, the special use permit scheme does create the potential of substantially restricting, or even preventing, the establishment of new Exotic Dancing Nightclubs. Nevertheless, the record does not support the conclusion that the Ordinance amounts to a total ban on protected activity--especially considering that existing Exotic Dancing Nightclubs are unaffected by the Ordinance.

2. Strict or Intermediate Scrutiny: Were the Secondary Effects of Speech the "Predominant Concerns" Motivating Enactment of the Ordinance?

[4] Next, we must examine whether the Ordinance was designed to suppress the content of erotic expression or to address the negative secondary effects caused by such expression. *Ben's Bar*, 316 F.3d at 723. In other words, we must determine whether the "predominant concerns" motivating Rockford's enactment of the Ordinance "were the secondary effects of adult [speech], and not ... the content of adult [speech]." *Id.* [FN5] Rockford claims to have enacted the Ordinance to combat the negative secondary effects allegedly created by Exotic Dancing Nightclubs, including ***410** prostitution, crime, and decreased property values. To support this claim, Rockford points to testimony from Ald. Mark and City Attorney Elliott given at the ZBA meeting explaining that the purpose of the Ordinance was to ameliorate the negative secondary effects of Exotic Dancing Nightclubs. In addition, Ald. Holt and Ald. Johnson offered testimony at trial relating to the negative effects produced by adult-oriented businesses.

> FN5. "Federal courts evaluating the 'predominant concerns' behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware." *Ben's Bar*, 316 F.3d at 723, n. 28 (citing *Ranch House Inc. v. Amerson*, 238 F.3d 1273, 1280 (7th Cir.2001)).

However, observations made by Ald. Mark during trial somewhat complicate this inquiry. In response to questions relating to the purpose of the Ordinance, Ald. Mark stated that while Rockford had experienced no problems with the Exotic Dancing Nightclubs currently in operation, "there were some concerns that some people just don't like this type of entertainment." Combating the adverse

secondary effects caused by sexually explicit speech is a permissible purpose for a regulation; open and explicit hostility toward and disapproval of the speech itself is not. Certainly, such a direct acknowledgment from the official responsible for introducing the Ordinance makes us sensitive to the possibility that the Ordinance might be a pretextual use of the power to zone as a means of suppressing expression. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 84, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Powell, J., concurring). Nonetheless, what motivates one legislator to support a statute is not necessarily what motivates others to enact it. *See* Renton, 475 U.S. at 48, 106 S.Ct. 925 (citing *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)); *see also* DiMa Corp. v. Town of Hallie, 185 F.3d 823, 828-29 (7th Cir.1999) (rejecting an argument that legislators' improper motive can invalidate an otherwise constitutional ordinance). Accordingly, on balance, it seems that the predominant concerns motivating enactment of the Ordinance related to combating prostitution, crime, and other negative externalities.

3. Intermediate Scrutiny: Substantial Government Interest, Narrowly Tailored, and Reasonable Alternate Channels of Communication

Even accepting that the "predominant concerns" motivating Rockford's adoption of the Ordinance were the alleged secondary effects caused by Exotic Dancing Nightclubs, we are compelled to reverse the decision of the district court because the Ordinance cannot survive *Renton/Alameda Books* intermediate scrutiny (i.e., designed to serve a substantial government interest, narrowly tailored and does not unreasonably limit alternate avenues of communication). *See* Ben's Bar, 316 F.3d at 724.

a. Substantial Government Interest

As previously noted, our inquiry requires us to answer two questions: (1) "what proposition does a city need to advance in order to sustain a secondary- effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Alameda Books*, 535 U.S. at 449, 122 S.Ct. 1728 (Kennedy, J., concurring). Justice Kennedy put forth a proportionality principle to guide courts in answering the first question. He explained that, "a city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* Following this guideline, Justice Kennedy concluded that the rationale of a dispersal statute must be ***411** that the targeted businesses will disperse rather than shut down. *Id.* at 451, 122 S.Ct. 1728. rc: ED Connect /ATHANIS

[5] Accordingly, Rockford's premise in support of the Ordinance must be that locating Exotic Dancing Nightclubs away from churches, schools, and residential neighborhoods, and separating Exotic Dancing Nightclubs from one another will significantly reduce negative secondary effects that occur when there is a concentration of adult uses in an area without substantially diminishing the availability of speech.

As we move to the second question, we are confronted with a critical deficiency of the Ordinance--the lack of evidence to support this premise. The record is devoid of evidence connecting Exotic Dancing Nightclubs and the secondary effects that allegedly motivated the Ordinance's adoption. While it seems apparent that the Ordinance will have the effect of reducing the availability of speech, evidence is lacking to support the proposition that secondary effects will be reduced by the same degree, if at all.

