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1. [Wise Enters. v. Unified Gov't, 217 F.3d 1360](#)

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Wise Enters. v. Unified Gov't

United States Court of Appeals for the Eleventh Circuit

July 13, 2000, Decided ; July 13, 2000, Filed

No. 99-8265.

Reporter

217 F.3d 1360 *; 2000 U.S. App. LEXIS 16107 **; 13 Fla. L. Weekly Fed. C 844

WISE ENTERPRISES, INC., Crase, Inc. d.b.a. Chelsea's, Mardi Gras, Inc. d.b.a. Toppers International Showbar, et al., Plaintiffs-Appellants, v. UNIFIED GOVERNMENT OF ATHENS-CLARKE COUNTY, GEORGIA, John S. Culpepper, III, Director of Finance for the Unified Government of Athens-Clarke County, Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Middle District of Georgia. (No. 97-00129-3-CV-DF), Duross Fitzpatrick, Judge.

Disposition: AFFIRMED.

Core Terms

ordinance, establishments, adult entertainment, County's, nude dancing, license, alcohol, regulation, district court, content-neutral, zoning, governmental interest, nudity, alcoholic beverage, secondary effect, serve alcohol, consumption, undesirable, conditions

Case Summary

Procedural Posture

Appellants sought review of the United States District Court for the Middle District of Georgia's grant of summary judgment to appellees, a county government and its personnel, in a constitutional challenge to appellee's adult entertainment ordinance.

Overview

Appellant, a corporation that ran adult entertainment establishments, argued that the section of an ordinance prohibiting them from serving alcohol and providing adult entertainment at the same location violated their *U.S. Const. amend. I* rights. The court held that the ordinance did not attempt to regulate any potential communicative elements of nude dancing, nor did it limit the number of establishments where nude dancing

could occur, negating the need for heightened scrutiny. The county's interests were substantial government interests. The county had a reasonable basis for believing the ordinance would sufficiently further its interests. The ordinance focused on the secondary effects of combining nude dancing and alcohol consumption: protecting the public welfare; preventing undesirable community conditions, including the depression of property values; and reducing criminal behavior. It was narrowly tailored to address these problems. Also, there was no less restrictive alternative.

Outcome

The judgment was affirmed because the county's ordinance satisfied all four prongs of the O'Brien test and appellants' *first amendment* rights were not violated.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1 **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court. An appellate court will affirm the district court if the record demonstrates there is no genuine issue as to any material fact and the

moving party is entitled to judgment as a matter of law.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN2](#) **Fundamental Freedoms, Freedom of Speech**

The O'Brien level of scrutiny applies when a governmental entity seeks to regulate non-communicative elements of an activity and thereby imposes incidental burdens on protected expression.

Constitutional Law > ... > Fundamental
 Freedoms > Judicial & Legislative
 Restraints > Time, Place & Manner Restrictions

Governments > Local Governments > Ordinances &
 Regulations

[HN3](#) **Judicial & Legislative Restraints, Time, Place & Manner Restrictions**

Ordinances that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and thus are content-neutral.

Constitutional Law > ... > Fundamental
 Freedoms > Judicial & Legislative
 Restraints > Time, Place & Manner Restrictions

Governments > Local Governments > Ordinances &
 Regulations

[HN4](#) **Judicial & Legislative Restraints, Time, Place & Manner Restrictions**

An ordinance that prohibits nude dancing where alcohol is served is content-neutral if it restricts only the place or manner of nude dancing without regulating any particular message it might convey.

Constitutional Law > ... > Fundamental
 Freedoms > Judicial & Legislative
 Restraints > Time, Place & Manner Restrictions

Governments > Local Governments > Ordinances &
 Regulations

[HN5](#) **Judicial & Legislative Restraints, Time, Place & Manner Restrictions**

A regulation that furthers legitimate government interests unrelated to the message conveyed by nude dancing should be deemed content-neutral, even if the regulation has an incidental impact on protected expression.

Constitutional Law > ... > Fundamental
 Freedoms > Judicial & Legislative
 Restraints > Overbreadth & Vagueness of
 Legislation

Governments > Local Governments > Ordinances &
 Regulations

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HNG](#) **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

Under O'Brien, an ordinance is valid if: (1) it serves a substantial interest within the power of the government; (2) the ordinance furthers that interest; (3) the interest served is unrelated to the suppression of free expression; and (4) there is no less restrictive alternative.

