IN THE SUPREME COURT OF IOWA
NO. 10-0898

MALL REAL ESTATE, LLC., An Iowa Limited Liability Company, Plaintiff-Appellant,	*
vs.	*
CITY OF HAMBURG, An Iowa Municipal Corporation, Defendant-Appellee	*

Fremont County No. EQCV024257
Appeal from the Fremont County District Court
The Honorable Greg W. Steensland

APPELLANT'S PROOF BRIEF

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STATEMENT OF THE ISSUES

I. The City Ordinance at issue does not validly apply to Plaintiff's business

II. In the alternative, the City Ordinance at issue is unconstitutional as applied to Plaintiff.

STATEMENT OF THE CASE

A. Nature of Case: This is an action for declaratory judgment and equitable relief under Article I, § 7 & § 9 of the Iowa Constitution. Plaintiff claims that the sexually oriented business (SOB) ordinance, Chapter 48 of the Hamburg City Code does not apply to Plaintiff's business, and seeks declaratory judgment to that effect. In the alternative, Plaintiff alleges that the ordinance, as applied to it, violates the referenced sections of the Iowa

Constitution.

B. Course of Proceedings: Defendant City passed a sexually oriented business (SOB) ordinance on December 8, 2008. Plaintiff, believing that the ordinance was aimed at its business, and contending that the ordinance could not or should not be validly applied to it, filed an action for declaratory and injunctive relief in the District Court of Fremont County, on or about December 18, 2008. The Petition cited the First and Fourteenth Amendments to the United States Constitution, and Article 1 § § 7 and 9 of the Iowa Constitution. On January 14, 2009, Defendant gave notice of removal to the U.S. District Court for the Southern District of Iowa. On February 10, 2009, Plaintiff filed an amended and substituted Complaint in the U.S. District Court for the Southern District of Iowa, relying exclusively on Article I § § 7 and 9 of the Iowa Constitution. The matter was thereafter remanded to the Fremont County District Court for further proceedings.

C. Relevant Facts:

Plaintiff is an Iowa Limited Liability Company with its principal place of business in Hamburg, Iowa. Defendant is an Iowa municipal corporation, in Fremont County, Iowa. Plaintiff leases real estate located at 702 Main Street, Hamburg, Iowa 51640, and does business as the "Hamburg Theater

for the Performing Arts" (the "theater"). The building space is leased by Plaintiff to individual performers for the purpose of allowing these individuals to perform for any persons within the theater. Plaintiff also has granted vendor leases for a pop machine, juke box and pool table. Plaintiff operates the parking lots surrounding the theater building; and persons who wish to enter the theater must pay an individual parking fee to the Plaintiff. Patrons are not charged for entrance into the theater building. Plaintiff's income is derived from parking fees and from vendor leases and rental of space to individual entertainers who desire to perform at the theater.

The ordinance first contains "purpose and findings" language supplied to various cities, in anticipation of the passage of such laws. The findings include case law upholding restrictions on sexually oriented businesses. There are also citations to "studies" performed on behalf of various governmental entities, to the effect that certain adult businesses generate "negative secondary effects", including increased crime, decreased property values, and general "urban blight"; and that "employees of sexually oriented businesses, as defined in this chapter, often engage in certain types of elicit sexual behavior."

The ordinance includes the following definitions:

48.020.02 ADULT CABARET: A nightclub, bar, juice bar, restaurant, bottle club, or business or entity that is with the emphasis on observation or viewing of nude or *semi-nude* performances whether the performers receive compensation or not, that regularly features persons who appear nude or *semi-nude*

48.020.20 SEXUALLY ORIENTED ENTERTAINMENT ACTIVITY: means the sale, rental, or exhibition, for any form of consideration, of books, films, video cassettes, magazines, periodicals, or live performances that are characterized by any emphasis on the exposure or display of specified sexual activity or specified anatomical areas.

SPECIFIED ANATOMICAL AREAS: Means human genitals, pubic region, anus, cleft of the buttocks, or the nipple or areola of the female breast.

SPECIFIED SEXUAL ACTIVITY: Means any of the following:
A. sex acts, normal or perverted, including intercourse, oral copulation, masturbation, or sodomy; or

B. fondling, caressing, or other erotic touching either by the individual or anyone else of the specific anatomical areas specified herein; or

C. exposure of the specific anatomical areas; or

D. excretory functions as a part of or in connection with any of the activities described in (a), (b) or (c) above.

The ordinance states that businesses which are subject to the terms of the ordinance, including an adult cabaret, must have a sexually oriented business license, and that all employees must also have individual sexually oriented businesses licenses. A background check is necessary, and a fee is charged for the application. Activities of the business are closely regulated,

including signs, hours of operation, and nude appearances. Regarding those appearances, the ordinance states as follows:

> .01 It shall be a violation of this Chapter for a *licensee* required to obtain a sales tax permit to knowingly or intentionally violate Iowa Code § 728.5. It shall be a violation for any *person* to knowingly or intentionally, in a sexually oriented business, to appear in a state of nudity.
>
> .02 It shall be a violation of this Chapter for any *employee* to knowingly and intentionally appear *semi-nude* in a sexually oriented business unless the *employee*, while *semi-nude*, shall be in least six (6) feet from any patron or customer and on a stage at least two (2) feet from the floor
>
> .03 It shall be a violation of this Chapter for an *employee*, while *semi-nude* in a sexually oriented business, to knowingly or intentionally receive any pay or gratuity directly from any patron or customer or for any patron or customer to knowingly or intentionally pay or give any gratuity directly to any *employee*, while said *employee* is *semi-nude* in a sexually oriented business.
>
> .04 It shall be a violation of this Chapter for an *employee*, while *semi-nude* in a sexually oriented businesses, to knowingly or intentionally touch a customer or the clothing of a customer or for a customer to knowingly and intentionally touch an *employee* or the clothing of an *employee*, while said *employee* in *semi-nude* in a sexually oriented business.

Violations of the ordinance by employees are "imputed" to the sexually oriented business licensee by section 48.190 of the ordinance:

> Notwithstanding anything to the contrary, for the purpose of this Chapter, an act by an *employee* that constitutes grounds for suspension or revocation of that *employee's* license shall be imputed

> to the sexually oriented business *licensee* for the purposes of finding a violation of this ordinance, or for the purposes of license denial, suspension, or revocation, only if an officer, director, or general partner, or a *person* who managed, supervised, or controlled the business premises, knew or reasonably should have known that such act was occurring and failed to prevent such act. It shall be a defense to liability under this Chapter that the *person* to whom the violative act is imputed was powerless to prevent the act.

At trial, several City officials testified concerning the ordinance. The Mayor presides over meetings of the City Council and is responsible for the police force (Tr. 10). The Mayor attributed the passage of the new law directly to Plaintiff's establishment:

> In the time that I have been Mayor, we had increased crime. And we had a number of things that happened as it related to the club, and also the club has been in Court – we had minors drinking in the club that we had first hand knowledge of. We had minors dancing in the club. We also had minors that were allowed in the club. And we had an increase in crime – also sexual-assault in the City of Hamburg. (Tr. 10-11)

There was one particular sexual assault against a fifteen (15) year old, where the perpetrator "went back to the club." (Tr. 11).

She referred to the "purpose and findings" in the ordinance, and the studies referred to there, and stated that secondary effects would include:

> increasing crime, devaluation of property, definitely an increase in sexual crime. There can be noise issues, as well as hour issues, meaning hours of the day, drunk driving, those kinds of issues, and

driving without a license. (Tr. 13).

