COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2125

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

TOWN OF LYNDON,

PLAINTIFF-RESPONDENT,

V.

PETER F. BEYER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Reversed and cause remanded with directions.*

¶1 DYKMAN, P.J.[1] Peter F. Beyer appeals from a judgment upholding the constitutionality of a Town of Lyndon ordinance prohibiting nude dancing in "licensed establishments" and a judgment convicting him of violations

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1999-2000).

of the ordinance. Beyer argues that the ordinance is facially overbroad, thereby infringing upon expressive conduct protected by the First Amendment of the United States Constitution. The Town contends that there is no infringement and that if any infringement exists it can be remedied by a common sense limiting construction. Because the ordinance is facially overbroad, and because a limiting construction is not adequate to remedy the overbreadth of the regulation, we reverse the judgments of the trial court.

I. Background

¶2 Beyer applied for and received a liquor license to operate an establishment called "Cruisin'" in the Town of Lyndon. He began operations in July 1999. On July 3, 1999, the Town adopted Ordinance 18b prohibiting nude dancing in licensed establishments.[2] Beyer thus required Cruisin's nude dancers to be attired in pasties and G-strings.[3]

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[2] Town of Lyndon Ordinance No. 18b states in part:

> **SECTION 1. NUDE DANCING IN LICENSED ESTABLISHMENTS PROHIBITED.**
>
> It is unlawful for any person to perform or engage in, or for any licensee or manager or agent of the licensee to permit any person, employee, entertainer or patron to perform or engage in any live act, demonstration, dance or exhibition on the premises of a licensed establishment which:
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> Shows his or her genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering; or
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> Shows any portion of the female breast below a point immediately above the top of the areola; or
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> Shows the covered male genitals in a discernibly turgid state.
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> **SECTION 2. EXEMPTIONS.**
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> The provisions of this ordinance do not apply to the following licensed establishments: theaters, performing arts centers, civic

(continued)

¶3 The Town sued Beyer for injunctive relief and forfeitures for alleged violations of the ordinance. Beyer counterclaimed, asserting that the ordinance violated his rights under the First Amendment to the United States Constitution. The Town moved for summary judgment. The trial court concluded that the ordinance did not violate the First Amendment and granted the Town's motion. It ordered Beyer to pay a forfeiture of $500 plus costs for each offense and entered a judgment of conviction. Beyer appeals.

> centers, and dinner theaters where live dance, ballet, music and dramatic performances of serious artistic merit are offered on a regular basis and in which the significant business or attraction is not the offering to customers of entertainment which is intended to provide sexual stimulation or sexual gratification to such customers and where the establishment is not distinguished by an emphasis on, or the advertising or promotion of, employees engaging in nude erotic dancing.
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> **SECTION 3. DEFINITIONS.**
>
> For purposes of this ordinance, the term "licensed establishment" means any establishment by [sic] the Town Board of the Town of Lyndon to sell alcohol beverages pursuant to ch. 125, Stats. The term "licensee" means the holder of a retail "Class A," "Class B," or "Class C" license granted by the Town Board of the Town of Lyndon pursuant to Ch. 125, Stats.
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> For purposes of this ordinance, the term "regular basis" is defined as follows: "Regular basis" refers to the frequency with which the nudity occurs in relation to the establishment's typical course of business. "Regular basis" refers to whether the nudity is customarily highlighted or given special prominence. "Regular basis" refers to whether it is inherent in the nature of the business in question to emphasize nudity. "Regular basis" refers to whether focussing on nudity is part of the systematic conduct of the business as a business.

[3] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 850 (10th ed. 1993) describes pasties as "small round coverings for a woman's nipples worn esp. by a stripteaser." That dictionary also describes a G-string as "a strip of cloth passed between the legs and supported by a waist cord that is worn esp. by striptease dancers." ***Id.*** at 516.