Governments > Local Governments > Ordinances &
 Regulations

[HN7](#) **Local Governments, Ordinances & Regulations**

The government has a substantial government interest in protecting order and morality.

Governments > Local Governments > Ordinances &
 Regulations

Governments > Local Governments > Police Power

[HN8](#) **Local Governments, Ordinances & Regulations**

The regulation of activity that has demonstrated a capacity to induce breaches of the peace is a traditional and legitimate subject for the exercise of a municipality's police power.

Governments > Local Governments > Ordinances & Regulations

[HN9](#) **Local Governments, Ordinances & Regulations**

The second prong of the O'Brien test mandates the challenged regulation further the government's interests.

Governments > Local Governments > Ordinances & Regulations

[HN10](#) **Local Governments, Ordinances & Regulations**

Under the third prong of the O'Brien test, the government interests must be unrelated to the suppression of free expression.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Local Governments > Ordinances & Regulations

[HN11](#) **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

The fourth prong of the O'Brien test requires that the incidental restriction on *U.S. Const. amend. I* rights be no greater than necessary to the furtherance of the government interests.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Time, Place & Manner Restrictions

Governments > Local Governments > Ordinances & Regulations

[HN12](#) **Zoning, Ordinances**

A content-neutral zoning ordinance is properly analyzed as a form of time, place, and manner regulation. Thus, like all content-neutral time, place, and manner regulations, zoning ordinances are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

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For Unified Government of Athens-Clarke County, Georgia, Appellee: dePascale, Ernest, Forston, Bentley & Griffin, Athens, GA.

For Unified Government of Athens-Clarke County, Georgia, Culpepper, John S., III, Appellees: Hight, Ellen L., Athens-Clarke County, Unified Government, Athens, GA.

Judges: Before ANDERSON, Chief Judge, and BLACK and HALL *, Circuit Judges.

Opinion by: BLACK

Opinion

[*1362] BLACK, Circuit Judge:

Appellants Wise Enterprises, Inc., Crase, Inc., Mardi Gras, Inc., and Sandra Gardner appeal the district court's order granting summary judgment to Appellees Unified Government of Athens-Clarke County ("the County") and John S. Culpepper III, the Director of Finance for the County. Appellants claim the district court erred in concluding the County's [****2**] Adult Entertainment Ordinance did not violate Appellants' *First Amendment* rights. We affirm.

I. BACKGROUND

Appellants have operated adult entertainment establishments in Athens-Clarke County since 1992.

* Honorable Cynthia Holcomb Hall, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appellants' establishments feature nude barroom dancing contemporaneous with the serving of alcoholic beverages. On November 4, 1997, the County amended Title 6 of its code by adopting an Adult Entertainment Ordinance ("the ordinance"). The ordinance provides that a license is required for the operation of an adult entertainment establishment, and that no such license shall be issued to businesses operating in the Central Business District, a zoning district set out in the zoning ordinances of the County. See *Athens-Clarke County Code* § 6-11-9(d) (1997). The ordinance further prohibits the holder of an adult entertainment establishment license from serving, selling, distributing, or permitting the consumption or possession of alcohol or controlled substances on its premises. See *id.* § 6-11-21 (1997).

Approximately one month after the enactment of the ordinance, Appellant Crase simultaneously submitted to the County's finance department a renewal application for its alcoholic **[**3]** beverage license and an application for an adult entertainment establishment license. In response, Appellee Culpepper sent Crase a letter stating it could not legally be licensed both to sell alcoholic beverages and to offer adult entertainment at the same location. The letter advised Crase that if it wanted to obtain an adult entertainment establishment license, it would have to withdraw its renewal application for an alcoholic beverage license.

Appellant Mardi Gras also was rejected in its attempt to obtain an adult entertainment establishment license. The letter Mardi Gras received from Appellee Culpepper indicated that Mardi Gras did not qualify for an adult entertainment establishment license because its establishment was located in the Central Business District. Appellants consequently filed an action challenging the validity of the County's ordinance. The County moved for summary judgment, and the district court granted its motion. This appeal followed.

II. DISCUSSION

Appellants contend the district court erred in granting summary judgment to Appellees. They argue the section of the ordinance prohibiting them from serving alcohol and providing adult entertainment at the same **[**4]** location violates their rights under the *First Amendment of the United States Constitution*. Appellant Mardi Gras also challenges the portion of the ordinance that precludes adult entertainment establishments from being located in the Central Business District.