The Mayor stated that "they have a higher propensity to happen where there is a sexually oriented business." (Tr. 14). The City Council received a summary of secondary effects when they received the proposed ordinance from the City Attorney, in October, 2008. (Tr. 14) While the Mayor did not know if anyone had reviewed the studies, she stated "I can say that we have been living the study." (Tr. 14). She did say that there were complaints from the public about the sexual aspects of the business, but did not give details. (Tr. 19) She also stated that there were a number of complaints about the sign in the parking lot: "the name of the parking lot is camel toe parking, and that is quite disturbing to many of our citizens." (Tr. 20). There had been signs on a trailer and a mini-bus advertising nude dancing. The mayor knew of no specific instances of drug sales or prostitution near the club. (Tr. 21) The Court took notice that there had been a prosecution two (2) years prior, and the Defendant had been found not guilty (Tr. 22). The Mayor had no reports of sexually transmitted diseases (STDs). (Tr. 22-23) She did say that "we had an incident with a dancer who removed her clothes and danced in the parking lot at Pizza Hut early evening. (Tr. 25)

The Mayor thought perhaps the recession may have lowered property

values, but stated that her own taxes had gone up (Tr. 29-30). The Mayor was shown exhibit 14 which was a police report about scantily clad women running around near the Pizza Hut. Apparently, police determined that there was no indecent exposure (Tr. 34-35). She indicated that she had trouble with police officers, because of the club:

> When we were employing City police officers, as the mayor, I was told repeatedly by our candidates and also existing police officers that were married that their wives really don't like them going into this club and that it had caused problems. We had difficulty hiring because a lot of the activity, especially at night from midnight to five, was club-related. It was from patrons in the club. Not that the club was doing something, but it was the patrons (Tr. 36).

The City now has a contract with the Fremont County Sheriff's Office for law enforcement. Prior, however, to that change, the hours of operation of the club caused the City problems:

> From a police standpoint, we could only afford one police officer. And on Thursday, Friday, and Saturday nights, he was working from early evening until 5:00 AM, which meant the town was not covered in the morning or afternoons. (Tr. 41)

The ordinance changes the hours of operation until 2:00 AM, which makes it consistent with the hours of operation for bars. (Tr. 42)

The Mayor pointed out that there was a bar in town, known as "The Blue Moon". It had a liquor license and was therefore regulated. Shotgun

Geniez "is a bring your own and do not have to regulate the customers how much – if they have had too much to drink." (Tr. 42-43) She has had no complaints about The Blue Moon or Harvest, which have liquor licenses. Her complaints have been over this club. (Tr. 43). She had been in the club on one occasion as part of the ambulance squad. There had been a fight in which a person had been hit by a beer bottle, and was bleeding. She had a number of complaints from the Pizza Hut across the street about broken beer bottles and "soiled condoms" near their parking lot. (Tr. 44). The Pizza Hut is now out of business (Tr. 45). The Mayor expressed additional concerns:

> A councilman had firsthand knowledge of kids going in and underage drinking. We also knew of one that had gone in, had received beer, and had danced underage (Tr. 45).

Part of the reason for passing the ordinance was to require Shotgun Geniez to ensure that children are not on the premises (Tr. 46). It was also "to ensure that offensive signs like "Camel Toe Parking Lot" would be removed from the premises so it would not offend people". (Tr. 47) She also said:

> The next thing that continued to occur is a fear factor. We had many citizens fearful. Our average age in Hamburg – we have a population of 1240, and our average age is 42, so many of our citizens are much older, and that was a fear factor (Tr. 47).

The Mayor was concerned about the image of her small town and neighboring communities:

> So I had many, many, many complaints about people who didn't even want to go to Omaha and sign their checks because it said Hamburg because people would respond about what kind of a town you are (Tr. 48).

She said that a specific group of "cheerleaders" were in the club. Neither they nor the theater were cited for any unlawful activity, but had been disciplined for it at school (Tr. 55).

The Mayor said that the ordinance was not designed to shut down Shotgun Geniez. Instead, she stated "I believe that it would help Clarence and Terry regulate the business that they had not been regulating." (Tr. 57). She said that the ordinance would give police specific power to inspect the premises, as they had difficulty in entering the building. It would also license dancers to make sure that they were all eighteen or over (Tr. 58-59). The ordinance prohibits people from bringing alcohol into the club, as there have been instances of "drinking and getting out of control both within and outside of the club" (Tr. 59). The club, because of the small size of the community, brought in a lot of people from other areas, including a lot of Nebraska and some Missouri license plates in the parking lot. (Tr. 60-61)

Kent Benfiel is a business owner and City Council member. He did not review any studies prior to voting on the ordinance. He was aware that citizens wanted the business better regulated. When asked about the meaning of "secondary effects", he stated "I don't know, drunk drivers, drug abuse, I don't know." (Tr. 64). He didn't know whether citizens were in fear, but they "wanted something done." (Tr. 65). He did not have any knowledge of sexual misconduct, drug deals, or prostitution. (Tr. 65-66) He was unaware of health risks associated with the dancing. He voted for the ordinance because there were about one hundred (100) constituents at the meeting who wanted him to vote for it. (Tr. 66-67). He had a number of complaints, including the sign. He runs a towing service, and was aware of drunk drivers and drug arrests near the club; but he was not aware of any direct connection. (Tr. 69)

Terri Moore was also a member of the City Council (Tr. 72). She did not remember seeing any secondary effect studies. She had a general idea that secondary effects were things that might happen around the business. She could not give any examples (Tr. 73). She did not know anything about problems around the club:

When I looked at the ordinance, it looked like there were some things

> that could have been done a little bit better down at the club as far as the girls' safety, the minors and such going down there. (Tr. 74)

She was unaware of an increase in crime around the club. (Tr. 75) She did review the ordinance, but "I don't know if I read the whole thing." (Tr. 76).

Lynda Burdick is also a member of the City Council. Ms. Burdick did not see, prior to passing the ordinance, any secondary effects studies. She did receive some general complaints about the club. She believed that the closing of the Pizza Hut had something to do with the club. (Tr. 83) She had no knowledge specifically of drug dealings or prostitution in relation to the club. (Tr. 84). She went into the club a couple of times, and saw nude dancers. The way they moved and touched themselves made her feel uncomfortable (Tr. 90).

Rhonda Lucas was also a member of the City Council. She did make some effort to read some studies prior to the City Council decision. (Tr. 96) She had not received any complaints about the operation of Plaintiff's establishment. (Tr. 97 - 98) She voted for the ordinance to avoid the small town getting additional clubs of that type. It was never the intent of the council, as far as she knew, to put Plaintiff out of business (Tr. 102).

Cliff Ferguson was a member of the City Council at the time of the

ordinance (Tr. 108). He thinks there were discussions of secondary effects, but he doesn't recall any details (Tr. 108). A lot of people had expressed opinions about the place to him (Tr. 109). He did not have any specific complaints about drugs, litter, illicit sexual activity or prostitution. (Tr. 109 - 110). He voted against the ordinance because he thought that it was too broad and not enforceable (Tr. 111). He was concerned about the possibility of a legal action, and the City possibly not prevailing. (Tr. 115).

Clarence Judy and his partner purchased the building about eleven (11) or twelve (12) years ago. The building was in disrepair. They spent over $250,000.00 fixing it up (Tr. 119). The building is used for performances, including nude and semi-nude dancing. There are no employees, just independent performers (Tr. 119). The performers spend a substantial part of their time talking to customers (Tr. 120). It would be very difficult for performers to talk with customers if there were a requirement that they stay six (6) feet away (Tr. 121). Performers fill out applications which specify that there will be no illegal conduct (Tr. 122). He is not aware of any problems with minors in possession of alcohol at the club (Tr. 123). People must be eighteen (18) to get in. IDs are checked and photographed (Tr. 121-123). Wrist bands are put on people under twenty-one (21), to prevent

them from drinking. (Tr. 124) Law enforcement agents have been in frequently, and have found no illegal conduct (Tr. 124-125).

When the ordinance was proposed, he did a survey of all the neighbors around the club. Exhibit 2 was the survey that he did (Tr. 129). Nobody ever told him that they do not like his parking lot sign; but he did hear that some people felt that way (Tr. 131). There was one incident of prostitution being prosecuted, several years ago, resulting in a "not guilty" verdict (Tr. 126, 131). Exhibit 13 was a record of police calls for one thousand (1,000) feet around the club (Tr. 132 - 134). There was a problem with a person urinating in the parking lot at Pizza Hut. He believed that was because they had closed their restrooms, and had nothing to do with his club (Tr. 136). One performer pled guilty to possession of marijuana, over the nine (9) years the place was open (Tr. 138). His relationship with the people at the Pizza Hut varied, as managers changed rapidly there. Some were friendly, and some were not (Tr. 140). There allegedly was a condom found in the parking lot at Pizza Hut on one occasion, but he did not think it had anything to do with his club (Tr. 141).