II. Analysis

¶4 Since the inquiry before us implicates the First Amendment of the United States Constitution, it is a question of law that we review de novo. ***Lounge Mgmt., Ltd. v. Town of Trenton***, 219 Wis. 2d 13, 19-20, 580 N.W.2d 156 (1998). Ordinances normally are the beneficiaries of a presumption of constitutionality which the attacker must refute. *See* ***State v. Holmes***, 106 Wis. 2d 31, 41, 315 N.W.2d 703 (1982). However, where an ordinance regulates the exercise of First Amendment rights, the burden shifts to the government to defend the constitutionality of that regulation. ***City of Madison v. Baumann***, 162 Wis. 2d 660, 669, 470 N.W.2d 296 (1991).

¶5 In ***Barnes v. Glen Theatre, Inc.***, 501 U.S. 560, 565 (1991), the Supreme Court concluded that nude dancing is expressive conduct that falls within the First Amendment's protection. The Court held that the State of Indiana could reasonably regulate conduct implicating expression in order to combat the "secondary effects" that shadow establishments where nudity occurs, such as prostitution, sexual assault, and other criminal activity. ***Id.*** at 582-83 (Souter, J., concurring).[4] This holding was based on the constitutional principle that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." ***Id.*** at 567.

¶6 Accordingly, our supreme court has determined that in an overbreadth claim where reasonable regulation of the protected expression

[4] The Wisconsin Supreme Court has determined that Justice Souter's concurring opinion represents the holding of the Court in ***Barnes v. Glen Theatre, Inc.***, 501 U.S. 560 (1991). ***Lounge Mgmt., Ltd. v. Town of Trenton***, 219 Wis. 2d 13, 22, 580 N.W.2d 156 (1998).

inherent in nude dancing exists, the overbreadth analysis is conducted by inquiring whether the ordinance is drafted in a manner that addresses the secondary effects of adult entertainment. *See* ***Lounge Mgmt.***, 219 Wis. 2d at 24.

¶7 As an important preliminary matter, we must distinguish "constitutional as applied" challenges from overbreadth challenges. Beyer has limited his appeal of the trial court's judgment to an overbreadth challenge. An overbreadth challenge asserts that the ordinance is promulgated in an overly expansive fashion, having the collateral effect of chilling the constitutionally protected expression of third parties under the First Amendment. ***Lounge Mgmt.***, 219 Wis. 2d at 22. A finding of substantial overbreadth renders facially unconstitutional ordinances invalid. ***Id.*** at 22.

¶8 We recently upheld a nudity ordinance with language similar to the Town's ordinance in ***Urmanski v. Town of Bradley***, 2000 WI App 141, ¶¶1-2, 237 Wis. 2d 545, 613 N.W.2d 905. In ***Urmanski***, 2000 WI App 141 at ¶¶12-17, we applied a test first outlined in ***United States v. O'Brien***, 391 U.S. 367, 377 (1968). ***O'Brien*** was a draft-card burning case, but the Supreme Court has twice applied its analysis in ***O'Brien*** to the nude dancing context, first in a plurality opinion in ***Barnes***, 501 U.S. at 567, and then in ***City of Erie v. Pap's A.M.***, 529 U.S. 277, 296 (2000). In ***Urmanski***, 2000 WI App 141 at ¶¶6-11, we also relied heavily upon ***Erie***. Because ***Urmanski***, ***Barnes***, ***Erie***, and ***O'Brien*** were not overbreadth cases,[5] we do not engage in an ***O'Brien*** analysis here but instead rely on ***Lounge Mgmt.***, 219 Wis. 2d at 21, in which our supreme court squarely addressed and

[5] Early in ***Urmanski v. Town of Bradley***, 2000 WI App 141, ¶1, ¶5 n.2, 237 Wis. 2d 545, 613 N.W.2d 905, we identify an overbreadth challenge, but then state that "[b]ecause the application of ***Erie***'s analytical framework is dispositive of the issue presented in the instant case, we refrain from addressing Urmanski's alternative arguments."

decided an overbreadth claim.[6] *See also* ***Schultz v. City of Cumberland***, 228 F.3d 831, 848 (7th Cir. 2000) (noting that the Court did not reach the issue of overbreadth in ***Barnes*** and ***Erie***, which therefore do not shield an ordinance from an overbreadth challenge).