The Supreme Court has consistently held, "a city must have latitude to experiment, at least at the outset, and ... very little evidence is required [to support an ordinance's proposition]." *Id.* As previously noted, "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books*, 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion) (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925). However, Rockford has produced little evidence of harmful secondary effects connected to Exotic Dancing Nightclubs beyond the assumption that such effects exist. While it is true that common experience may be relied upon to bolster a claim that a regulation serves a current governmental interest, the experience in this case falls short of satisfying the minimal evidentiary showing required by *Alameda Books*. Indeed, while courts may credit a municipality's experience, such consideration cannot amount to an acceptance of an "if they say so" standard.

Rockford does not identify any studies, judicial opinions, or experience-based testimony that it considered in adopting the Ordinance. Furthermore, the evidence presented at trial represented only a limited showing, consisting of: evidence of a higher than average incidence of prostitution in the 7th Street and Broadway area, testimony from two local officials that police action had not been effective to curb prostitution activity, and testimony from Ald. Johnson that based on her personal observations strip clubs have negative secondary effects on adjoining residential properties. [FN6]

FN6. While the Supreme Court has not definitively addressed the issue, our Court has

permitted municipalities to make a record for trial with evidence that it may not have considered when it enacted its ordinance. *See* DiMa Corp., 185 F.3d at 829-30.

Even if we were dealing with a typical adult entertainment zoning ordinance, it is questionable whether this modest amount of support would be sufficient under the albeit permissive guidelines set by the Supreme Court and this Court's previous cases. While "reasonably believed to be relevant" is not a particularly demanding evidentiary standard, neither the Supreme Court nor this Court has found it satisfied by a similarly limited proffer of evidence. *Compare* Alameda Books, 535 U.S. at 425, 122 S.Ct. 1728 (city relied on study it conducted a number of years prior to enacting ordinance); Renton, 475 U.S. at 44, 106 S.Ct. 925 (planning committee conducted ***412** extensive studies and hearings); G.M. Enterprises, 350 F.3d at 631 (town board collected 16 studies and consulted judicial opinions and police reports); Ben's Bar, 316 F.3d at 725 (village board relied on numerous judicial decisions, studies from 11 different cities, and findings in a report from the state's attorney general); Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir.2000) (city collected and reviewed studies and conducted legislative research); DiMa Corp., 185 F.3d at 830-31 (town "minimally" met its evidentiary burden by relying on the factual record supporting the experience of another community as reported in a judicial opinion).

We reiterate that "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." G.M. Enterprises, 350 F.3d at 640 (quoting Alameda Books, 535 U.S.at 451, 122 S.Ct. 1728). However, in a situation like the one before us, where Rockford has not adequately engaged in such an assessment, to conclude that the "reasonably believed to be relevant" requirement has been satisfied would be to permit a municipality to employ an unacceptably low level of justification, as proscribed by the Alameda Books plurality. *See* 535 U.S. at 438, 122 S.Ct. 1728.

Nonetheless, the requirement that municipalities be allowed a reasonable opportunity to experiment with solutions to an admittedly serious problem might render the offered evidence sufficient if the Ordinance applied only to bars and clubs that present nude or semi-nude dancing. "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 minimal burden to demonstrate its interest in regulation of such activity." Giovani Carandola, Limited v. Bason, 303 F.3d 507, 516 (4th Cir.2002) (internal citations omitted). In contrast, the regulation in this case targets clothed dancers who convey an erotic message through their movements. Within the confines of this record evidence does not exist to support a connection between establishments offering dancing by entertainers who are clothed and adverse secondary effects. While it may have been reasonable for Rockford to believe that the evidence presented at trial was relevant to demonstrate a connection between adverse secondary effects and nude or topless dancing, we conclude that it falls short of being relevant to establishing a meaningful connection between negative secondary effects and the type of entertainment to which the Ordinance applies.

Most of Rockford's evidence, at least as presented to date, does not appear to be directly relevant to the type of entertainment that Rockford seeks to regulate. At trial, Rockford focused on the problems afflicting the 7th Street and Broadway area. Indeed, Officer Dominguez's incidence reports reflect that many prostitution calls originated from this general vicinity in 2001 and 2002. However, Rockford did not present to the Court any examples of businesses in this area that fall within the definition of the Ordinance. While the members of the City Council indicated in their testimony that such establishments exist, they did not provide any examples. Their general statements alone may have been sufficient were it not for the repeated overlap of terminology at trial. Witnesses and Rockford's attorney continuously used the terms Sexually Oriented Business and Exotic Dancing Nightclub interchangeably. As a result of this lack of distinction, we cannot presume that the businesses operating in the 7th Street and Broadway area are Exotic Dancing ***413** Nightclubs as opposed to Sexually Oriented Businesses.

