

348 So.2d 916
District Court of Appeal of
Florida, Second District.

The BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, Florida, and
Frank Wanicka, Sheriff of Lee
County, Florida, Appellants,
v.
Robert DEXTERHOUSE
and Andy Martin, Appellees.

No. 76-1442. | July 20, 1977.
| Rehearing Denied Sept. 1, 1977.

Operators of commercial establishments which sold alcoholic beverages for consumption on the premises brought action for declaratory and injunctive relief against ordinance making it unlawful for those who sell alcoholic beverages for consumption on the premises to permit females to expose their breasts on the premises. The Circuit Court, Lee County, James R. Adams, J., granted relief and county commissioners appealed. The District Court of Appeal, Scheb, J., held that: (1) adult females who choose to display their breasts in public to patrons in a bar are engaged in conduct incident to a commercial endeavor and are not expressing their right of free speech or expression so that ordinance was not subject to attack on grounds that it was overbroad or violative of constitutional guarantees of free speech and expression, and (2) the ordinance in question dealt with discipline and good order of persons while in establishments selling alcoholic beverages and did not interfere or conflict with state's regulation of the sale of such beverages and thus was not void on theory that the state had preempted the field.

Reversed.

West Headnotes (5)

[1] **Courts**

🔑 Decisions of United States Courts as
Authority in State Courts

Decision of United States Court of Appeals holding a town ordinance similar to the one involved in the instant action unconstitutional under the First Amendment to the United States Constitution was not binding on Florida trial court. *U.S.C.A.Const. Amend. 1.*

10 Cases that cite this headnote

[2] **Courts**

🔑 Decisions of United States Courts as
Authority in State Courts

The only federal decisions binding upon the courts of Florida are those of the United States Supreme Court.

10 Cases that cite this headnote

[3] **Constitutional Law**

🔑 Freedom of Speech, Expression, and
Press

First Amendment protection is applicable only where a communication element is present. *U.S.C.A.Const. Amend. 1.*

[4] **Constitutional Law**

🔑 Nudity in General

Adult females who choose to display their breasts in public to patrons in a bar, or who are required to do so by their employer, are engaged in conduct incident to a commercial endeavor and are not expressing their right of free speech or expression so that ordinance prohibiting such activity is not subject to challenge on grounds that it is overbroad or violative of the guarantees of free speech and expression. *U.S.C.A.Const. Amend. 1.*

6 Cases that cite this headnote

[5] **Intoxicating Liquors**

🔑 Concurrent and Conflicting
Regulations by State and Municipality

Ordinance prohibiting any female from displaying her breasts in a

commercial establishment at which alcoholic beverages are offered for sale for consumption on the premises was directed at discipline and good order of persons while in establishments selling alcoholic beverages and did not in any manner interfere or conflict with state's regulation of the sale of such beverages and thus was not void on theory that the state had preempted the right to regulate the field. West's F.S.A. §§ 561.02, 561.11, 562.45(2).

[8 Cases that cite this headnote](#)

Attorneys and Law Firms

*917 Julian Clarkson, James T. Humphrey, County Atty., and Kenneth A. Jones, Asst. County Atty., Fort Myers, for appellants.

Wilbur C. Smith, III, of Smith, Carta & Snow, Fort Myers, for appellee Andy Martin.

Opinion

SCHEB, Judge.

Appellant Lee County enacted an ordinance making it unlawful for those who sell alcoholic beverages for consumption on the premises to permit females to expose their breasts on the premises. Appellees, who operate affected businesses in the unincorporated areas of the county, challenged the ordinance as being unconstitutional. The trial court held those portions which had the effect of proscribing topless dancing were overbroad and in violation of first amendment rights, and enjoined enforcement by the county and its sheriff. We hold the ordinance is a valid exercise of the police power by the Board of County Commissioners of Lee County. We reverse.

Appellees began featuring "topless dancing" at their establishments, whereupon the County Commissioners enacted the challenged Ordinance No. 75-9, the relevant portions of which provide as follows: SECTION 2. PROHIBITION

2.1 It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:

A. To suffer or permit any female person while on the premises of said commercial establishment, to expose to the public view that area of the human female breast at or below the areola thereof. . . .

2.1(sic) It shall be unlawful for any female person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof. . . .

