

COMMISSION AGENDA:

3.22.11 # 10

TO: The Honorable Chairman and Members of the
Board of County Commissioners

FROM: James L. Bennett, County Attorney *JLB*

SUBJECT: Notice of New LawsUIT and Defense of the Same by the County Attorney
in the Case of Leah Duffy, et al. v. State of Florida
DCA Case No. 2D11-589

DATE: March 22, 2011

NOTICE: THIS IS TO ADVISE THE BOARD OF COUNTY COMMISSIONERS THAT THE ABOVE-REFERENCED LAWSUIT WAS FILED AGAINST THE COUNTY AND THE COUNTY ATTORNEY'S OFFICE WILL DEFEND THE SAME SHOULD THAT BE NECESSARY.

DISCUSSION: The above Petitioners are adult use dancers who recently filed a Petition for Writ of Certiorari with the Second District Court of Appeals appealing a circuit court appellate order upholding a County Court order finding that the Pinellas County Adult Use Ordinance satisfied constitutional standards of due process under the Fourteenth Amendment of the U.S. Constitution as well as under the First Amendment of the U.S. Constitution. The Petitioners are arguing that Section 6-2 et. seq. of the County Code does not provide sufficient legislative support to sustain the provisions that prohibit the exposure of specified portions of the female breast in establishments serving alcohol. The remedy requested through the Writ of Certiorari is for the case to be remanded to the County Court for further consideration. In this matter, the Defendants/Petitioners were cited for violations of County Ordinance by the Pinellas County Sheriff therefore the County is representing the State of Florida.

JLB:CEB:elb

Attachment

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**IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA**

LEAH DUFFY,)
WHITNEY NICOLE SHELLY,)
CANDACE DAWN WHITE,)
and ASHLEY JAMIESON,)
)
 Petitioner,)
)
v.)
)
)
STATE OF FLORIDA)
)
 Respondent.)
_____ /

CASE NO.: 2D11-589
Circuit Case No.: 10.00001

PETITION FOR WRIT OF CERTIORARI

Pursuant to Fla. R. App. P. 9.100, LEAH DUFFY, WHITNEY NICOLE SHELLY, CANDACE DAWN WHITE, and ASHLEY JAMIESON, (hereinafter referred to as, “Petitioners”) respectfully petition this Court for a Writ of Certiorari to review the Circuit Court’s Order, Affirming the County Court’s Order Denying Petitioner’s Motion to Dismiss.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a Writ of Certiorari under Rule 9.030(b)(2)(B) of the Florida Rules of Appellate Procedure.

STANDARD OF REVIEW

The standard of review for a certiorari petition challenging a decision of a circuit court acting in its review capacity requires assessing whether the circuit court departed from the essential requirements of law in rendering its decision on appeal. In the leading decision of *Combs v. State*, the Supreme Court explained the meaning of the phrase “departure from the

essential requirements of law”, and discussed the standard to be used in the review of circuit court appellate decisions as follows:

In granting writs of common law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district court should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

STATEMENT OF THE FACTS

The instant Petition involves the review of the Circuit Court’s affirmance of a County Court’s denial of the Petitioners’ Motion to Dismiss Charges Made Under Pinellas County Code Section 6-2. Filed pursuant to Florida Rule of Criminal Procedure 3.190(b), Article I, Sections 4, 5, and 9 of the Florida Constitution, and the First and Fourteenth Amendments to the United States Constitution, the facts that supported the initial Motion to Dismiss, as well as the points and authorities establishing that the Circuit Court’s affirmance of the County Court amounted to a departure from the essential requirements of the law, are set forth in the following paragraphs.

The charges sought to be dismissed involved a number of contemporaneously charged Petitioners, all arrested for alleged violations of Section 6-2 of the Pinellas County Code, titled, “*Exposure of genitalia or female breasts in alcoholic beverage establishments prohibited.*” The performers arrested included, Leah Duffy, Ashley Jamieson, Candace Dawn White, and Whitney Nicole Shelly.

On or about June 23, 2009, the Petitioners were present at “Oasis,” a “place of public assembly” in Pinellas County, Florida. The “Oasis” is a licensed Adult Entertainment Business

in the County, presenting exotic dance performances, including “expressive nudity,” protected by the First Amendment.

The Petitioners were arrested for allegedly not covering their breasts, in violation of Section 6-2, while *performing* within the establishment. This was perhaps not a surprising situation, having occurred in what would colloquially be referred to as “*topless* bar,” and what the County defined as a “*special cabaret*.” In the Motion to Dismiss, it was alleged that the restrictions imposed by Section 6-2 were arbitrary and unreasonable *as applied* to the conduct which was the subject of the Petitioners’ arrests, because the restrictions on that conduct were alleged not to bear a reasonable relationship to the stated governmental interests. Critical to the issues raised herein is the fact that Sec 6-2 has two completely different approaches to the “exposure of anatomical areas,” one level of restriction for non-adult businesses, and a different level for “adult businesses.” The salient terms of Sec. 6-2 are set forth, as follows:

(c) *Prohibitions.*

(3) *Prohibited acts by all persons.* It shall be a violation of this section for any person, while within the premises of an establishment dealing in alcoholic beverages, to expose to public view such person's genitals, pubic area, anus, or cleavage of the nates of the human buttocks, or to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, anus, or cleavage of the nates of the human buttocks.