Notably, Ald. Mark testified that five Exotic Dancing Nightclubs currently exist within Rockford. Indeed, five specific business establishments (The Flag, State Street Station, Hideaway, Surf Lounge, and Bigfoot) were mentioned by various witnesses at trial as examples of Exotic Dancing Nightclubs. However, our search of the public record indicates that none of these businesses are actually located in the 7th Street and Broadway area. Accordingly, it is difficult to conclude that the incidence reports and testimony regarding 7th Street and Broadway reasonably support the premise that a concentration of Exotic Dancing Nightclubs result in adverse secondary effects. In effect, the only evidence we are left with supporting Rockford's rationale behind the Ordinance are the conclusory statements in the ZBA and codes and regulations minutes and the testimony of one local

official that in her personal experience Exotic Dancing Nightclubs have a negative impact on the surrounding community. If Rockford had presented more convincing evidence to show that some businesses featuring clothed entertainers produce adverse secondary effects, a different result might ensue.

b. Narrowly Tailored and Reasonable Alternate Channels of Communication

[6] Additionally, the Ordinance does not appear to be narrowly tailored to affect a category of business establishments shown to produce unwanted secondary effects--or even establishments that could conceivably produce them. *See Ben's Bar,* 316 F.3d at 725 (explaining that a regulation must leave the quantity and accessibility of speech substantially intact). Under a narrow reading, the Ordinance regulates all persons performing an erotic dance (or other specified movements) at a business establishment while wearing more or less the equivalent of short shorts and, if female, an opaque bra. [FN7] While understandably aimed at entertainers of a more "adult" persuasion, there exists the potential that mainstream performances could fall under the purview of the Ordinance. Simply, Rockford has not presented justification why it is essential to regulate such a wide universe of dance. *Cf. Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988 (7th Cir.2002) (holding that an ordinance prohibiting a sexually oriented business' signage from displaying anything other than the business name was not narrowly tailored to reduce secondary effects where municipality could not articulate a single reason why such a rule was necessary).

> FN7. This interpretation is similar to the one advanced by Wayne Dust, Rockford's zoning manager, at trial (i.e., the clothing clause is read to modify all three categories of conduct). While we believe Ald. Mark's interpretation (i.e., the clothing clause applies only to the last category) is the more structurally natural reading; the outcome produces an irrational result that we will not employ. We will treat the clothing clause as modifying all three categories of conduct.

Certainly, as a direct restriction on erotic expression, speech fares worse under the Ordinance than it did under the laws at issue in similar cases. In *Ben's Bar,* the ordinance did not restrict erotic expression, but rather prohibited sexually oriented businesses from serving alcohol during a dancer's performance. 316 F.3d at 726. Similarly, in *G.M. Enterprises,* the availability of speech was left substantially intact because the ordinances merely sought to minimize the factors that "heighten[ed] the probability that adverse secondary effects would result from nude dancing: physical proximity between the dancers ***414*** and patrons, and the consumption of alcohol by patrons." 350 F.3d at 638. Under the regulation at issue in *G.M.,* if dancers chose to wear *de minimus* clothing the ordinance's restrictions could be avoided entirely. *Id.; see also Alameda Books,* 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring) (noting that the ordinance extended to non-expressive activities, like massage parlors); *DiMa Corp.,* 185 F.3d at 823 (ordinance regulated book-store's hours of operation).

In contrast, the Ordinance here is focused on expressive conduct. Rather than targeting a non-expressive aspect of Exotic Dancing Nightclubs, like neon signs, the Ordinance targets the speech itself. As a zoning regulation we view the Ordinance as less restrictive than an outright ban; however, it is still the case that to avoid the Ordinance dancers must not convey an erotic message through their movements (or they must wear significantly more clothing than the amount we have considered to be *de minimus* in past cases). Like the regulation this Court struck down in *Schultz v. City of Cumberland,* the Ordinance "deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance and thereby interferes substantially with the dancer's ability to communicate an erotic message." 228 F.3d 831, 847 (7th Cir.2000) (invalidating regulation that banned the performance of specified sexually explicit movements within sexually oriented businesses finding that "[b]y restricting particular erotic movements and gestures of the erotic dancer ... [the regulation] unconstitutionally burdens protected expression.").

As we have determined that the Ordinance is not appropriately designed to serve a substantial government interest and is not narrowly tailored, it is unnecessary for us to separately analyze whether the Ordinance leaves open reasonable alternate channels of communication.