Arguing they would sustain irreparable injury through criminal prosecution and loss of business, appellees filed for a declaratory judgment contending said ordinance was unconstitutional. Appellees asked the court to enjoin the county and its sheriff from enforcing its provisions against them. In holding the above-quoted sections of the ordinance void, the trial judge stated:

The case of [Salem Inn, Inc. v. Frank](#), 522 F.2d 1045 (1975), however, is in point. There, the Federal Circuit Court of Appeals, Second Circuit, struck down a town ordinance nearly identical to the Ordinance in question on the ground that the ordinance was invalid for overbreadth under the First Amendment to the Constitution of the United States. Without comment on whether this Court agrees or disagrees with the decision in the Salem Inn case, this court feels, nevertheless, bound to follow the Federal decision on a point of Federal law.

[1] [2] *918 At the outset we observe that the Salem case was not binding on the trial court. The only federal decisions binding upon the courts of our state

are those of the United States Supreme Court. [State v. Dwyer](#), 332 So.2d 333 (Fla.1976).

This appeal presents two basic issues. First, whether Ordinance No. 75-9 is a valid exercise of the county's police power rather than a violation of the freedom of speech and expression guaranteed by the first amendment to the United States Constitution. Second, is the ordinance in conflict with Chapters 561 and 562, Florida Statutes (1975), which place the regulation of alcoholic beverages exclusively within the control of the Division of Beverage of the Department of Business Regulation?

Lee County, a non-charter county, is authorized to enact ordinances effective in its unincorporated areas, provided such ordinances are not inconsistent with general or special laws. [Article VIII, Section 1\(f\), Florida Constitution](#). In enacting Ordinance No. 75-9, the County Commission of Lee County recited in one of the preambles of the ordinance that there was a direct relationship between “. . . concurrent consumption of alcoholic beverages and the nude and semi-nude activities (of females) . . . and an increase in criminal activities, moral degradation, and disturbance of the peace and good order of the community.” On this premise the county's elected commissioners, relying on the county's police power, sought to prohibit the above-outlined activities, as well as other activities described in other portions of the ordinance not invalidated by the trial court.¹

Police power regulations which bear a substantial relation to the public health, peace, safety, morals, or welfare should be upheld where the ordinance is within the ambit of the legislative authority of the local government. Courts recognize the propriety in allowing people, through their elected officials, to exercise police power authority. [City of Miami v. Kayfet](#), 92 So.2d 798 (Fla.1957).

The County Commissioners concluded there was a necessity for the ordinance. It is not our function to review the wisdom of their action. Rather, we should only determine if this ordinance is within the scope of their constitutional and statutory authority and demonstrates a rational exercise of their police power designed to correct conditions adversely affecting the public.

[3] [4] We reject the contentions that the ordinance is overbroad and violative of the constitutional guarantees of free speech and expression. First amendment protection is applicable only where a “communication element” is present. [United States v. O'Brien](#), 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In [Hoffman v. Carson](#), 250 So.2d 891 (Fla.1971), our supreme court quoted with approval from [City of Portland v. Derrington](#), 253 Or. 289, 451 P.2d 111, cert. denied, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969). There the Supreme Court of Oregon declared:

When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is a fit subject for governmental *919 regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours. 451 P.2d at 113.

We agree. Adult females who choose to display their breasts in public to patrons in a bar, or who are required to do so by their employer, are engaged in conduct incident to a commercial endeavor. They are not expressing their right of free speech or expression.²

In [California v. La Rue](#), 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), the United States Supreme Court considered state regulations which prohibited certain sexually explicit conduct, including “topless” and “bottomless” dancing, in licensed bars and nightclubs. The Court rejected the argument that these regulations were forbidden by the first amendment. Moreover, the Court did not find “irrational” the State Beverage Department's conclusion “that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility.” 409 U.S. at 118, 93 S.Ct. at 397.

But even if there is no constitutional prohibition against police power regulation of the conduct proscribed by the ordinance, has the State of Florida preempted the right to regulate in this field?

Appellees correctly point out that the regulation and operation of establishments selling alcoholic beverages is by statute vested in the Division of Beverage which is granted full power or authority to adopt regulations to carry out the beverage laws of this state. [Sections 561.02 and 561.11, Florida Statutes \(1975\)](#). Local control over establishments selling alcoholic beverages is limited to: (1) hours of operation; (2) location of business; and (3) sanitary regulations. [Section 562.45\(2\), Florida Statutes \(1975\)](#).