The ordinances prohibit entertainers from being closer than six (6) feet to audience members (Tr. 144). The existence of the ordinance would

not help with the very few incidents of misconduct that had been observed (Tr. 146). Customers come to the theater because of the nude dancing, but also to talk to the girls, and for lap dances (Tr. 150-151). Customers are not allowed to fondle breasts (Tr. 152). The City would have a legitimate interest in preventing people under eighteen (18) from dancing in the club (Tr. 154). The sign referring to camel toe parking does refer "part of a woman's body, but you see worse depictions of that every day on the signs and windows in Omaha." (Tr. 155).

Dr. Linz' report was prepared after the ordinance was put into effect. (Tr. 156-157) The club is on the border near Nebraska and Missouri, and therefore gets regular visits from residents of Nebraska and Missouri (Tr. 157). Exhibit 50 is a record of incident reports around the business. One report referred to a fight in September, 2003. (Tr. 159) There was another fight in January, 2004. (Tr. 160) There were a couple of incidents where Pizza Hut employees called the police because of people coming in and making them feel uncomfortable. There was no direct connection with the club. (Tr. 159-162).

There was a police report of a complaint about someone selling drugs out of her car, on October 17, 2005. No charges were filed. (Tr. 163-164).

There was also a report (Ex. No. 37) of a juvenile dancing in the establishment under age (Tr. 164). IDs are checked at the door. Bates No. 56 is a report of a fight between dancers, in October 2009. Exhibit 26 relates to a search warrant issued in February, 2006. It related to alleged drug activity by dancers in the dressing room. (Tr. 166 - 167) One of the dancers was charged with possession of a small amount of marijuana (Tr 167).

Cassandra Hofich has been a Deputy Sheriff since April 27, 2009. Between that time and January, 2010, she issued several warnings to people outside the club holding drinks. They are to remain inside (Tr. 178). She has issued five (5) or six (6) DUI citations, none of which relate to the theater. She has made no arrests for drug offenses or sex acts.

The State introduced the summary of secondary effects; Exhibit 54, a Memorandum from T.J. Pattermann, the City Attorney; and Exhibit 37, a report of Todd Poppie. Tapes of the City Council proceedings were introduced as Exhibit 56. Exhibit 58 is a letter from the Kiwanis club regarding the ordinance. (Tr. 184)

Kevin Aistrope is the Sheriff of Fremont County (Tr. 185). There is a concern over the establishment staying open until 4:00 or 5:00 in the morning (Tr. 186). At that time of day, there is only one deputy for the

entire county (Tr. 189). Clubs in Nebraska close at 1:00 AM, so people come over from Nebraska after that time (Tr. 189). He has concerns about lap dancing, occurring in "the champagne room" which might degenerate to sex acts. He favors a six (6) foot barrier, to avoid that problem. (Tr. 190). People between the ages of eighteen (18) and twenty-one (21) who are in the club can easily obtain alcohol there from others (Tr. 191).

There have been no any minor in possession charges. There has been at least one investigation; there was at least one report of a sex act in the club, but did no sufficient evidence (Tr. 192). There have not been many incidents between 2:00 and 5:00 AM. (Tr. 194) Problems arise when Nebraska people come over, continue drinking, and then drive home at 3:00 or 4:00 AM. (Tr. 201)

Todd Poppie is Chief of Police in Sydney, and has been since October, 2008. Prior to that he was a police officer in Hamburg (Tr 203). Exhibit 37 is a letter he wrote to the Mayor about issues around Shotgun Geniez. There was a sexual assault connected to the club, there was an assault outside the club, and there is still an outstanding warrant for a dancer who ran around the parking lot naked. There were more calls and problems around Shotgun Geniez than around either of the two (2) bars in town. At night, a majority of

the license plates in the parking lot were from Nebraska or Missouri. (Tr 207).

Dr. Linz examined police reports and survey results, and concluded that the existence of the theater does not contribute to increased crime. Dr. Linz specifically expressed concern over a proposal to restrict hours of operation. His studies found that requiring adult businesses to close for a significant part of the night actually increase crime, rather than decrease it. An open business where people congregate serves as "a neighborhood guardian" that tends to suppress crime in the area. Plaintiffs also showed (Exhibit 5) a steady increase of property values. Additionally, Plaintiff submitted a number of studies written by Dr. Linz and other authorities rebutting the notion that secondary effects are a natural occurrence around adult establishments.

D. Disposition in the District Court

The matter was tried on December 29, 2009, and further evidence was submitted on February 8, 2010. On April 29, 2010 the District Court denied relief, finding that the ordinance does apply to Plaintiff's business, and that the ordinance is not unconstitutional as applied. Notice of Appeal was timely filed on May 26, 2010.

ARGUMENT

POINT I

THE SUBJECT ORDINANCE DOES NOT APPLY BY ITS TERMS TO PLAINTIFF'S BUSINESS OPERATIONS; AND IT IS IN CONFLICT WITH STATE LAW

The following Iowa statutes are relevant to the case at hand; and the ordinances must be considered in conjunction with these statutes:

> **Iowa Code § 702.17**: The term "sex act" or "sexual activity" means any sexual contact between two or more persons by: penetration of the penis into the vagina or anus; contact between the mount and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person; contact between the finger or hand of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148, 145C, 151, or 152; or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.
>
> **Iowa Code § 728.5**: An owner, manager, or person who exercises direct control over a place of business is required to obtain a sales tax permit shall be guilty of a serious misdemeanor under any of the following circumstances:
>
> 1. If such person allows or permits the actual or simulated public performance of any sex act upon or in such a place of business.
>
> 2. If such person allows or permits the exposure of the genitals or buttocks or female breast of any person who acts as a waiter or waitress.
>
> 3. If such person allows or permits the exposure of the genitals or female breast nipple of any person who acts as an entertainer, whether or not the owner of the place of business in which the activity is

performed employs or pay any compensation to such person to perform such activities.

4. If such person allows or permits any person to remain in or upon the place of business who exposes to public view the person's genitals, pubic hair, or anus.

5. If such person advertises that any activity prohibited by this section is allowed or permitted in such place of business.

6. If such person allows or permits a minor to engage in or otherwise perform in live act intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons. However, if such person allows or permits a minor to participate in any act included in subsections 1 through 4, the person shall be guilty of an aggravated misdemeanor.

The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances. (728.5).

Some of the issues here have come before the Iowa Court of Appeals. One of the members of the Plaintiff L.L.C., Clarence Judy, was charged, in 2008, with violation of Iowa Code §728.5 in that he allowed an unlawful nude performance in the Plaintiff establishment. Specifically, however, performances in a theatre are exempted. After a non-jury Trial, the District Court determined that the State had not proved beyond a reasonable doubt that Plaintiff's establishment constituted a theater. The

Court found that this establishment fit within the theatrical exception, because of the raised stage, lights, chairs, and other accouterments of a theater. Based on that, Mr. Judy was acquitted of the criminal charge.

The State of Iowa filed an application for discretionary review with the Supreme Court of Iowa. The State acknowledged that Mr. Judy was not subject to a further trial, based on double jeopardy principles; but claimed that "this court may grant discretionary review when the district court's not-guilty verdict presents an important question of statutory interpretation." In support of its application, the Iowa Attorney General stated:

> The district court's analysis, however, faltered when it came to interpreting the exemptions listed at the end of section 728.5. The district court acknowledged: "The evidence proved beyond a reasonable doubt Shotgun Geniez is primarily a strip club that features nude dancing." Order at 12. The district court, nevertheless, found that the strip club met the "ordinary definition of a theater" because it featured a raised stage with specialized lightening, chairs and tables arranged for patrons to observe the stage presentations, and a separate dressing area for performers before they take the stage. *Id*. The district court concluded: "Given the First Amendment implications of a statute that may limit expression, it is not the role of the Court to judge the taste or quality of the art presented at Shotgun Geniez when determining whether or not it is a theatre."

The Supreme Court granted the discretionary review; but Mr. Judy did not participate in further proceedings, due to the double jeopardy issue.