C. Applying *Renton/Alameda Books* Beyond Sexually Explicit Speech

As a final matter, we observe that challenging questions are raised by the Ordinance's expansiveness. While we applied the *Renton/Alameda Books* framework in reviewing the constitutionality of the Ordinance, it is unclear how "sexual" in nature regulated speech must be to warrant the *Renton/ Alameda Books* analysis. Even under our narrow reading of "exotic dancing," a

number of expressive activities may fall within Rockford's definition that are not ordinarily regulated under a secondary effects theory. It is important to keep in mind that the Ordinance does not apply to nude dancing or other forms of nude entertainment. A survey of the laws challenged on secondary effects grounds in leading Supreme Court and Seventh Circuit cases illustrates the unusual breadth of the Ordinance. *See Alameda Books,* 535 U.S. at 425, 122 S.Ct. 1728 (prohibiting "Adult Entertainment Businesses" [FN8] from operating in the same building); *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (restricting public nudity); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (same); *Renton,* 475 U.S. at 41, 106 S.Ct. 925 (regulating the location of adult motion picture theaters); *G.M. Enterprises,* 350 F.3d at 631 (regulating nude dancing); *Ben's Bar,* 316 F.3d at 702 (prohibiting the sale, use, and consumption ***415** of alcohol on the premises of "Sexually Oriented Businesses" [FN9]).

FN8. The city defined "Adult Entertainment Business" as an "adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters." 535 U.S. at 431, 122 S.Ct. 1728.

FN9. The ordinance at issue in *Ben's Bar* defined "Sexually Oriented Business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency or sexual encounter center." 316 F.3d at 708, n. 8. As it regularly featured nude and semi-nude persons, Ben's Bar fell under the sub-category of "adult cabaret." *Id.* at 708. The ordinance further defined semi-nudity as "the exposure of a bare male or female buttocks or the female breast below a horizontal line across the top of the areola at its highest point with less than complete and opaque covering." *Id.*

As these cases demonstrate, courts have upheld a number of restrictions on sexually explicit expression that falls short of obscenity. [FN10] However, what constitutes sexually explicit but non-obscene expression can be difficult to define. Previously, regulating nudity or semi-nudity has served as a common link in the laws enacted by municipalities pertaining to sexually explicit expression. The uniqueness of the Ordinance is that it removes nudity from the calculus and seeks to regulate clothed individuals. The challenge attendant to this legislative leap may be that it cuts a broader swath across expression and attempts to apply the "secondary effects" reasoning of *Renton* to laws not confined to regulating "sexually explicit" speech. Recently, the Eighth Circuit noted that First Amendment issues may be raised by classifying live entertainment by clothed dancers as sexual expression. *Jake's, Ltd., Inc. v. City of Coates,* 356 F.3d 896, 903 (8th Cir.2004). Indeed, it remains questionable how and if the *Renton/Alameda Books* analysis would apply in a case with even more tangential of a relationship to businesses purveying sexually explicit materials and entertainment. *See Boos v. Barry,* 485 U.S. 312, 334-35, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (Brennan, J., concurring) (objecting to implication that content-based regulations could ever be subject to "secondary effects" analysis outside the area of sexually explicit speech).

FN10. Obscenity is a constitutionally unprotected category of speech.

See Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (holding that governments may regulate speech as obscene if it (a) under community standards, appeals to the prurient interest, (b) taken as a whole, is a patently offensive depiction or description of sexual conduct, and (c) lacks serious literary, artistic, political, or scientific value).

III. Conclusion

We do not conclude that Rockford may not permissibly use its zoning power to regulate any type of clothed dancing. As we have previously noted of other zoning ordinances regulating dancing: "the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a

modest social value and is anyway not suppressed but merely shoved off to another part of town, where it remains easily accessible to anyone who wants to patronize that kind of establishment." *Blue Canary Corp. v. City of Milwaukee,* 251 F.3d 1121, 1124 (7th Cir.2001) (upholding denial of liquor license to club whose dancers performed in pasties and bikini bottoms). It is arguable that at least some forms of clothed entertainment may initiate adverse secondary effects similar to the ones caused by establishments featuring nude and semi-nude entertainment. However, a municipality must offer sufficient evidence in support of this proposition. Without further direction from the Supreme Court, we cannot constitutionally lower the already modest evidentiary hurdle for justifying regulations of sexually explicit but non-obscene speech on secondary effects grounds, especially in ***416** a case where mainstream speech is affected.

For the foregoing reasons, the Ordinance as presently drafted violates the First Amendment. As this determination is sufficient to permanently enjoin enforcement of the Ordinance, we offer no opinion regarding RVS's prior restraint arguments. We REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

C.A.7 (Ill.),2004.

R.V.S., L.L.C. v. City of Rockford

361 F.3d 402

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