We recognize the limited areas within which local government can legislate; however, there is a distinct difference between enactments which govern conduct of individuals while on the premises of their establishments, as opposed to the regulation of the licensees themselves in the sale and dispensing of alcoholic beverages. Illustrative of the distinctions are two decisions of the Supreme Court of Florida. In [State ex rel. Anthony Distributors, Inc. v. Pickett, 59 So.2d 856 \(Fla.1952\)](#), it was held an ordinance which authorized the City of Sarasota to investigate the character of licensees and to decline licenses to those it determined to be unfit was in direct contravention of the Beverage Act, Chapters 561 and 562, Florida Statutes (1951).

On the other hand, during an era when local governments were permitted to exercise their police power in a more protective manner in respect to women, the City of Miami passed an ordinance prohibiting barmaids from selling intoxicating liquors by the drink over the bar. In [Nelson v. State ex rel. Gross, 157 Fla. 412, 26 So.2d 60 \(Fla.1946\)](#), the court found that ordinance was not in conflict

with the provisions of the Beverage Act, noting that the state plan of regulation did not cover that area. Similarly, in [City of Miami v. Jiminez, 130 So.2d 109 \(Fla.3d DCA 1961\)](#), the Third District Court of Appeal upheld a City of Miami ordinance prohibiting female employees in drinking establishments from accepting drinks paid for by customers. When Pickett, Nelson and Jiminez were decided, the Beverage Act, just as it does now, limited local authorities to regulating hours of operation, location, and sanitary requirements for liquor establishments.

[5] As in Nelson, the statutory scheme of state regulations does not embrace the area of conduct covered by the Lee County ordinance. We conclude that the ordinance now before us is one directed at the discipline and good order of persons while in establishments selling alcoholic beverages, and does not in any manner interfere or conflict with the state's regulation of the sale of such beverages.

*920 In sum, we have determined the assailed provisions of Ordinance No. 75-9 have a rational basis and represent a valid exercise of Lee County's police power. Further, the acts proscribed by the ordinance represent conduct rather than speech or expression, and as such there is no contravention of the constitutional guarantees of free speech and expression. Finally, we have concluded that the provisions of the ordinance are not in conflict with the Beverage Act.

REVERSED.

McNULTY, Acting C. J., and GRIMES, J., concur.

Footnotes

1 The portions of the ordinance not invalidated by the trial court are as follows:

SECTION 2. PROHIBITION

2.1 It shall be unlawful . . .

(A) . . .

(B) To suffer or permit any female person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in Section 3.1(A).

(C) To suffer or permit any person, while on the premises of said commercial establishment, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage.

2.2 . . .

2.3 It shall be unlawful for any person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage, or to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft or cleavage.

- 2 We do not mean to imply that nudity can never be expression protected by the first amendment, only that it is not under the circumstances of this case. In the format of a legitimate stage production for example, we might very well find nudity to be expression. See generally, [California v. La Rue](#), 409 U.S. 109, 114, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972).

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794 F.2d 1520

United States Court of Appeals,
Eleventh Circuit.

INTERNATIONAL FOOD & BEVERAGE
SYSTEMS, a partnership, Plaintiff-Appellee,

v.

CITY OF FORT LAUDERDALE, a municipal
corporation, Defendant-Appellant.

No. 85-5728. | July 25, 1986.

Operator of nude bar challenged ordinances of city limiting locations where nude bars could operate. The United States District Court for the Southern District of Florida, No. 85-6527-CIV-JAG, Jose A. Gonzalez, Jr., J., entered injunction prohibiting city from enforcing its ordinances, and city appealed. The Court of Appeals, Nichols, Senior Circuit Judge, sitting by designation, held that fact that nude bar operator's loss of his former site precipitated earlier action on ordinance that had been on stocks for year so as to forestall operator from establishing himself in nonconforming site did not establish that city's asserted reasons for enacting ordinances limiting locations of nude bars were mere pretext and real purpose was to suppress protected expression.

Vacated and remanded.

West Headnotes (8)

[1] **Obscenity**

🔑 **Sex and nudity**

Total nudity is not necessarily obscene, and if not, enjoys constitutional protection as much as partial nudity.