HN1[↑] We review a district court's grant of summary judgment de novo, applying the same standards as the

district court. See *Harris v. H&W Contracting Co.*, 102 F.3d 516, 518 **[*1363]** (11th Cir.1996). We will affirm the district court if the record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir.1990).

A. Restriction On Establishments That Serve Alcohol

Relying heavily on the dissenting opinion in *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir.1998), cert. denied, __ U.S. __, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000), Appellants contend the section of the County's ordinance that prohibits them from serving alcohol and providing adult entertainment at the same location is a regulation **[**5]** of protected expression. Appellants argue heightened scrutiny should be applied to the County's ordinance rather than the intermediate scrutiny test articulated by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Appellants' argument fails in light of established precedent of this Court and the Supreme Court's recent decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).

In *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir.1998), cert. denied, __ U.S. __, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000), and *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982), we upheld against constitutional attack ordinances similar to the one challenged by Appellants. The ordinances were content-neutral and thus properly analyzed under the *O'Brien* intermediate level of scrutiny. See *Sammy's*, 140 F.3d at 996; *Grand Faloon*, 670 F.2d at 947. **HN2**[↑] The *O'Brien* standard applies "when a governmental entity seeks to regulate non-communicative **[**6]** elements of an activity and thereby imposes incidental burdens on protected expression." *Grand Faloon*, 670 F.2d at 947 (citing *O'Brien*, 391 U.S. at 376, 88 S. Ct. at 1678-79). **HN3**[↑] Ordinances that prohibit nude dancing where alcohol is served or consumed are "independent of expressive or communicative elements of conduct," and thus are content-neutral. *Grand Faloon*, 670 F.2d at 947. Like the ordinances discussed in *Sammy's* and *Grand Faloon*, the County's ordinance is a content-neutral ordinance. **HN4**[↑] It "restricts only the place or manner of nude dancing without regulating any particular message it might convey." *Sammy's*, 140 F.3d at 998. The ordinance does not attempt to regulate any potential communicative elements of nude dancing, nor does it limit the number of establishments where

nude dancing can occur.

The Supreme Court's recent decision in [City of Erie v. Pap's A.M.](#), 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000), further mandates that we conclude the County's ordinance to be content-neutral. In *Pap's*, the Supreme Court held that the city's ordinance prohibiting public **[**7]** nudity, as applied to nude dancing, should be analyzed under the *O'Brien* test because the ordinance was aimed not at suppressing the message conveyed by nude dancing, but rather at the secondary effects caused by public nudity in general and by adult entertainment establishments in particular. See [Pap's](#), 120 S. Ct. at 1391-1394. The Court reasoned that [HN5](#) **[↑]** a regulation which furthers legitimate government interests unrelated to the message conveyed by nude dancing should be deemed content-neutral, even if the regulation has an incidental impact on protected expression. See [id.](#) at 1394-95.

In this case, the preamble to the County's ordinance provides:

It is the finding of the Mayor and Chair and Commission that public nudity ... under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages ... begets criminal behavior and tends to create undesirable community conditions. Among the undesirable conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement **[*1364]** personnel to preserve law **[**8]** and order, increased burden on the judicial system as a consequence of the criminal behavior ... and acceleration of community blight by the concentration of such establishments in particular areas. Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity.

Athens-Clarke County Code § 6-11 (1997). The ordinance also states that its purpose is to protect the public's health, safety and welfare. See *id.* It is clear from these statements the County's ordinance is aimed at the secondary effects of nude dancing combined with

the consumption of alcoholic beverages, not at the message conveyed by nude dancing. We therefore hold the district court was correct in using the intermediate scrutiny test set forth in *O'Brien*.