The application, and further proceedings, were contested, however, by Jeffrey Marshall and Davenport Bar Investments, Inc., both as amicus curiae. Both amicus parties were involved in theatrical ownership or management of a similar establishment. The effect of the State's application was to seek an appellate court determination that the District Court had erred in its interpretation of the "theatrical exception" to the statute. Mr. Marshall had likewise been charged with the same offense, and likewise acquitted.

The Supreme Court referred the case for further proceedings to the Court of Appeals. After briefing and oral arguments, the Court ruled, in State v. Judy, Case No. 9-578/08-1430 (Iowa App. 2010) that the State had impermissibly sought review of the sufficiency of the evidence supporting a judgment of acquittal. This Court, citing State v. Wardenburg, 261 Iowa 1395, 1398, 158 N.W.2d 147, 149 (1968) rejected the challenge. An application for further discretionary review with the Iowa Supreme Court was denied April 16, 2010.

The same issue came before the District Court in Scott County in State v. Marshall, Case No. SRCR202583 in 1998. The facts were virtually identical to those above. The Court there acquitted Mr. Marshall on the

same grounds and referenced the theatrical exception:

> Irrespective of the evidence proffered by the Defendant on that issue, the Court does conclude that dance, even nude dance, may be an art or one of the arts. See. Webster's New World College Dictionary, at 77 ("creative work or its principles; a making or doing of things that display form, beauty, and unusual perception; art includes painting, sculpture architecture, music literature, drama, the dance, etc."). that the dance performed at the Southern Comfort Free Theater for the Performing Arts is not dance as performed at Hatcher Auditorium, the Galvin Fine Arts Center, or the Adler Theater is a difference of degree or quality, not a difference of kind.
>
> The Southern Comfort Free Theater for the Performing Arts is a facility for the presentation of a form of art, though certainly not fine art based on the testimony presented. The facility has a raised stage on which the dancers perform. The stage has specialized lighting consistent with stage lighting found in mainstream theaters such as those listed previously. A separate dressing area is provided for the entertainers before they take the stage. Seating is arranged for the patrons of the business to view the performances.
>
> This Court determines that the evidence when viewed in its entirety fails to rise to the level of sufficient evidence from which a rational trier of fact could conclude that the Southern Comfort Free Theater for the Performing Arts is not a theater as that term is used in Section 782.5, Iowa Code Supplement (1997). Thus the Court would be required to grant Defendant's motion for judgment of acquittal made at the conclusion of all the evidence in this case.

Plaintiff claims that the Ordinance does not apply it this establishment because it is a theatre, and is exempt from the definitions of the Ordinance by Iowa Code § 728.5. Plaintiff acknowledges the different standards of review between the two (2) previous cases and the one presented here.

When viewed in conjunction with the Mills County case, however, Plaintiff claims that there is sold authority for its position.

The District Court for Mills County also faced a similar legal action in R & LB Corp. V. Mills County, Iowa, Case No. CVCC023358, in 2004. There, the Court did not directly deal with the theatrical exception, but instead with the definitions of "sexual activity"; and it found none. The Court there made the following Findings of Fact:

> 1. The plaintiff is an Iowa corporation who owns and leases out a building and parking lot located in Mills county, Iowa known as the "Performing Arts center".
>
> 2. The defendant is a County located in the state of Iowa.
>
> 3. The plaintiff is leasing the building out to individual performers for the purpose of entertaining others within the "Performing Arts Center". That the individuals leasing the building pay a fee a fee to the plaintiff for said space to perform as evidenced by the contract between the individuals and the plaintiff.
>
> 4. That another Corporation leases the parking lot from the plaintiff. The corporation pays a weekly rental fee to the plaintiff for said parking lot as evidenced by the lease agreement between the corporation and the plaintiff.
>
> 5. The State of Iowa has no laws that prevent the Plaintiff from operating his business as structured. The defendant attempts to regulate the businesses such as the Plaintiff's by passing their own ordinance even if said business complies with all other laws in the state of Iowa. Defendant passed the ordinance entitled "Title II – Health and Welfare, Chapter 4, Sexually Oriented Businesses."

6. Defendant's ordinance sets forth the specific types of business it is trying to regulate. The ordinance requires a "sexually oriented business" to obtain a license to operate from the County Auditor.

7. "Sexually oriented businesses" are defined in the ordinance under section 240.05. In examining the five classifications that might apply to the Plaintiff's business is "adult cabarets". All other sections as defined do not apply to the Plaintiff.

8. "Adult cabaret" is defined in section 240.04 in section 240.04© as "A nightclub, bar, juice bar, bottle club, or similar commercial establishment". It is clear from the testimony presented by the plaintiff that the "Performing Arts Center" foes not qualify as a nightclub, bar, juice bar or bottle club. The Court when must look further to determine if it qualifies as a "similar commercial establishment".

9. "Similar commercial establishment" itself is not defined in section 240.04 (M). The term "sexually oriented business" is included in the definition. Although that phrase is not specifically defined in the ordinance, the court looks at the definitions included in sections 240.04 (V) &(Y) to find definitions of "Sexually Oriented Entertainment Activity" and "Specified Sexual Activity"".

10. The testimony covering "Sexually Oriented Entertainment Activity" shows that there are live performances but not of a "Specified Sexual Activity" nature. "Specified Sexual Activity is defined under 240.04(Y). It is clear form the plaintiff's testimony that there are no sex acts or the excretory functions from such acts occurring on the premises as defined by the ordinance under section 240.04(Y). As such, there is not "sexually oriented entertainment activity" occurring on the plaintiff's premises to warrant then needing a license.

11. The Court finds sufficient evidence to determine that the "Performing Arts Center" is not a "sexually oriented business". The court further finds that there are no "specified sexual activities"

occurring on the premises as defined in the County's ordinance.

Plaintiff acknowledges that the City of Hamburg attempted to avoid the same result by redefining "sexual activity" to include mere nudity. Plaintiff, however, maintains that the City does not have the power to redefine "sexual activity in this manner. Surely Iowa Code § 728.5 was designed specifically for the question at hand. It does not purport to be a general public lewdness statute; but is specifically designed to "certain establishments". The law which defines sexual activity applies uniformly across the State; and the City cannot redefine it in the manner attempted.

The District Court here, in upholding the ordinance and its application to Plaintiff, made the following observation regarding previous applications of the law:

> Mall Real Estate attempts to bolster its position by referring the Court to two previously decided district court cases in the 4th Judicial District. Those are State v. Judy, Fremont County Case No. AGCR008441 and R&LB Corporation v. Mills County Iowa, Mills County Case No. CVCV023358. Mall Real Estate's reliance upon these cases is misplaced. Those cases dealt with different statutes under different facts and circumstances. In fact, one of them is a criminal as opposed to civil case. The fact that Mall Real Estate's business might fit a particular definition under one statute does not preclude it from fitting the definitions provided in this ordinance for an adult cabaret. (Emphasis added).
>
> This Court specifically finds that the ordinance does affect and apply

to Mall Real Estate. Because the Court makes such a finding, it now becomes necessary to address the Constitutional arguments made by Mall Real Estate.

A municipality is able to legislate in the same area as a state statute. City of Des Moines v. Gruen, 457 N.W.2d 340, 342 (Iowa, 1990). However, if the laws are unable to be reconciled, the state statute prevails. *Id*. See also Iowa Code Section 364.2(3). In the case-at-bar, the ordinance is not in harmony with the state statute, and, therefore should be struck down. *Gruen*, 457 N.W.2d 340 (Iowa, 1990).

The State of Iowa, in enacting Iowa Code § 728.5 has specifically avoided the constitutional problem that would be created if it attempted to prohibit nudity in theaters. And the courts of this State have generally interpreted the "theatrical exception" to indecent exposure laws liberally. Thus, the ordinance at issue here appears to be in conflict with State law and public policy in general.