(d) Exception. Subject to section 26-181 et seq. and section 42-108 of the Pinellas County Code a licensed adult use establishment may serve alcoholic beverages and allow exposure of that area of the human female breast laterally below the point immediately above the top of the areola so long as the areola and nipple are completely and opaquely covered by any covering tape or pasty.

(e) *Penalties.* Any person who shall violate any provision of this section shall be punished as provided in section 1-8, except that a

penalty of imprisonment shall not be imposed for violation of section 6-2(c)(1). Nothing in this provision shall be interpreted to bind sheriff's officers to the requirements of code enforcement officers consistent with F.S. § 125.69.

This Code section sets out no "legislative findings," *which is a fatal flaw, as will be explained below*, and alleges no threat to the public health safety or welfare caused by the exposure of the female breast in its entirety, as opposed to the exposure of a breast covered with a "pastie" over the areola and nipple.

The primary argument raised below was that any legislation restricting the exercise of fundamental rights (such as the First Amendment protections that attach to the use of nudity in an expressive performance) need to be supported by an adequate "legislative predicate," established by the submission of evidence and testimony during the adoption process of the legislation. Applied to the instant scenario, when Sec. 6-2 was adopted, the legislative body (Pinellas County Commission) needed to produce and consider said adequate "legislative predicate," which, in plain English means that the Government *must* put forth evidence to show the *necessity* and *efficacy* of any regulation that impinges a fundamental right, which includes the First Amendment protected expression inherent in the presentation of exotic dancing. The subject Motion to Dismiss asserting this basis for dismissal of the criminal charge was filed in the case of Petitioner Jessica Broom-Spillars (Appendix A). Each Petitioner adopted the subject Motion (Appendix B, C, D, E).

The gravamen of the subject Motion asserted that Sec. 6-2, *which had no independent reference to any legislative predicate*, was constitutionally infirm because of this fatal flaw. The State's response essentially argued that Sec. 6-2 could be "saved" by the fact that Sec. 6-2, in its "cross-references" section, identified Chapter 42, the County's Comprehensive Adult

Entertainment Code. This “cross reference” gave no indication that it was an “incorporation by reference” of any hearing or evidence that might have been held in the adoption of the “Adult Code,” and is explained by the fact that the “exception” in Sec 6-2(d) for adult business specifically referenced only *Section 42-108 of the Pinellas County Code*. This section sets forth only restrictions, applicable to a “special cabaret,” like the location where the subject arrests took place, and does not set forth any type of legislative predicate, but simply states:

Sec. 42-108. - Special cabarets, adult photographic or modeling studios, and adult theaters.

In addition to the general requirements for an adult use establishment contained in section 42-106, a *special cabaret*, an adult photographic or modeling studio, and an adult theater, regardless of whether it is licensed, shall observe the following special requirements:

- (1) A stage shall be provided for the display or exposure of any specified anatomical area by an employee to a person other than another employee consisting of a permanent platform or other similar permanent structure raised a minimum of 18 inches above the surrounding floor and encompassing an area of at least 100 square feet.
- (2) The stage shall be at least three feet from the nearest table, chair or other accommodation where food or drink is served or consumed.
- (3) Any area in which a private performance occurs shall:
 - a. Have a permanently open entranceway not less than two feet wide and not less than six feet high, which entranceway shall not have any curtain rods, hinges, rails, or the like which would allow the entranceway to be closed or partially closed by any curtain, door, or other partition; or
 - b. Have a wall to wall, floor to ceiling partition of solid construction without any holes or openings, which partition may be completely or partially transparent, and which partition separates the employee from the person viewing the display.

It is critical to note the fact that this single “incorporated” section, 48-108, set forth the regulations for appearing fully nude! The definition of “adult cabaret,” not referenced therein, is set forth in Sec. 42-51, “Definitions”:

Special cabarets means any bar, dancehall, restaurant, or other place of business which **features** dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers, or waiters or waitresses **that engage in specified sexual activities or display specified anatomical areas**, or any such business establishment, the advertising for, or a sign or signs identifying which, use the words, "adult," "topless," "nude," "bottomless," or other words of similar import.