[HN6](#) **[↑]** Under *O'Brien*, an ordinance is valid if: (1) it serves a substantial interest within the power of the government; (2) the ordinance **[**9]** furthers that interest; (3) the interest served is unrelated to the suppression of free expression; and (4) there is no less restrictive alternative. See *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679. The County's stated interests in this ordinance are protecting the public welfare, preventing undesirable community conditions including the depression of property values, and reducing criminal behavior. Such interests are substantial government interests that satisfy the first part of the *O'Brien* test. See, e.g., [Barnes v. Glen Theatre, Inc.](#), 501 U.S. 560, 569, 111 S. Ct. 2456, 2462, 115 L. Ed. 2d 504 (1991) (concluding [HN7](#) **[↑]** the government has a substantial government interest in "protecting order and morality,"); [Grand Faloan](#), 670 F.2d at 949 (noting "[HN8](#) **[↑]** the regulation of activity which has demonstrated a capacity to induce breaches of the peace is a traditional and legitimate subject for the exercise of a municipality's police power.").

[HN9](#) **[↑]** The second prong of the *O'Brien* test mandates the challenged regulation further the government's interests. See *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679. For the County to meet its **[**10]** burden under this element, it must have "some factual basis for the claim that [adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity." [Grand Faloan](#), 670 F.2d at 949 (emphasis in original). The statements contained in the preamble and the minutes of the county commission meeting at which the ordinance was adopted indicate the County's enactment of the ordinance was based upon the experiences of other urban counties and municipalities, copies of studies from other jurisdictions examining the problems associated with public nudity in conjunction with the sale of alcohol, and a review of information received by the Athens-Clarke County Police Department detailing police visits to adult entertainment establishments in the County. The record thus demonstrates the County had a reasonable basis for believing the ordinance would sufficiently further its interests. See [Sammy's](#), 140 F.3d at 997.

[HN10](#) **[↑]** Under the third prong of the *O'Brien* test, the government interests must be unrelated to the suppression of free expression. See *O'Brien*, 391 U.S.

[at 377, 88 S. Ct. at 1679](#). There is no evidence [**11] in the record that the County passed the ordinance to discourage nude dancing or to hinder the communicative aspects of such conduct. Rather, the ordinance focuses on the secondary effects of combining nude dancing and alcohol consumption. The County was "attempting only to regulate the sale of alcohol in inappropriate places and it has determined that it is inappropriately sold in places where nude dancing is offered." [Sammy's, 140 F.3d at 998](#). Such a regulation is unrelated to the suppression of free expression.

[HN11](#) [↑] The fourth prong of the *O'Brien* test requires that the incidental restriction on [**1365] *First Amendment* rights be no greater than necessary to the furtherance of the government interests. See [O'Brien, 391 U.S. at 377, 88 S. Ct. at 1679](#). The ordinance satisfies this requirement because it is narrowly tailored to the problem targeted by the County--the undesirable community conditions associated with establishments that combine alcohol and nude dancing. There is no less restrictive alternative. The ordinance does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise.

The [**12] County's ordinance satisfies all four prongs of the *O'Brien* test. The district court was therefore correct to grant summary judgment to Appellees on Appellants' *First Amendment* claims.

B. *Restriction On Establishments Located In The Central Business District*

Appellant Mardi Gras also challenges the portion of the County's ordinance that prohibits adult entertainment establishment licenses from being issued to businesses operating in the Central Business District. We conclude the district court correctly determined Appellant's claim is defeated by the Supreme Court's decision in [City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 \(1986\)](#).

In *Renton*, the Supreme Court held that [HN12](#) [↑] a content-neutral zoning ordinance is "properly analyzed as a form of time, place, and manner regulation." [Id. at 46, 106 S. Ct. at 928](#). Thus, like all content-neutral time, place, and manner regulations, zoning ordinances "are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." [Id. at 47, 106 S. Ct. at 928](#). [**13] The

County's ordinance is content-neutral because, as previously noted, it focuses on the secondary effects of adult entertainment establishments. *Cf. id. at 47-48, 106 S. Ct. at 929*. We have determined the County's interests in passing the ordinance were substantial. We further conclude the zoning provision does not unreasonably limit alternative avenues of communication. The ordinance solely prohibits Appellant from obtaining an adult entertainment establishment license for an establishment within the Central Business District. Appellant may operate an adult entertainment establishment in other locations outside the Central Business District, subject to other applicable zoning restrictions. The zoning provision of the ordinance thus satisfies the requirements of the *First Amendment*.

III. CONCLUSION

The County's ordinance prohibiting nude dancing at establishments that serve alcohol satisfies the four-part *O'Brien* test. The zoning provision of the ordinance is constitutional under *Renton*. Therefore, the County's Adult Entertainment Ordinance does not violate Appellants' *First Amendment* rights.

AFFIRMED.

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