The City has bypassed the need for such a finding by adding to its ordinance new categories of "Specified Sexual Activity". Before doing so, however, it refers to a number of State statutes regarding unlawful sexual activities (Definitions .22). It does not, however, directly refer to the Iowa

State definition of “Sexual activity” as contained in Iowa Code § 702.17, because it redefines that term within its definition of “Specified Sexual Activity” to include “Exposure of the specified anatomical areas” and “fondling, caressing, or other erotic touching either by the individual or anyone else of the specific anatomical areas specified herein”. Defendant has banned nude dancing within Plaintiff’s business by defining nudity and certain touching of oneself as “sexual activity”, despite the fact that State law does not so define “sexual activity” in Iowa Code § 702.17. So, “sexual activity” means something in all areas of the State except within the confines of Plaintiff’s business; and it means something much more within those confines. Plaintiff contends that the State has spoken on this issue and the city may not redefine the term in this specific instance.

The intention of the ordinance drafter appears to be to avoid the “gap” mentioned in the Mills County case, where the Court found that there was no sexual activity in the subject establishment, as defined in the law. The drafter, however, did not consider that an act cannot be turned into something that it is not, simply by expanding the definition. The City obviously does not have the power, for instance, to include kissing or holding hands” within its definition of a sex act, and within this

establishment, by adding those activities into its definition. Such an action would conflict with State Law and it would violate the Iowa Constitution by prohibiting activity which is clearly protected by the free speech guarantees of the Constitution.

POINT II A

NUDE DANCING IS PROTECTED UNDER THE IOWA CONSTITUTION, AS IT IS UNDER THE UNITED STATES CONSTITUTION.

The City, in the Court below, stated Iowa constitutional law on free speech as follows:

> The Iowa Supreme Court has utilized federal case law to provide a framework for determining the constitutionality of provisions wherein the State exercises its police power. See, for example, Three KC v. Richter, 279 N.W.2d 268 (Iowa 1979). As concerns the question whether an ordinance or statute violates a strip club's free speech rights, the courts utilize a three step analysis:
>
> 1. The Court must determine whether the city's ordinances constitute a ban in "adult entertainment businesses" or only a time, place, and manner regulation;
>
> 2. The Court must determine whether the city's ordinances are "content neutral" or content based; and
>
> 3. If the amended ordinances are found to be content neutral, the Court must determine whether they are designed to serve a substantial government interest and whether reasonable alternative avenues of communication remain available, or (b) if the amended ordinances are found to be content based, the

> Court must apply strict scrutiny to determine the validity of the ordinances.

The U. S. Supreme Court, in California v. LaRue, 409 U.S. 109 (1972), ruled that dancing, like theatrical productions, might be entitled to First Amendment protection. In that case, the Court upheld an ordinance regulating dancing or performances in an establishment licensed to sell alcoholic beverages. The Court recognized performing arts, including dancing, as expression, but found that the powers granted to the States by the Twenty-first Amendment allowed States to determine the conditions under which alcoholic beverage licenses would be granted. In 44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484 (1996), the Supreme Court explicitly overruled California v. LaRue, but left open the question of State authority over nude dancing.

In Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), the Court granted First Amendment protection to topless dancing in places not selling alcohol. The Court, however, indicated that there are limited protections for such types of dancing. The Court said:

> In the present case, the challenged ordinance applies not merely to places which serve liquor, but too many other establishments as well. The District Court observed, we believe correctly:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place". It could include the theatre, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, the ordinance would prohibit the performance of the "Ballet Africans'" and a number of other works of unquestionable artistic and socially redeeming significance. 364 F.Supp. at 483. 422 U.S. at 932-3.

The Court invalidated the ordinance, though it did so based on the overbreadth of the law which might also apply to more "artistic" productions.

The question of nude dancing as protected expression was again addressed by the Supreme Court in Schad v. Mount Ephraim, 452 U.S. 61 (1981). In this case, an adult bookstore expanded its facility to include live nude dancing. The Borough of Mount Ephraim, New Jersey outlawed any such entertainment. The Supreme Court found the ordinance overbroad in that it would prohibit much constitutionally protected expression. The Doran and Schad decisions continue to be quoted with approval, through the most recent nude dancing cases. Redefining mere nudity here as “sexual activity” prohibits much constitutionally protected activity as a form of prostitution; and that violates Article I § 7.

Federal courts have allowed “reasonable time, place and manner

restrictions" on businesses featuring nude dancing. They have not allowed States to completely ban the activity, by laws directed at the nude dancing itself, as distinguished from general public nudity laws. The issue of outlawing nudity came again before the Supreme Court in the case of Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). The Court fractured in several directions concerning the underlying First Amendment issues. Both the plurality opinion of the Chief Justice (501 U.S. at 560), and the dissent of Justice White (501 U.S. at 594) cited Doran with approval. The Court did, however, uphold a general anti-nudity law from the State of Indiana, which had been applied to nude dancing.

In City of Erie v. Pap's A.M., 529 U.S. 277 (2000) a city ordinance along the same lines as the Indiana anti-nudity Ordinance, was upheld by the Supreme Court against a facial attack on First Amendment grounds. This ordinance , however, is not similar to that upheld there. Both Supreme Court decisions were fractured; and no single opinion was joined in by a majority. Seven Justices, in the most recent case, agreed that nude dancing is a form of expression protected by the First Amendment. They failed to agree on how much protection is afforded, and under what circumstances. The plurality opinion of Justice O'Connor stated:

> To determine what level of scrutiny applies to the Ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." Texas v. Johnson, 491 U.S. 397, 403 (1989); See also United States v. O'Brien, 391 U.S. at 377. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from O'Brien for evaluating restrictions on symbolic speech. Texas v. Johnson, Supra, at 403; United States v. O'Brien, Supra, at 377. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the O'Brien test and must be justified under a more demanding standard. Texas v. Johnson, Supra, at 403. 529 U.S. at 289.

The ordinance at issue applies here only to adult businesses featuring nude dancing as expressive conduct; and it appears directly targeted at Plaintiff's business. It does not purport to be a general ordinance banning public nudity. The ordinance, in §48.100 prohibits both "prostitution" and "any specified sexual activity" on the premises and holds the business owner liable for that activity. Those two offenses appear to be duplicative. Plaintiff suggests that this approach finds no support in Barnes or Erie. In fact, the plurality opinion in Erie appears to require that this ordinance, particularly directed at nude dancing, be reviewed under strict scrutiny. The U.S. District Court in New York reviewed nude dancing jurisprudence in Nakatomi Investments, Inc. v. City of Schenectady, 949 F.Supp. 988 (N.D.N.Y 2007):

Moreover, in *Schad v. Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), the majority's position on nude dancing was accepted by the entire Court. In *Schad*, the Court noted that "as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation." 452 U.S. at 66, 101 S.Ct. at 2181. Id.

However, in order to pass constitutional muster under the third prong of the *O'Brien* test, the "governmental interest must be *unrelated* to the suppression of free expression." 391 U.S. at 377, 88 S.Ct. at 1679 (emphasis added). Here, unlike the Indiana law at issue in *Barnes*, which the *Barnes* Court took pains to note was a "general law" banning all nudity, *see Barnes* at 568, 111 S.Ct. at 2461 ("enacted as general prohibition") (Rehnquist, C.J.); *id*. at 572, 111 S.Ct. at 2463-64 (Scalia, J. concurring), Schenectady's ordinance targets only seven enumerated establishments. Schenectady's ban is thus not a ban on nudity generally, but a targeted ban aimed at certain establishments. (emphasis added).

Consequently, it is necessary to ascertain the distinctions between the seven establishments where nudity is illegal and, for example, the theatre (where *Oh Calcutta* might be performed) or the opera (where Richard Strauss's *Dance of the Seven Veils* might be performed) where nudity is permitted. Each establishment requires a stage, music, dancing, an audience, and, of course, nudity. Is a cabaret different from the theatre or opera, to such a degree as to justify disparate treatment by the City of Schenectady in its role as protector of order and morality, merely because the audience is "less cultured"? Because the music originates from a stereo speaker rather than an orchestra? Because a cabaret dancer performs to Elvis rather than Tchaikovsky? Because the costumes in a theatre or opera are more elaborate? Because cabaret dancers earn tips? Perhaps the establishments are distinguishable because the dances in a cabaret are not formally choreographed. Perhaps the City of Schenectady finds the performances in cabarets more objectionable because the audience is mostly men who prefer to drink Budweiser while they view the naked form engaged in dance, rather than the couples at the opera who

prefer Dom Perignon with their falsetto.

