IN THE IOWA DISTRICT COURT FOR STORY COUNTY

REBEKAH BETH WILLIAMS and ALIJAH BLUE ALLISON,	)	
Appellants,	)	Case Nos. AMCICI006542 and AMCICI006544
vs.	)	
CITY OF AMES, IOWA,	)	**RULING ON APPEAL**
Appellee.	)	

A combined hearing was held on September 8, 2014, wherein the Appellants filed and submitted their appeal from their conviction of a civil infraction under the Ames Municipal Code, concerning Ames "Adult Entertainment Business" under Section 17.31(1). The Appellants were represented by their attorney William T. Talbot. The City of Ames was represented by its attorney Jessica Dawn Spoden. Each party made arguments to the Court based on their briefs.

Each of the Appellants was charged with a violation of the City of Ames Lap Dance Section 17.31. The Appellants filed a Motion to Dismiss the charges against them which was overruled by Judge Steven Van Marel in Orders entered on January 28, 2014, and on January 30, 2014. Judge Van Marel found each of the Appellants guilty of a civil infraction under the Ames Municipal Code in an Order filed on February 14, 2014. Subsequently, each Appellant appealed. The appeal is to be decided in the same manner as the appeal of a small claim, Iowa Code Section 364.22(10). Section 631.13, The Iowa Code, describes the procedure for handling the appeal.

The District Associate Court decision finding the Appellants guilty of a civil infraction was based upon a written stipulation of facts. Accordingly, no court transcript of oral

evidence exists for appellate review. The parties' stipulation of facts appears sufficient for rendering a decision on appeal. From that stipulation, this Court enters the following.

STATEMENT OF FACTS

1. On October 27, 2013, Officer Eric Snyder, from the Ames Police Department, conducted a bar check at Dangerous Curves in the city of Ames, Iowa.

2. Dangerous Curves is an establishment that serves alcohol and allows women to dance while wearing bikinis or underwear.

3. Ames Municipal Code § 17.31(1) provides that: "No person appearing as an entertainer on commercial premises subject to an Iowa liquor license or beer permit, or on premises of an 'adult entertainment business' within the meaning of Table 29.501(4)-7, Ames Municipal Code, shall fondle, caress or sit on the lap of any customer on said premises if the entertainer presents a performance on the premises while nude or so attired as to leave exposed the entertainer's . . . buttocks. . ."

4. During the bar check, Officer Snyder observed the Defendants performing lap dances while having exposed buttocks, in violation of Ames Municipal Code § 17.31.

5. Believing they were in violation of Ames Municipal Code § 17.31, Officer Snyder issued a citation to each of the Defendants on October 27, 2013.

6. The Defendants pled not guilty, and a non-jury trial was scheduled to be held before the District Associate Court.

7. Prior to trial, District Associate Judge Van Marel denied the Defendants' motions to dismiss in orders issued on January 28, and January 30, 2014. He found the Defendants guilty of violating Ames Municipal Code § 17.31(1) in an order issued on February 14, 2014.

a. In their motions to dismiss, the Defendants asserted two challenges to Ames Municipal Code § 17.31:

i. First, the Defendants claimed that Iowa Code § 728.11 preempts Ames Municipal Code § 17.31, and thus, the Ames ordinance is void and unenforceable.

ii. Second, the Defendants claimed that Ames Municipal Code § 17.31 is unconstitutionally vague and overbroad.

8. On March 7, 2014, the Defendants filed an appeal from the District Associate Court's orders denying the motions to dismiss, and the order entering Final Judgment against the Defendants.

9. That appeal was eventually transferred to the Iowa District Court and argued to District Court Judge Timothy J. Finn on September 8, 2014.

ISSUES

1. Does Iowa Code § 728.11 preempt Ames Municipal Code § 17.31, rendering the ordinance void?

2. Is Ames Municipal Code § 17.31 unconstitutionally vague and overbroad?

ANALYSIS

Issue 1: Preemtpion

Iowa Code § 728 regulates "obscenity." Iowa Code § 728.11 states: "In order to provide for the uniform application of the provisions of this chapter relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall me under the provisions of this chapter, and no municipality, county or other

governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations shall be or become void, unenforceable and of no effect on January 1, 1978. Nothing in this section shall restrict the zoning authority of cities and counties."

Under Iowa Code § 728.1(3), "material" is defined as: "any book, magazine, newspaper or other printed or written material or any picture, drawing, photography, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials."

Iowa Code § 728.5 regulates public indecent exposure in certain establishments, and specifically provides: "An owner, manager, or person who exercises direct control over a place of business required to obtain a sales tax permit shall be guilty of a serious misdemeanor under any of the following circumstances: (b) If such person allows or permits the exposure of the . . . buttocks . . . of any person who acts as a waiter or waitress."

The Defendants argue that Ames Municipal Code § 17.31 attempts to regulate obscene material (as defined in Iowa Code § 728.1(3)), which is "preempted" by Iowa Code § 728.5, and therefore is void and unenforceable under Iowa Code § 728.11.