[2] **Constitutional Law**

🔑 **Public nudity or indecency**

If nudity in public is not expression, it is conduct, and is devoid of constitutional protection. *U.S.C.A. Const.Amend. 1.*

[3] **Constitutional Law**

🔑 **Nude or semi-nude dancing**

Constitutional protection of nonobscene nude dancing as mode of expression is not absolute, but is subject to reasonable content-neutral regulations relating to time, place, and manner, which are acceptable as long as they serve substantial government interest and do not unreasonably limit alternative avenues of communication. *U.S.C.A. Const.Amend. 1.*

17 Cases that cite this headnote

[4] **Constitutional Law**

🔑 **Zoning and Land Use**

Regulation relates to place, and may be regarded as content neutral, though it makes separate category of protected expression, if it is aimed to control secondary effects resulting from protected expression, as legitimate exercise of municipal power to enact zoning codes. *U.S.C.A. Const.Amend. 1.*

5 Cases that cite this headnote

[5] **Constitutional Law**

🔑 **Geographic restrictions in general**

Fact that nude bar operator's loss of his former site precipitated action on ordinance that had been on stocks for year so as to forestall operator from establishing himself in nonconforming site did not establish that city's asserted reasons for enacting ordinances limiting locations of nude bars were mere pretext and real purpose was to suppress protected expression; planning director and commissioners of city supposed, in good faith, rightly or wrongly, that they were not suppressing operator, but providing him with choice of 25 viable sites. *U.S.C.A. Const.Amend. 1.*

21 Cases that cite this headnote

[6] **Constitutional Law**

👉 **Freedom of Speech, Expression, and Press**

First Amendment does not guarantee anyone profit, but rather, all it requires is that speech, expression, and ideas be allowed physically adequate forum. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[7] **Constitutional Law**

👉 **Nudity in general**

City is not required to experience actual deleterious effects before it can regulate nude bars as cause.

3 Cases that cite this headnote

[8] **Constitutional Law**

👉 **Nudity in general**

Zoning ordinances limiting locations in which nude bars could operate should have been tested by reference to entire zoning scheme of which they were meant to be part, not as isolated whim of commissioners, or as attempt by them to impose their notions of moral behavior on community.

10 Cases that cite this headnote

Attorneys and Law Firms

*1521 Gerald L. Knight, Lindsey A. Payne, Asst. City Attys., Fort Lauderdale, Fla., for defendant-appellant.

Richard L. Wilson, Dallas, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

1522 Before FAY, Circuit Judge, HENDERSON and NICHOLS**, Senior Circuit Judges.

Opinion

NICHOLS, Senior Circuit Judge:

This appeal asks us to review a judgment of the United States District Court, Southern District of Florida, which permanently enjoins the appellant city from enforcing its ordinances No. C-84-91 and C-84-100. We vacate and remand for further consideration in light of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). That case reverses a decision below, 748 F.2d 527 (9th Cir.1984), on which the above district court relied as authority. We invite attention to other matters also that ought to be considered before a municipality is prevented from enforcing ordinances important to it.

Background

This case relates to the right or absence of right of the City of Fort Lauderdale to enforce ordinances which impose location restrictions on what we will call, for brevity, nude bars, *i.e.*, bars which sell liquor under license and which have partly or wholly nude persons on the premises during open hours as waitresses, performers, or customers. Though the record does not make the points as clear as is really needed for non-Floridian judges, we assume that Fort Lauderdale has the usual powers of municipality to enact zoning laws of the nationally familiar type as, *e.g.*, dealt with in the *Renton* case mentioned above, including laws controlling the business location of liquor licenses, but that the state has a body independent of that and other municipalities, to regulate and control the liquor trade, similar to the New York body which was a litigant in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981). If any such state body has a rule or regulation bearing on the instant controversy, it was not called to our attention. We further assume that the powers of Fort Lauderdale respecting zoning are vested in the persons, consisting of a mayor and commissioners (number not stated), who enacted the ordinances here involved.

Fort Lauderdale is or was a community of 31 square miles and 156,000 inhabitants. Consultation of a road map reveals it is located 10 miles, more or less, north of the vast and growing metropolis of Miami, and on

the Atlantic Ocean. Its amenities included an airport, a seaport, churches, colleges, schools, parks, residential areas, and the federal courthouse where this case was tried. They also included in 1984, 10 nude bars. According to testimony, the community was known in certain circles, at least, as "Fort Liquordale." Since the injunction, there have been added additional nude bars according to undisputed statements at oral argument.

Mr. Ritchie, planning director for the city, had been working on the involved ordinances since late summer of 1983, as directed by the city manager. Shortly before enactment of the first, October 1984, it was learned that a well known nude bar, the Centerfold Lounge, was looking for a location in Fort Lauderdale as it was losing the site it then occupied elsewhere, by condemnation for airport expansion. Mr. Ritchie had the office of the city attorney prepare a draft and he laid it before the commissioners. Before they voted, he displayed a zoning map of the city with an overlay he prepared for the purpose, showing 25 sites where he said a nude bar could locate in conformity with the draft ordinance. This was in addition to the 10 nude bars already operating in the city, so 35 nude bars in all would have been permissible if the count of available sites was right.