The only logical distinction of legal relevance here is that the "erotic message" displayed by the dancers at a cabaret, dance hall, bar tavern, lounge, discotheque or restaurant, which is arguably not presented, or at least not as strongly presented in Strauss's *Dance of the Seven Veils* or in *Oh Calcutta*, is more offensive to the City of Schenectady's legislators. In the end, the City's position distills down to the assertion that nude dancing in the seven enumerated establishments is distasteful and/or morally repugnant as compared to the same conduct presented in the theatre or opera. Accordingly, the Court must conclude that § 128-8 of the Schenectady City Code targets these seven establishments based on their distasteful erotic message, which the City finds objectionable; there is no other plausible distinction justifying disparate treatment in furtherance of the City's protection of order and morality. Emphasis added. Id. at 999.

This is precisely the kind of censorship, however, against which the First Amendment aims to guard. "When the government, acting as censor, undertakes selectively to shield the public from some kinds of [expression] on the grounds that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125 (1975). As Justice Harlan eloquently stated in *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971), "we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Although we may find the expression inherent in nude dancing to be objectionable, "[i]f there is a bedrock principle underlying the First Amendment it is the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. at 414, 109 S.Ct. at 2545. Id. at 1000.

See also Schultz v. City of Cumberland, 228 F.3d 831, 847 (7th Cir. 2000), which struck down bans on the same activities prohibited as

"specified sexual activities" under part B of the definition above:

> The Ordinance, however, goes several steps further. Section VIII(A) outlaws the performance of a strikingly wide array of sexually explicit dance movements, or what the Ordinance misdenominates as "specified sexual activities," including the fondling or erotic touching of human genitals, pubic region, buttocks, anus, or female breasts."
>
> By restricting the particular movements and gestures of the erotic dancer, in addition to prohibiting full nudity, Section VIII(A) of the Ordinance unconstitutionally burdens protected expression.

There has been no suggestion that any of the performances here would be legally obscene; and thus, as in Schultz, the definition of specified sexual activities which is prohibited is unconstitutionally overbroad.

POINT II B

PLAINTIFF HAS SUCCESSFULLY REBUTTED ANY PRESUMPTION OF "NEGATIVE SECONDARY EFFECTS" FROM PLAINTIFF'S BUSINESS; AND THE SUBJECT ORDINANCE IS NOT NARROWLY TAILORED TO DEAL WITH EXISTING OR POTENTIAL PROBLEMS.

The seminal authority for the application of intermediate scrutiny is United States. v. O'Brien, 391 U.S. 367 (1968). In that case, which dealt with the illegal destruction of a draft card in an act of civil disobedience, the U.S. Supreme Court determined that a general statute regulating behavior may incidentally burden expression:

> if it is within the constitutional power of government; if it furthers

> an important or substantial governmental interest; if governmental interest is unrelated to the suppression of expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

Under the so-called "intermediate scrutiny test" (also the O'Brien test), a regulation of speech must be must be narrowly tailored to deal with the "negative secondary effects" associated with the business, rather then the protected expression itself.

Likewise, "intermediate scrutiny" is applied to adult business regulation (and is sometimes also referred to as the Renton test). See also Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Schad v. Borough of Mt. Ephraim, 452 U.S 61, 75 (1981) and City of Renton v. Playtime Theatres, Inc., 475 US. 41 (1986). As the trial Court correctly held, if the regulation is directly aimed at the expressive conduct, the Court must apply "strict scrutiny."

The Supreme Court, in City of Erie, referred to the existence of negative "secondary effects" of adult businesses; but the plurality opinion of Justice O'Connor left open an opportunity to rebut such findings:

> Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In

> the absence of any reason to doubt it, the city's expert judgment should be credited (emphasis added) 529 U.S. at 295-6.

The U. S. Supreme Court reviewed the issue of secondary effects evidence in City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002). Justice O'Connor, speaking for the plurality, said:

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to 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, the municipality meets the standards set forth in Renton. If plaintiffs succeed 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. 535 U.S. at 438.

The opinion of Justice Kennedy concurring in the result, is the prevailing judgment of the Court, under Marks v. United States, 430 U.S. 188 (1977):

> In Renton the Court determined that while the material inside adult book stores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as much as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside that is, even if the measure is in fact sense content based.

> On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. This is true even if the government purports to justify the fee by reference to secondary effects. Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech. (internal citations omitted).
>
> A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. Id. at 445.
>
> At the outset, we must identify the claim a city must make in order to justify a content based zoning ordinance. As discussed above, 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. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice Souter. See Post, at 5. The rationality of the ordinance must be that it will suppress secondary effects and not by suppressing speech. Id. at 449.

In Young v. American Mini Theatres, 427 U.S. 50 (1976), the Court approved a zoning regulation which would allow a city to avoid a concentration of adult uses in a specific area. The danger of such a concentration, said the court was that "the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes

an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." 427 U.S. at 55. In doing so, the Court acknowledged "a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect." In City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the City of Renton Washington, a suburb of Seattle, with little experience with such businesses, was allowed to use information obtained from Seattle, to determine the threat from such businesses, and to take corrective action. The City passed an ordinance designed to zone adult theaters into one area of the City. The Court ruled that the ordinance was a valid and reasonable response to a problem which was likely to occur in the City.

The 11th Circuit in Flanigan's Enterprises, Inc. of Georgia v. Fulton County GA., 242 F.3d 976 (11th Cir. 2001) held that a city may not ignore contravening evidence. Fulton County, where the City of Atlanta is located, conducted its own study of the local nude dancing industry. Contrary to expectations, the study showed no secondary effects. The Court of Appeals held that a City with an extensive background in dealing with such adult businesses, could not ignore its own experience and rely on allegations of others. Plaintiff claims that Hamburg may not rely merely on the studies

referred to in the Preamble, prepared by others. Because they have had years to study this matter, they cannot ignore what they have found; nor can they ignore the findings of Dr. Linz. Statements of city officials made surrounding the passage of the ordinance are of moral objections, their embarrassment at hosting such clubs, and a fear for their reputation. They do not support a finding that the ordinance is aimed at secondary effects.

The Court below made the following legal conclusion:

> This Court also finds that the ordinance is "content neutral". The evidence in this case was clear that Hamburg has no intention of closing this business. The ordinance was passed to address secondary effects that are created by businesses of this nature. Mall Real Estate argues that these secondary effects have not been proven and really don't exist anyway. The evidence simply does not support that position. The studies clearly show secondary effects of businesses of this nature. Hamburg presented evidence to show that these secondary effects were showing up in regards to the operation of this business by Mall Real Estate. Some of the things that have occurred specifically at this business include a person under the age of 18 dancing in the nude, trash and litter (including soiled condoms) surrounding the premises, increased police and law enforcement to this location at all hours of the night, and at least one allegation of sexual assault with the indication that there are others. Perhaps the most poignant factor present with regards to the secondary effects as specifically related to Mall Real Estate's business was the evidence concerning the sign with the phrase "Camel Toe Parking". This sign is clearly visible to the public, including minors and persons attending to other businesses located in close proximity to this business run by Mall Real Estate. (Emphasis added.)

Plaintiff does not concede that their sign is objectionable, and without

protection under the Iowa Constitution. But the law requires an ordinance to be narrowly tailored to deal with the problem. Certainly an objectionable sign does not justify early closing hours, six foot barriers between the audience and entertainers, or the classification of mere nudity to be "sexual activity". An objectionable sign can be dealt with by a specific ordinance which restricts signs at an adult establishment, perhaps as part of an overall sign ordinance. There has been little evidence presented that such effects have occurred, or are in imminent danger of occurring, in Hamburg. The mayor suggested that the existence of the business is embarrassing, that police officers do not like to go there (because their wives complain). There were some hearsay references to litter and a case of indecent exposure (which apparently turned out to be "exaggerated"). The ordinance's prohibitions do not address those issues. This ordinance does not survive "intermediate scrutiny under O'Brien because it is not a measured reaction to perceived or existing problems. It instead is a content-based regulation designed to punish those whose taste in entertainment is deemed "offensive" or "embarrassing" to those in City government.