Iowa Chapter 725.9 is identical to Section 728.11. In *Chelsea Theater Corp. v. City of Burlington*, 258 N.W.2d 372 (Iowa 1977), the Supreme Court of Iowa held that Iowa Code § 725.9 "prohibits local governments from regulating the availability of obscene materials generally, and not just with respect to minors." That means that, ". . . chapter 728 expressly prohibits a municipality from enacting an ordinance regulating obscenity." *Mall Real Estate,*

L.L.C. v. City of Hamburg, 818 N.W.2d 190, 195 (Iowa 2012)(*citing City of Burlington*, 258 N.W. 2d at 372).

The most similar case in this matter is *Mall Real Estate, L.L.C. v. City of Hamburg*. In *City of Hamburg*, the Supreme Court of Iowa considered whether a city ordinance, known as the "Sexually Oriented Business Ordinance," was preempted by the Iowa Code. The court stated, ". . . [T]he Iowa Code preempts any local regulation of obscene materials. Accordingly, to the extent the Hamburg ordinance regulates obscene material, it is preempted by state law." *City of Hamburg*, 818 N.W.2d at 196. The court further determined that, ". . .the general assembly intended to include live performances in the definition of 'material' for the purpose of chapter 728. . . . [S]ection 728.11 preempts the City from enacting any ordinance regulating nude dancing in a theater. Until the general assembly amends section 728.11, the City is without authority to regulate nude dancing." *Id.*, at 200.

Thus in *City of Hamburg,* the Supreme Court of Iowa has determined that live nude performances constitute "obscene material" under Iowa Code § 728. Thus, if a city ordinance attempts to regulate live nude performances, the ordinance is preempted by state law, and will be void under Iowa Code 728.11.

The City of Ames attempts to distinguish the holding in *City of Hamburg* from the facts of this case. The City of Ames claims that the ruling in *City of Hamburg* applies to live nude dancing performances, but not to physical contact. The City of Ames asserts that once the dancer touches a customer, the dancing is no longer a performance fitting within the definition of obscene material. Rather, the City of Ames argues that it has a governmental interest in the health and safety of its citizens that allows it to regulate the physical contact between the dancers and customers of the establishment.

However, the performances contemplated in *City of Hamburg* included physical contact between the dancers and customers. When describing the performances in question in *City of Hamburg*, the court explained, "At times during performances, performers physically contact customers, often by sitting on their laps." *City of Hamburg*, 818 N.W.2d at 193. Therefore, the Supreme Court of Iowa has already determined that a live nude dancing performance, including physical contact with customers, is obscene material under Iowa Code § 728 and under § 728.11 the city is preempted from enacting such an ordinance. *Id.,* 818 N.W.2d at 193.

The performances in *City of Hamburg* were the same type of performance as the performances in this case, and cannot be distinguished. Therefore, in consideration of the precedent set by *City of Hamburg*, it seems clear that Ames Municipal Code § 17.31 regulates obscene material and is expressly preempted by state law.

It is worth noting there were dissenting opinions in the *City of Hamburg* case. Chief Justice Cady dissented, arguing that live performances do not fit within the definition of "obscene material." Chief Justice Cady first argued that under the doctrine of *noscitur a sociis*, it does not make sense to conclude that the legislature intended live performances to be included in the definition of obscene material. In evaluating the language of the definition of obscene materials in Iowa Code § 728.1(3), he wrote:

> Our legislature, like people in general, would not construct a list of twenty ways to distribute inanimate obscene material and then add a new topic of animate displays of obscenity to the definition by adding the word "materials" at the end of the list. Clearly this application of the doctrine of associated words would exclude live performing arts from the definition of 'material.' Under the *noscitur a sociis* doctrine, the word 'materials' would mean any mediums used to display inanimate obscene pornography not specifically listed.

Chief Justice Cady also argued that the doctrine of *ejusdem generis* does not support the contention that obscene materials include live performances. Again, he pointed out that, in context, other obscene materials clearly include only obscene material portrayed through inanimate mediums. Justice Waterman also dissented, and joined in Chief Justice Cady's "preemption" analysis.

Also, there was proposed legislation related to Iowa Code § 728.11. Introduced on February 27, 2013, House File 359 proposes a bill for "[a]n Act relating to obscene material by modifying the definition of material and authorizing local regulation of certain live acts, performances, and exhibitions." If passed, this legislation would reverse the holding in *City of Hamburg*, and would allow cities to regulate live nude performances in ordinances like Ames Municipal Code § 17.31. Although the bill has not yet been passed, it does provide evidence as to the legislator's disagreement with the Supreme Court of Iowa's definition of obscene material that includes live performances.

Obviously, the Court here cannot rely on bills merely introduced into the legislature, unless those bills are passed into law and signed by the Governor. That has not occurred here and for that reason the decision in *City of Hamburg* is still binding in this case.