¶9 The First Amendment doctrine of overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others. ***Board of Airport Comm'rs v. Jews for Jesus, Inc.***, 482 U.S. 569, 574 (1987). Where an otherwise permissible content-neutral regulation is promulgated in an overly expansive fashion, it may have the collateral effect of chilling constitutionally protected expression or allowing selective enforcement that may discriminate against certain classes of people. ***Lounge Mgmt.***, 219 Wis. 2d at 22; *see also* Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 865-67 (1991). Those unintended results are constitutionally impermissible. ***Lounge Mgmt.***, 219 Wis. 2d at 22.

¶10 In assessing an overbreadth challenge, the court may consider hypothetical situations in which a statute or ordinance might reach too far. ***Brandmiller v. Arreola***, 199 Wis. 2d 528, 546-47, 544 N.W.2d 894 (1996). We are to keep in mind that marginal infringement or fanciful hypotheticals of inhibition that are unlikely to occur will not render a statute constitutionally invalid on overbreadth grounds. ***State v. Stevenson***, 2000 WI 71, ¶14, 236

[6] Because it based its decision on overbreadth, the supreme court in ***Lounge Mgmt.*** did not need to address whether the ordinance was constitutional as applied. ***Lounge Mgmt.***, 219 Wis. 2d at 31 n.11. We proceed with our analysis on the assumption that the Town of Lyndon's ordinance is an otherwise permissible content-neutral, reasonable regulation of the protected expression inherent in nude dancing. We do not reach the question of whether the ordinance is constitutional as applied. That was the issue in ***Urmanski***, 2000 WI App 141 at ¶17.

Wis. 2d 86, 613 N.W.2d 90. Therefore, we are to remain cognizant that overbreadth is "strong medicine" that is employed "sparingly and only as a last resort," and only where the alleged overbreadth of the statute or ordinance is both real and substantial. ***Broadrick v. Oklahoma***, 413 U.S. 601, 613 (1973); *see also* ***State v. Thiel***, 183 Wis. 2d 505, 521, 515 N.W.2d 847 (1994).

¶11 We are to apply a limiting construction to a statute, if available, that will eliminate the statute's overreach, while still maintaining the legislation's constitutional integrity. ***Lounge Mgmt.***, 219 Wis. 2d at 23-24. Alternatively, a court may sever that portion of the statute which leads to overbreadth, leaving the statute as modified in full effect.[7] ***Id.*** at 24.

¶12 The preamble to the Town's ordinance indicates that it was passed to combat the secondary effects of nude dancing. Therefore, "we conduct our overbreadth analysis by inquiring whether the [o]rdinance is drafted in a manner that addresses the secondary effects" of nude dancing, such as prostitution, declination of property values, and the potential for infiltration by organized crime, among others.[8] ***Lounge Mgmt.***, 219 Wis. 2d at 24.

¶13 We first examine the ordinance on its face. ***Lounge Mgmt.***, 219 Wis. 2d at 24. If we determine that it is overbroad, we then must consider possible

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[7] The ordinance provides for this possibility as well:

> **SECTION 5. SEVERABILITY.**
>
> If any section of this ordinance is found to be unconstitutional or otherwise invalid, the validity of the remaining sections shall not be affected.

[8] We take our examples of secondary effects from both the Town's ordinance and ***Lounge Mgmt.***, 219 Wis. 2d at 24. Again, we proceed with the assumption that such effects are a sufficient government interest to infringe upon nude dancing.

constructions of the ordinance that may save it. ***Id.*** We have done so, and we conclude that the ordinance encompasses expressive activities that do not implicate the "secondary effects" that the Town may legitimately seek to regulate.

¶14 Several hypothetical situations exist in which the ordinance would substantially impinge upon protected expression. Such examples not only include exhibition of works found to be "works of serious artistic merit" that include brief nudity, such as "Hair" and "Equus," but also implicate productions that would not be considered provocative, such as "Children of a Lesser God." Any exhibition, play, or drama may be in violation of this ordinance, if at some point an offending flash of skin from a portion of the female breast is shown. A bare back of a performer in a play could expose too much of the lower back. Such an application is not mere fantasy; the case before us involves a proprietor who does not offer nude or topless dancing, but dancing with pasties and G-strings.