The draft included the usual provision sparing nonconforming uses existing on *1523 the date of adoption, *i.e.*, the 10 existing nude bars were not required to move or close if on nonconforming sites. The other provisions were that a nude bar must not operate within 750 feet of "residentially zoned" land or the same distance from any church, school, public park, playground, or another nude bar. There was a separability clause, *i.e.*, if any part should be rendered invalid by court decisions, the remainder would continue in full force. The ordinance was to take effect on passage.

None of the commissioners challenged the estimate of 25 sites available under the ordinance, but one pointed out that there was a considerable amount of nonconforming residential use, that is, people dwelling in areas zoned for other purposes. He thought they too should not be required to be close neighbors of nude bars. The original ordinance was enacted as Mr. Ritchie had submitted it, but two months later the commissioners enacted the second ordinance which

amended the first to make it provide that a nude bar could not locate within 750 feet of a parcel zoned *or used* for residential purposes. Mr. Ritchie seems to have thought this did not materially reduce the estimate of 25 sites still available for newcomer nude bars, and so testified, but there was contrary evidence too.

The ordinance, originally and as amended, incorporated a fact finding by the commissioners that nude bars in close proximity to residential areas, schools, churches, etc., have "a detrimental effect on such uses," and that the regulation was necessary "to preserve public peace and good order, the integrity of residential neighborhoods, and other sensitive land uses," the "sensitive use," we presume, being meant as one wilted or blighted by the proximity of an obnoxious use.

Neither the commissioners, nor afterwards, the court, had before them any evidence or recommendation by the police that the ordinance was needed for police purposes, *i.e.*, to control crime, and we must and do assume that such evidence did not exist. The source of recommendation was the city planner, not the chief of police. There was testimony by a couple of residents that the appearance of a nude bar in their neighborhood was followed by the appearance of prostitutes, but the trial court disregarded this, as do we. It was not of compelling probative value. There was no evidence of agitation for the ordinances by any person or persons not connected with the city government. There was no evidence of moral disapproval of nude bars, at least for recourse by others, on the part of anyone connected with the city government. Mr. Ritchie did assert he never entered them himself.

Mr. Moline, a night club operator and president of the Centerfold Lounge which, he testified, "had nude female dancers" and served alcoholic beverages, being displaced from Dania, sought a location in Fort Lauderdale, and being prevented by the above ordinance from selecting his first and second choices, picked one that was too isolated for that kind of business, and it was a disaster financially. His was the only place of its kind to open between the promulgation of the ordinance, and the injunction. He has since tried running a "Country and Western" night club called "San Antonio Rose" at the same location, and that is a disaster too.

There was evidence that the nude bar trade generally regarded the ordinances as total barriers to their entering Fort Lauderdale and that was why, except Mr. Moline, no one else attempted to enter while they were in effect.

The plaintiff, International Food & Beverage Systems, owns and operates seven businesses of the nude bar type in widely separate locations, and desired to open one called Solid Gold in Fort Lauderdale. The Solid Gold would have been of high class with performers flown in from Las Vegas. A site had been selected and a building obtained and decorated. It would have been close to a residential area, but plaintiff *1524 never had experienced difficulty from proximity of its other sites to residential areas. It filed this suit for injunction or declaratory judgment without, apparently, seriously considering any of the 25 sites Mr. Ritchie had said were available.

At the trial, testimony on behalf of the plaintiff was focused on the unsuitability of the 25 sites. Some were physically absurd, for example, one in the municipal water works. Some would have been prohibited by their proximity to residences, schools, etc., *i.e.*, by the terms of the ordinance itself, as amended. Others would have been on isolated sites, whereas the necessities of the nude bar business required location on or near a busy through highway, as was the location selected for Solid Gold. Still other of Mr. Ritchie's locations would have been in prohibitive high-rent portions of the city.

The testimony the trial judge heard, besides the above, included a detailed survey of the 25 sites, one by one, but Mr. Ritchie maintained that all, or nearly all, were available despite the difficulty added by the amendment suggested after he had prepared the overlay originally. The trial judge, in the end, made no finding as to just how many sites were available, though he conceded it might be a dozen, which added to the existing nonconforming uses, would have made 22 nude bars permissible. To him it was not a "myriad" of sites, and he apparently considered the first amendment required the city, if it zoned nude bars at all, to make a "myriad" of sites available for them.