The "studies" are not recent, and not scientifically valid. In these

studies, all "adult" businesses are treated alike, from adult bookstores to theaters to dance clubs; and the effects of these different businesses are not necessarily the same. These were clearly not reviewed by Hamburg officials, in passing this measure. See particularly Exhibit 3 below. Dr. Linz concluded:

> I requested through Mr. Murphy reports of all police activity surrounding the plaintiff's business. I read these reports, three in number. I conclude that these incidents are: 1)infrequent; 2)did not result in a crime being charged: 3)describe events not related to adverse secondary effects. They are therefore negligible. Further, my examination of the UCR reports for the entire county indicate that the county, as [a] whole including the plaintiff's business are, are not sources of crime.

The allegations of secondary effects, and the need for remedial action by the City, creates a rebuttable presumption of validity. Plaintiffs contend that they have rebutted that presumption. Further, Plaintiff claims that the outdated studies, as rebutted by Dr. Linz and others, constitute "shoddy data", which cannot justify the measures taken.

As the Court said in Doctor John's, Inc. v. City of Sioux City, 389 F.Supp. 2d 1096 (N.D. Iowa 2005):

> Almost completely absent from the preliminary injunction record was evidence of the kind that the City now submits in an attempt to demonstrate that both citizen and City Council members had become concerned about the "secondary effects" of "adult entertainment

> businesses," including Doctor John's, during the fall of 2003 and the winter of 2003-2004. The "secondary effects" the City identifies are negative impacts on surrounding businesses, neighborhoods, property values, and crime. Doctor John's disputes that its store in Sioux City has or could produce any such "secondary effects." What was also entirely absent from the preliminary injunction record was evidence that the City's decision makers considered any such materials concerning the "secondary effects" of "adult entertainment businesses" in the course of drafting, debating, and passing the "Moratorium" Amendments and the January 2004 Amendments.
>
> Almost none of the material submitted by the City in support of its contention that its amendments to the "adult entertainment business" ordinances were motivated by a concern about possible "secondary effects" of such businesses is information about any such "adult entertainment businesses" or "secondary effects" of such businesses in Sioux City, Iowa. Rather, they are studies, incident reports, and expert opinions relating to "adult entertainment businesses" and "secondary effects" in other cities.

Plaintiff here submitted material to the trial court including a survey of nearby property owners, who had no problems with Plaintiff's business. It also included a survey of studies, and an analysis of police activity by Daniel Linz, Ph.D. contesting the existence of "secondary effects" related to the operation of Plaintiff's business. City officials did not seriously attempt to research or refer to materials in support of the contention that adult businesses cause secondary effects. There is no finding of relevance of any of this material to the conditions of Hamburg. And it is important to note that the "studies" of other cities allegedly relied on by the City were all urban

areas, very different than the small town here.

Such alleged reliance has been disallowed by other courts, because of the lack of relevance to the small town. See DiMa Corp. v. High Forest Township, 2003 WL, 21909571 (D. Minn. 2003) , where the Court denied summary judgment to the Township on the validity of its ordinance which based its motion on ILQ Inv., Inc. v. City of Rochester, 25 3d 1413, 1418 (8th Cir. 1994). The Court found that the studies relied on by the Township were not convincing, especially in light of material submitted by Plaintiff questioning those studies:

> DiMa has submitted its own reports that call into question many of the findings of the reports relied upon by High Forest Township in enacting its ordinance. DiMa primarily relies upon an article prepared by Paul, Linz and Shafer entitled "Government Regulation of "Adult" Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Secondary Effects," 6 Comm. Law & Pol'y 355 (2001). This article specifically questions the scientific methodology and empirical research relied upon by High Forest Township, with the exception of the study conducted by the American Society of Planning Officials. Ultimately, the Linz, Paul & Shafer article reaches the conclusion that the secondary effects cited in the studies relied upon by High Forest Township are not related to adult entertainment facilities. DiMa I p. 6. (R. 303).

In denying Summary Judgment to the Township, the Court accepted the material submitted by the Plaintiff as tending to bring into question whether there was reasonable reliance on the studies used by the Township:

> Whether or not Alameda Books rises to the level of overruling ILQ, Alameda Books certainly clarifies the manner in which the Court should determine whether the municipality relied on evidence that was "'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent governmental interest." Alameda Books, 535 U.S. at 438. Here, under the standard set forth in Alameda Books, the Court finds that genuine issues of fact exist as to whether High forest Township was reasonable in relying upon the studies that provided the rationale for its Ordinance. Primarily, the Court finds persuasive that the studies relied upon by High Forest Township were conducted in metropolitan, not rural areas, and the studies did not particularly examine the secondary effects of purely take-home fare. In addition, some of the studies were more than 25 years old. While these factors alone may not be enough to overcome the rationality test of ILQ, the conflicting studies presented by Di Ma have certainly cast doubt on whether the studies relied upon by High Forest Township are applicable. Under Alameda Books, this is sufficient to shift the burden back to High Forest Township to further justify its rationale. However, because High Forest Township has not supplemented the record with additional evidence supporting its theory, genuine issues of fact remain as to the validity and applicability of the studies relied upon by High Forest Township. (DiMa I p. 8) (Emphasis added). (R. 304).

The Minnesota District Court relied in part, in its decision in DiMa, on the same article by Dan Linz that has been submitted here.

The Tenth Circuit Court of Appeals came to a similar conclusion in Abilene Retail #30, Inc. v. Board of Commissioners of Dickinson County, Kansas, 492 F.3d 1164 (10th Cir. 2007). This was a mostly rural area where the Plaintiff was an adult store near a freeway entrance, but over 1,000 feet

from another disqualifying use. The evidence was that the Board of Commissioners had increased distance requirements specifically to zone out this store. Based on this, and the disagreements of the experts, the Court reversed the summary judgment previously granted to the Board:

> In the case at bar, the studies relied upon include a wide variety of methodologies, both anecdotal and empirical, and are not easily summarized. Equally diverse are the studies' findings. Although most, if not all, find that adult businesses trigger at least some secondary effects in surrounding areas, the findings rest on a number of factors, including: the type of neighborhood in which the sexually oriented businesses are located, the concentration of sexually oriented businesses, and the nature of the sexually oriented business itself. All of the studies relied upon by the Board examine the secondary effects of sexually oriented businesses located in urban environments; none examine businesses situated in an entirely rural area. To hold that legislators may reasonably rely on theses studies to regulate a single adult bookstore, located on a highway pullout far from any business or residential area within the County, would be to abdicate our "independent judgment" entirely. Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any sexually oriented business, of any type, located in any setting. 492 F.3d at 1174-1175.

This is a content based law designed to put out of business one easily identifiable business, which has been in Hamburg for many years. The effect of this ordinance is to censor the message itself, by converting the nude dancing that takes place there into a "sex act". This does not just deal

with the issues that have generated complaints. This is not a law that can be construed to apply to anyone else but Plaintiff. It is up to the City to show that the ordinance is designed to produce a significant decrease in secondary effects and a trivial decrease in speech. Plaintiffs believe it is obvious that the City has not done this.

The City suggests that much of the expressive conduct would not be eliminated by this Ordinance; and the Court below found that the Ordinance was not designed to close Plaintiff's business. But the restrictions of the ordinance appear to do just that. As Justice Kennedy said in Alameda Books, the intermediate scrutiny test is only appropriate in cases which do not involve banning an activity. This form of entertainment is established in Iowa, and in the Defendant city for many years. That in itself requires the use of strict scrutiny.

In Reno v. American Civil Liberties Union, 521 U.S. 844; 117 S.Ct. 2329 (1997). the United States Supreme Court stated:

> In Renton, we upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects" -- such as crime and deteriorating property values -- that these theaters foster: `it is the secondary effect which these zoning ordinances attempt to avoid, not the dissemination of offensive speech.' The purpose of the CDA is to protect children from the

> primary effects of "indecent" and "patently offensive" speech, rather than any secondary effects of such speech. Thus the CDA is a content-based blanket restriction on speech and, as such, cannot be "properly analyzed as a form of time, place and manner regulation." 117 S.Ct. at 2342-43.