¶15 Another area where the ordinance impinges upon conduct that can not rationally be linked to the secondary effects listed, are live acts featuring nudity in a hotel. The ordinance is applicable to acts between married people in a hotel room. Many hotels have liquor licenses and many have "minibars" that contain alcohol for sale. Hotels clearly do not fall within the ambit of the ordinance's exemptions.

¶16 The Town contends that the ordinance's exemptions provide more than enough protection for legitimate expression. However, the exemptions are limited to four types of establishments. An additional problem arises because the ordinance does not make a general exception for works of serious artistic merit, but only provides such exemptions in the four limited venues.

¶17 The Town, in attempting to uphold its burden of proof, argues that the ordinance only regulates nude dancing in bars and taverns. But the words "bars" and "taverns" only appear in the preamble and not in the text of the ordinance itself. Under the rules of statutory construction, we are to give effect to the intent of the legislative body. ***Marshall-Wisconsin Co. v. Juneau Square Corp.***, 139 Wis. 2d 112, 133, 406 N.W.2d 764 (1987). In determining that intent, we look first to the language of the ordinance. *See* ***id.*** If the meaning is plain, we are prohibited from looking beyond the language to ascertain its meaning. *See* ***id.*** The Town of Lyndon ordinance is clear on its face that it applies to establishments other than bars and taverns. As such we have no need to inquire further.

¶18 Even if we were to limit the ordinance to only include bars and taverns, works of serious artistic merit are still prohibited. Bars often have a stage, and taverns commonly have a large hall where private parties and gatherings occur. In a small town, such a venue may be the only place large enough to put on such an exhibition. Additionally, an occasional play would not convert a hall into a dinner theater. An occasional play certainly would not convert a tavern to something that offered such works on a regular basis, a requirement if one is entitled to an exemption. These impingements on protected conduct remain real and substantial.

¶19 The Town attempts to dismiss these arguments as insubstantial by suggesting that if these performances came to the Town, this would result in "the temperature in Hades falling below the freezing point." To the contrary, the Town's contention is apt in support of our conclusion. The primary purpose of the overbreadth doctrine is to prevent the "chilling" of First Amendment speech. ***Lounge Mgmt.***, 219 Wis. 2d at 30. As the Wisconsin Supreme Court noted, "the First Amendment to the United States Constitution applies universally to all

communities within our borders." ***Id.*** "A violation of the First Amendment is as troubling in a small rural community as it is in a metropolitan area." ***Id.*** It is a court's duty to ensure that such protected expression not be infringed upon by the undue interference of government. Therefore, the likelihood that certain productions would not be welcomed by many in the Town, nor likely to be performed there does not undermine our determination that an ordinance banning them is overbroad in violation of the First Amendment.

¶20 We have a collateral concern. The Supreme Court has recognized that nude dancing enjoys First Amendment protection. ***Barnes***, 501 U.S. at 565. The Town's ordinance requires an opaque covering over most of the female breast, and all of the genitalia. If the Town is correct in its First Amendment analysis, an ordinance permitting nude dancing as long as the dancer wears an opaque covering over his or her entire body would pass First Amendment scrutiny. Such a performance is no longer nude dancing. We recognize that dancing with a G-string and pasties is also not nude dancing. And, government entities may constitutionally require the wearing of this attire. But at some point, nude dancing while wearing clothing cannot be described as nude dancing.

¶21 We are unwilling to limit or sever the offending portions of the ordinance. The degree to which the ordinance would need to be reconstructed would require rewriting the ordinance, thereby eliminating the legislative intent of the Town. This would contravene both the goal of a limiting reading under the overbreadth doctrine and the role of the judicial branch. We will not legislate in this manner and leave it to the Town to enact an ordinance that "both means what it says and comports with federal constitutional principles." ***Lounge Mgmt.***, 219 Wis. 2d at 31. Accordingly, we determine that the ordinance is overbroad, thus violating the First Amendment of the United States Constitution. We therefore

reverse the judgment of the circuit court and direct it to grant summary judgment in favor of Beyer. We also vacate the judgment convicting Beyer of violations of the ordinance.

By the Court.—Judgments reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).