There was no testimony by either side expressing opinions as to, *e.g.*, the impact of nude bars on crime, on property value, or on the raising and education of children, and this was by the court's own choice. He believed both sides could hire experts if he listened to them and they would cancel each other out. There was also, however, no testimony as to the city plan itself, its goals, and methods of operation, and how it made use of zoning to effectuate the plan. Instead of being fitted into, and their place determined in the overall plan, the original and amended ordinances were dealt with as if they were an isolated whim of the commission. Yet, on their faces, the ordinances were framed as part of the city zoning code. The city relied, and relies here, on the preamble to the first ordinance to explain to the court what the ordinances were all about and what they were meant to accomplish, a heavy load for such brief and perfunctory language to carry. We do not know, for example, whether the city plans to make itself the honky-tonk capital of South Florida, or whether it seeks to become a balanced community of homes, churches, schools and, of course, entertainment facilities, all in their due proportion.

The parties stipulated that nude dancing was an activity protected under the first amendment, and that Fort Lauderdale did not have any authority to regulate nude dancing in bars under the twenty-first amendment. After hearing the testimony, the court promulgated a "Final Judgment" which is a discursive discussion of the facts as the court viewed them and the applicable law. The court held, and it is not disputed here, that nude dancing in a business establishment is a constitutionally protected form of expression. The efforts of the Supreme Court to define the rationale and scope of the protection in *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the court considered at length, and rejected Justice Steven's analysis for a plurality and accepted that of Justice Powell, concurring, because the former would require a subjective evaluation on the part of the judge. As to the purpose of the ordinances, he rejected other purposes on the ground they were "but a pretext" and the real object was to "suppress a constitutionally protected form of expression," specifically the form of expression proposed by Mr. Moline when he sought to move the Centerfold Lounge to a Fort Lauderdale location. The court pointed to the lack of any showing of a "well-documented concern" on

the part of *1525 Fort Lauderdale. He found the ordinances unconstitutional for the further reason that they were “not the least restrictive means of controlling first amendment activities,” because the number of sites assigned for nude bars were inadequate. He seemed to derive from *American Mini Theatres* a requirement that a “myriad” of sites be provided, but threw no light on how many constituted a myriad. Presumably his real meaning is a number exceeding any likely demand, but he had no forecasts before him what that demand might be. The alleged 25 sites included, he found, many not really available, but he conceded, arguendo, as many as 12 might be, and still that was not enough, *i.e.*, 12 sites for new nude bars added to 10 already in use by nude bars as “nonconforming uses” was insufficient for a city of 156,000.

Discussion

I

[1] [2] We may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before paying customers and not in a street or park before casual viewers. *Schad v. Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). Total nudity is not necessarily obscene and, if not, enjoys constitutional protection as much as partial nudity. Total nudity was what the Solid Gold was to display. The stipulation does not add to these obvious truths and we must view askance any effort to commit us to a version of the law that may be (though here it is not) contrary to our own beliefs. The status of nudity not for profit is more dubious; *cf. South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir.1984) (on beaches, lolling, not dancing). The rather common employment of nondancing cocktail waitresses to perform their duties “topless” is also covered by the ordinances, but may be disregarded in our discussion because the Solid Gold wanted to employ nude dancers and for the further reason that the ordinances could be invalid as applied to nude dancers and not saved by its application to customers or to other nude employees of the bar. If nudity in public is not “expression,” it is “conduct,” *South Florida Free Beaches, supra*, and it is devoid of constitutional protection so far as appears. Dancing is “expression.”

[3] [4] The constitutional protection of nonobscene nude dancing as a mode of expression is not absolute, but is subject to reasonable content-neutral regulations relating to time, place, and manner, which are acceptable as long as they serve a substantial government interest and do not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, —, 106 S.Ct. 925, 928, 89 L.Ed.2d 29, 37 (1986). The instant regulation relates to place, and may be regarded as content-neutral, though it makes a separate category of protected expression, if it is aimed to control secondary effects resulting from the protected expression, as a legitimate exercise of municipal power to enact zoning codes. *Renton, supra*.