If Plaintiffs can show that the fear of secondary effects did not form the motivating factor for this ordinance, strict scrutiny must be used to evaluate the ordinance. Plaintiffs believe they have done so. Under the requirements of "strict scrutiny" a law is valid only if it serves a compelling State interest in a manner which imposes the least possible burden on expression. See Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989). The ordinance does not serve a compelling state interest; and the restrictions in the law have nothing to do with the perceived problems.

POINT III

THE CONSTITUTION OF IOWA CONTAINS BROADER PROTECTIONS FOR EXPRESSIVE RIGHTS; AND THE ORDINANCE AT ISSUE VIOLATES THE IOWA CONSTITUTION.

Article I § 7 of the Iowa Constitution states, in relevant part:

> Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press.

Article I § 9 of the Iowa Constitution states, in relevant part, "no

person shall be deprived of life, liberty, or property, without due process of law". Plaintiff acknowledges that the Iowa Supreme Court has generally followed Federal case law in its interpretation of the free speech guarantees of the Constitution of Iowa. But that is not always the case. The Court may interpret the Iowa Constitution to provide greater protection than the United States Constitution. State v. Cline, 617 N.W.2d 277 at 285 (Iowa 2000). In State v. Skola, No. 1-549/00-1643 (Iowa Court of Appeals, 2001) the Court considered whether the Iowa Constitution provided greater protection than the United States Constitution. It ruled the Iowa Constitution provided greater protection than the United States Constitution in the area of a Fourth Amendment search. *Skola* involved a cursory safety check of a residence after an arrest. The Court said that the officer may have been justified in the initial entry into the residence based on the protected sweep exception to the United States Constitution. However, the Court stated further hat he violated the Iowa Constitution because there was no evidence that he had reasonable grounds to believe there were persons present who posed a safety risk. This ruling is crucial in its relation to the case-at-bar. Here, the Plaintiff argues that the Court should again consider whether the Iowa Constitution provides greater

protection to its citizens than the United States Constitution. It is in the vein of *Skola* that the Plaintiff claims the challenged ordinance should be found unconstitutional under Article 1 Sections 7 and 9 of the Iowa Constitution.

When the Supreme Court, in Erie held that the City anti-nudity ordinance did not offend the United States Constitution, the case was remanded to the Pennsylvania Supreme Court for further proceedings. Plaintiff there argued that the ordinance also violated the constitutional rights outlined in the Pennsylvania Constitution. There was also a question as to whether the City had authority to pass such a law, or whether State law on the subject controlled. On remand, the Pennsylvania Supreme Court, in Pap's A.M. v. The City of Erie, 812 A.2d 591 (Pa. 2002) found that the ordinance in the City of Erie violated the free speech provisions of Article 1 §7 of the Pennsylvania Constitution. The provision of the Pennsylvania Constitution relied upon to essentially overrule the U.S. Supreme Court on the City of Erie case is remarkably similar to Article I § of the Iowa Constitution:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, written and print on any subject, being responsible for the abuse of that

liberty.

A comparison of the two provisions supports the position that the Iowa Constitution gives a higher level of protection to the rights of expression and association than does the United States Constitution.

Many other states have recognized greater constitutional protection under their state constitutions than under the Constitution of the United States. In State v. Henry, 732 P.2d 9 (Or. 1987), the Oregon Supreme Court considered whether the Constitution of Oregon gives greater protection to the dissemination of speech than does the United States Constitution. The defendant was found guilty of dissemination of obscene material and the Supreme Court of Oregon held that obscene expression is protected speech under the Oregon Constitution. Article 1, § 8 of the Oregon Constitution also uses similar language and states that "no law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; that every person shall be responsible for the abuse of this right." Although the Oregon Court agreed that the State's obscenity law was constitutional under the United States Constitution, it held that the additional language in the Oregon Constitution provision mandated a greater protection of speech by the State.

The Henry Court commented that “it is difficult to see how language or material dealing with love, loss and sex is any less entitled to First Amendment scrutiny when regulation is attempted than is the language or depiction of violence and revolution.” Id. at 16.

In City of Portland v. Tidyman, 759 P.2d 242 (Or. 1988), the Oregon Supreme Court held that the Oregon State constitution guarantee of free expression invalidated measures which address alleged "secondary effects" by regulating the expression, rather than attacking the secondary effects themselves. The Court found that a blanket distance requirement without a specific finding of an immediate threat of harmful effects is an illegal restraint on freedom of expression. Plaintiffs contend that the constitutional language in Iowa supports the Oregon conclusion. The effect of the Tidyman case is to overrule, on State Constitutional grounds, the United States Supreme Court cases of Renton and American Mini Theatres which ruled that "content neutral" ordinances allegedly aimed at "negative secondary effects of adult businesses, justified severe zoning restrictions on such businesses.

More recently, the Oregon Supreme Court also decided State v. Ciancanelli, 339 Ore. 282, 121 P.3d 613 (Ore. 2005). Appellee argued that

previous Oregon decisions granting increased protection to nude dancing as a form of expression were not properly contained in the "well-established historical exceptions" to the free speech provisions of the State Constitution. Once again, the Court ruled that Article I Section 8 of the Oregon Constitution protects nude dancing as a form of expression, and that efforts to restrict it by making it a crime to produce a live show involving "sexual conduct" violates the Oregon Constitution (unless the conduct involves acts of prostitution, which are not protected). This case reinforces a trend towards extending such constitutional protections.

The California Supreme Court in Morris v. Municipal Court for San Jose-Milipitas, 652 P.2d 51 (Cal. 1982) held that nudity in dancing was constitutionally protected under both the United States and the California State Constitutions. While the majority decision upheld the constitutionality of nudity in entertainment without specifying whether such nudity was protected under the California Constitution independent of the United States Constitution, the concurrence specifically pointed out that such nudity was so protected under the California Constitution independently of the Federal Constitution and even went so far as to hold that "obscenity" was also protected expression under the California

Constitution because of the difficulties of attempting to differentiate obscene expression from non-obscene expression.

In People ex rel. Arcadia v. Cloud Books, 510 N.Y.S.2d 844 (N.Y. 1986), the New York Court of Appeals quoted the New York Constitution: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . . ." Id. at 845. The Court of Appeals found that this broader language required an expansion, and thus on independent State grounds, reversed the order closing a bookstore which had been previously issued by the U. S. Supreme Court. This language also tracks that of the Iowa Constitution.

The Massachusetts Supreme Judicial Court, in Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 827 N.E.2d 180 (Mass. 2005) ruled that Section 16 of the Declaration of Rights protects nude dancing as a form of expression, and that efforts to suppress it by use of a public lewdness ordinance are unconstitutional. Further, the Massachusetts Court specifically ruled that the requirement for pasties and g-strings does indeed alter or mute the constitutionally protected message involved in the dance, and that the ordinance is an unlawful means of censorship.

Even to the extent that some portions of the Iowa Constitution may appear similar to that of the Federal Constitution, it need not be interpreted the same. The Federal Constitution already existed at the time that the State Constitution was created. There was no necessity for the founders of the State Constitution to repeat and reiterate those rights and protections already embodied within the Federal Constitution. The speech component of the Iowa Constitution owes nothing to the First Amendment of the Constitution of the United States. Its protections should be judged independently. Where the interests are significant, a State is free to depart from the increasingly restrictive interpretation put upon the United States Constitution by the present U. S. Supreme Court. This Court should review this ordinance, and its obvious intent to prohibit a form of entertainment based on its content, in light of the Constitution of Iowa, and should find that the ordinance violates important rights protected independently under the State Constitution.

CONCLUSION

Plaintiff is entitled to declaratory and injunctive relief, declaring that the Hamburg SOB ordinance is unconstitutional on its face in that it prohibits Constitutionally protected expressive activities without sufficient

justification. It also conflicts with Iowa law and is beyond the power of a local municipality to enact.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument.

COST CERTIFICATE

We certify that the cost of printing Appellant's Proof Brief is $117.45.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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DATED this 4th day of October, 2010.

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on October 4, 2010, I served this document by mailing a copy to all other parties in this matter at their respective addresses as shown below:

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I further certify that on October 4, 2010, I will file this document by mailing two proof copies to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Ave., Des Moines, IA 50319.

_____
Brian B. Vakulskas