As such, that decision means that § 17.31 of the Ames Municipal Code is "preempted" by Iowa Code § 728.11 as interpreted by the Iowa Supreme Court in *Chelsea Theater Corp. v. City of Burlington, Id.,* and *Mall Real Estate, LLC v. City of Hamburg, Id.*

Issue 2: Vague and Overbroad

The Appellants also argue that the Ames City ordinance is vague and overbroad. The Court will set forth its analysis of that argument here but, as set forth below, it determines that this argument that the ordinance is vague and overbroad must fail. The Court puts forth this

rationale here in the event that this decision is appealed and the Appellate Courts of Iowa take another look at the *City of Hamburg* case, which was decided by a split court.

In addition to the claim that §17.31 is preempted by state law, the Defendants also assert that §17.31 is unenforceable because it is unconstitutionally vague and overbroad. This case can be resolved solely on the preemption issue, but in order to address each of the Appellant's arguments against Ames Municipal Code § 17.31, the Court will also address these issues.

A. Vague

The Defendants first contend that Ames Municipal Code § 17.31 is unconstitutionally vague as a result of the use of the term "buttocks."

"Statutory language offends due process under the Fourteenth Amendment on the ground of vagueness if it does not inform a person of ordinary intelligence what conduct it forbids." *State v. Price*, 237 N.W.2d 813, 815 (Iowa 1976). In order to pass the vagueness test, a penal statute ". . . must satisfy two specific standards: (1) It must give a person of ordinary intelligence fair warning of what is prohibited, and (2) it must provide explicit standards for those who enforce it." *Knight v. Iowa Dist. Court of Story County*, 269 N.W.2d 430, 432 (Iowa 1978). However, "[l]iteral exactitude or precision is not necessary. Due Process requires no more than a reasonably ascertainable standard of conduct." *Three K.C. v. Richter*, 279 N.W.2d 268, 174 (Iowa 1979). "If the statute's meaning is fairly ascertainable by reliance on generally accepted and common meaning of words used, or by reference to the dictionary, related or similar statutes, the common law, or previous judicial constructions, due process is satisfied." *Id.*

In *Wright v. Town of Huxley*, the Supreme Court of Iowa considered the claimed vagueness of a city ordinance similar to the Ames ordinance in question in this case. As to the

vagueness of the word "buttocks," the court stated, "We find it difficult to believe [the defendant] seriously contends people of common intelligence would not understand the meaning of nudity or would not be able to determine when the ordinance was violated by exposing to public view the breasts, buttocks, or genitals." *Wright v. Town of Huxley*, 249 N.W.2d 672, 678 (Iowa 1977). Thus, as previously determined by the Supreme Court of Iowa, the term "buttocks" is not unconstitutionally vague.

B. Overbroad

The Defendants also contend that Ames Municipal Code § 17.31 is unconstitutionally overbroad because § 17.31 makes it illegal to expose the "buttocks," but does not provide clarity on how much of the buttocks may be exposed.

". . . [A] statute is unconstitutionally overbroad 'if it attempts to achieve a governmental purpose to control or prevent activities constitutionally subject to state regulation by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" *City of Maquoketa v. Russell*, 484 N.W.2d 179, 181 (Iowa 1992) (*quoting State v. Pilcher*, 242 N.W.2d 348, 353 (Iowa 1976)). "Under the First Amendment overbreadth 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 Com'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (*quoting Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)). But, "[a] finding of overbreadth is 'strong medicine' to be used 'sparingly and only as a last resort.'" *Farkas v. Miller*, 151 F.Supp.3d 900, 905 (8th Cir. 1998) (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

Because the term "buttocks" is not vague, requiring the entire buttocks to be covered is not overbroad. As DAJ Van Marel stated in the January 30 Order, buttocks is ". . . universally defined as that portion of the upper thigh that is sat upon. . . . The Court also finds that it would be easily discernible to observe whether or not the buttock was covered either partially or fully." DAJ Van Marel also stated in the January 30 Order that § 17.31 is not overbroad because it specifically lists six body parts that must be covered during a dancer's performance.

The District Associate Court's reasoning supporting the holding that § 17.31 is not overbroad is correct. However, the ruling below must be reversed because Iowa Code § 728.11 "preempts" Ames Municipal Code § 17.31 and renders that ordinance void.

IT IS THEREFORE THE ORDER OF THE COURT that Ames Municipal Code §17.31 is found to be void because Iowa Code § 728.11 preempts this ordinance.

IT IS THE FURTHER ORDER OF THE COURT that the convictions of Rebekah Beth Williams and Alijah Blue Allison are therefore REVERSED. Court costs to be assessed against the City of Ames, Iowa.

Clerk to provide copies to:

William T. Talbot
ATTORNEY FOR APPELLANTS

Jessica Dawn Spoden
ATTORNEY FOR APPELLEE

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
AMCICI006544	CITY OF AMES VS. ALIJAH BLUE ALLISON
AMCICI006542	CITY OF AMES VS. REBEKAH BETH WILLIAMS

So Ordered

Timothy J. Finn, District Court Judge
Second Judicial District of Iowa