[5] The district court finessed all this law by finding that the asserted reasons for the ordinances were “pretextual” and the real purpose was to “suppress protected expression,” with particular reference to the prospective incursion of Mr. Moline's enterprise, the Centerfold Lounge. A careful examination of the entire record discloses not a shred of evidence to support the existence of any intention to suppress. *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672, 683–84 (1968) teaches against striking down otherwise constitutional legislation on the basis of a speculated illicit legislative motive. Mr. Moline's well-known loss of his former site precipitated earlier action on an ordinance that had been on the stocks for a year already, so he would not forestall it and establish himself in a nonconforming site. They intended to require *1526 him to select a conforming site. Mr. Moline was not suppressed, he established the Centerfold at a site in Fort Lauderdale he selected, where as it proved he could not compete against other nude bars, more fortunately situated. The planning director and the commissioners supposed, in good faith, rightly or wrongly, that they were not suppressing Mr. Moline, but providing him with a choice of 25 viable sites. The findings imply bad faith which is not lightly imputed to public officials: proof of bad faith must be “irrefragible,” *i.e.*, pretty strong and assimilated with a specific intent to inflict injury. *Kalvar Corp. v. United States*, 211 Ct.Cl. 192, 543 F.2d 1298, 1301–02 (1976), *cert. denied*, 434 U.S. 830, 98 S.Ct. 112, 54 L.Ed.2d 89 (1977) and cases cited. They might have been mistaken as to the number of sites,

and if they were badly enough in error, perhaps they failed to satisfy the *Renton* test, but inquiry remains necessary as to that.

The judge also found, without a shred of evidence, that the commissioners intended to “make a moral statement,” another pejorative in this first amendment context, where official morality is suspect.

The district judge in our case cited and relied on the Ninth Circuit decision, *Playtime Theatres, Inc. v. Renton*, 748 F.2d 527 (1984), which was reversed in the Supreme Court decision already cited. In that case the city zoning was supposed to allow 520 acres for the use of the involved “adult motion pictures,” but there was evidence, which the Ninth Circuit believed, that little or none of that was really available as a matter of practical and commercial reality, and the existing theatres plaintiff wished to use were in a prohibited zone. The Supreme Court brushed this aside saying:

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have “the effect of suppressing, or greatly restricting access to, lawful speech,” *American Mini Theatres*, 427 U.S. at 71 n. 35 [96 S.Ct. at 2453] (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.* at 78 [96 S.Ct. at 2456] (Powell, J., concurring) (“The inquiry for First Amendment purposes is not concerned with economic impact”). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

475 U.S. at —, 106 S.Ct. at 932, 89 L.Ed.2d at 42.

[6] The district court, itself, recognized the first amendment does not guarantee anyone a profit. All it requires is that “speech,” “expression,” and “ideas” be

allowed a physically adequate forum, or at least that is all it seems to require in Justice Rehnquist’s analysis.

We are also at a loss how anyone could determine that as many as 22 sites for such bars were not enough, without reference to community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plan works towards. Justice Rehnquist does not say the city may not “limit alternative avenues of communication,” but only that it may not limit them “unreasonably.” What is reasonable cannot be ascertained by reference to nothing except the wishes of the nude bar proprietors. On the other hand, zoning as sustained in *Renton* is not meant as a means to prohibit otherwise legal activities.

[7] [8] The district judge also would require actual experience of the city with *1527 deleterious effects before it could regulate nude bars as the cause, citing *Krueger v. Pensacola*, 759 F.2d 851 (11th Cir.1985). This, too, is contrary to *Renton*, which city had had no such experience, and, moreover, fails to note the different nature of the ordinance involved in *Krueger* and that in its counterpart case, *Grand Faloona Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.), cert. denied, 459 U.S. 859, 103 S.Ct. 132, 74 L.Ed.2d 113 (1982). Those were police action cases, not zoning cases. They flatly prohibited all nude bars in the respective cities, with no exception or grandfathering of those existing, a far more stringent type of regulation. The courts required actual police-type experience; the absence of it in *Krueger*, and presence of it in *Grand Faloona* dictated the respective results. Zoning involves far wider interests and does not now depend for its validity on the experience or the needs of the chief of police or the blotter of the local station. Cf. *Euclid v. Ambler Company*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). It is based on an aspect of the police power to be sure, in the old and broad sense of the term which includes the power to prevent one person from so using his property as to injure another’s. The ordinances here challenged should have been tested by reference to the entire zoning scheme of which they were meant to be a part, not as an isolated whim of the commissioners, or as an attempt by them to impose their notions of moral behavior on the community. The ordinances were, Mr. Ritchie testified, based on his awareness of like measures that had been taken elsewhere and

of their results, and properly so under *Renton*. These errors might have been avoided if the district judge could have been guided by the *Renton* decision of the Supreme Court, not that of the Ninth Circuit which the Supreme Court reversed. We think a remand to reconsider and retry in light of the *Renton* case is the most appropriate measure for us to take.

II

There are other matters which we think should be reconsidered on the remand.

First, the stipulation, *supra*, says that the city “does not have the authority to regulate nude or semi-nude dancing in establishments selling alcoholic beverages under the Twenty-first Amendment,” citing *Krueger v. Pensacola*, *supra*. Apparently “under the Twenty-first Amendment” is meant to modify “authority.” So read, it is true as to a regulation such as that in *Krueger*, but *Krueger* says nothing about zoning laws. Most persons probably would think it made a considerable difference if nude dancing were offered in connection with the sale of liquor and not independently, and the challenged ordinances themselves apply only in that case. In *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), it is held that the State Liquor Authority may, because of the twenty-first amendment, flatly prohibit “topless” dancing in establishments licensed to serve liquor. In *Krueger* and in *Grand Faloan*, cited in *Krueger*, 739 F.2d at 854–55, the point is made that in Florida municipalities do not possess the state’s twenty-first amendment power, but in *Grand Faloan*, 670 F.2d at 944 n. 1, this is more specifically stated—municipalities do not possess such power *except* in respect to their control over hours of operation, *location of businesses*, and sanitary regulations. Those exceptions, of course, were irrelevant in *Krueger* and *Grand Faloan* which did not involve regulations of those types, but the zoning ordinances here involved do regulate location of businesses and nothing else. In any event, the Florida Supreme Court has now held in *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla.1985), that under the twenty-first amendment, municipalities in Florida do have the powers recognized in *Bellanca*.

The city argued that the association of drinking and nude dancing should be considered, but as the matter was not briefed, we do not rule on it and do not reverse or remand on its account, but direct that the matter be fully considered and briefed below if any new injunction is going to be *1528 issued, or the old one reinstated. The attempt should not again be made to commit us to a stipulation of law. *Swift & Company v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289, 37 S.Ct. 287, 290, 61 L.Ed. 722, 725 (1917).

In *Bellanca*, 452 U.S. at 714, 101 S.Ct. at 2601, 69 L.Ed.2d at 361, the court quotes with approval a legislative memorandum which includes this statement:

Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand.

Analysis such as we have under review, which treats Fort Lauderdale nude bars as if they sold no liquor, seems quite irrational. Nor is it consistent with the dignity of the first amendment to hold that the degree to which expression is subject to first amendment protection depends on the identity of the state-created public body proposing a restraint upon it.

In *Larkin v. Grendel’s Den*, 459 U.S. 116, 121–22, 103 S.Ct. 505, 509, 74 L.Ed.2d 297, 304 (1982), the Supreme Court says:

The zoning function is traditionally a governmental task requiring the “balancing [of] numerous competing considerations,” and courts should properly “refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.” [Citing cases.] Given the broad powers of states under the Twenty-first Amendment, judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor regulation. [Citing cases.]

Second, this court recognizes its obligation to sustain the constitutionality of an act whenever possible by severing invalid clauses and permitting the remainder of the act to stand. *Scheinberg v. Smith*, 659 F.2d 476, 481 (5th Cir. Unit B. 1981). The city suggested that the trial court should do this, but allowed the court's refusal to drop without preserving the issue for its appeal. The reason for the refusal was not stated with any clarity, except that the ordinances were unseverable. Though the matter cannot be the basis for reversal now, it should be considered afresh upon retrial if the court is again disposed to hold the ordinances invalid as a whole.

There was evidence that the city's calculation that it make 25 new sites for nude bars available was refuted when the commission passed the second ordinance which added to the restriction that nude bars must be at least 750 feet from areas zoned residential, another that they must be also 750 feet from structures actually used as residences. A considerable amount of nonconforming residential use existed in areas zoned industrial, indeed, that is why the commission added the amendment at a later date. But they did not reexamine the map to see which, if any, of the 25

sites were thus eliminated. Here is where they were arbitrary and capricious, if anywhere. If any of the ordinance is unconstitutional, it is quite possible that only the amendment makes it so. Such an amendment, added by a new ordinance after the original ordinance had been law for two months, would seem a prime candidate for severance. We know they would have passed the ordinance minus the 750-foot distance from nonconforming residences, because that is how they originally did pass it.

Conclusion

The judgment below is vacated and the cause remanded for reconsideration in light of *City of Renton v. Playtime Theatres, Inc.*, *supra*, with leave to reinstate the injunction if the facts warrant doing so. The record may be reopened if the court so elects. Further proceedings shall be consistent with the holding in the *Renton* case and with this opinion.

Vacated and Remanded.

Footnotes

* See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.