Based on the foregoing, the “special cabaret” **allows** the exposure of “specified anatomical areas,” and purportedly allows one to “engage in” Specified sexual activities,” defined as:

Specified anatomical areas means:

- (1) Less than completely covered or opaquely covered:
 - a. Human genitals or pubic regions; or
 - b. Cleavage of the nates of the human buttocks; or
 - c. That portion of the human female breast directly or laterally below a point immediately above the top of the areola; this definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt, leotard, bathing suit, or other wearing apparel, provided the areola is not so exposed.
- (2) Human male genitals in a discernible turgid state, even if completely and opaquely covered.
- (3) Any covering, tape, pastie, latex spray or paint or other device which simulates or otherwise gives the appearance of the display or exposure of any of the specified anatomical areas listed in subsections (1) and (2) of this definition.

...

Specified sexual activity means:

- (1) Human genitals in a state of sexual stimulation, arousal or tumescence;
- (2) Acts of anilingus, bestiality, buggery, cunnilingus, coprophagy, coprophilia, fellation, flagellation, masochism, masturbation, necrophilia, pederasty,

pedophilia, sadism, sadomasochism, sapphism, sexual intercourse, sodomy, urolagnia or zoerasty;

(3) Fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast; or

(4) Excretory functions as part of or in connection with any of the activities set forth in subsections (1) through (3) of this definition.

The bottom line is that the Petitioners simply desired to, and did, in the context of their performances, dance “topless,” in a business licensed for the exposure of “specified anatomical areas,” (zoerasty and necrophilia, etc. not being part of their dance repertoire). Petitioners argued that the simple administrative convenience of a “cross reference” did not rise to the level of legislative consideration of record public hearing facts and evidence necessary to support the restrictions set forth in Sec. 6-2, particularly since they were at odds with the provisions of Chapter 42, which allowed for the presentation of entirely nude dance performances, simply because a business licensed Adult Business also held a license for the sale of alcohol.

On October 29, 2009, the Trial Court, Judge Karl Grube sitting by designation, entertained oral Argument on the subject Motion. The State provided a Response in Opposition to the Petitioners’ Motion, but it is undetermined if the State formally filed a copy of their response with the Clerk of Court. In any event, on November 21, 2009, Judge Grube denied the Petitioners’ Motion to Dismiss, (Appendix F). Subsequent to the denial of the Motion to Dismiss, on December 10, 2009, the Petitioners all entered Pleas of No Contest, preserving their rights to argue the Merits of the Motion to Dismiss in an Appellate proceeding. At that point, the Trial Court, then presided over by County Court Judge Lorraine Kelly, sentenced the Petitioners and withheld a formal adjudication of guilt for each.

Petitioners then filed an Amended Motion to Consolidate for the Purposes of Appeal (Appendix G). On January 8, 2010, the Trial Court granted the Motion and issued an Order

Granting Petitioners' Amended Motion to Consolidate for the Purposes of Appeal (Appendix H). This petition proceeds under the consolidation in continuity from the Circuit Court.

On January 11, 2010, the Petitioners filed their Notice of Appeal to the Circuit Court of the Sixth Judicial circuit (Appendix I). The Petitioners' chief argument on appeal was that the trial court had erred in determining that, from no source clearly described, there was legitimate evidence to support the restrictions in Section 6-2. On January 4, 2011, The Circuit Court signed an order affirming the trial court's order denying Petitioners' Motion to Dismiss, which was filed with the Clerk on January 5, 2011 (Appendix J). The timely submission of the instant petition ensues.

NATURE OF THE RELIEF SOUGHT

The Petitioners request that this Honorable Court grant this Petition for Writ of Certiorari, quashing the decision of the Circuit Court, and remanding this matter to the County Court, with directions to grant to Motion to Dismiss.

ARGUMENT

Based on the fact that nudity is allowed in licensed Adult Businesses, but restricted where alcohol is sold, apparently it is the "content" of the performances, in conjunction with the sale of alcohol, that concerns the County, and such content based determinations have never been allowable. At this point, it is well accepted that the type of performances the Petitioners were participating in are protected by the First Amendment, and thus the companion protections of the Florida Constitution. See *Barnes v. Glenn Theatre, Inc.* 111 S.Ct. 2456 (1991); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 603 (1990); and *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), cert. denied, 115 S.Ct. 1697 (1995). Simply put, nude dancing is protected *unless* the County can show an adequate

legislative predicate to establish that the County Commission considered the actual impact of the restrictions and actual evidence to support them. As basic as one can be, there has to be some evidence that the County can point to that supports the proposition that the exposure of a fully nude female breast poses some special threat to the public health, safety, and welfare, that a breast with the areola and nipple covered does not.

The character of Petitioner's proposed performances, as protected forms of expression under both the Florida and United States Constitutions, does not lose that protection based on the content of such expression. Local governments cannot unilaterally choose to regulate such expression by any procedures they want, regardless of the impact on the constitutional protections involved. *Simon & Schuster, Inc. v. New York Crime Victims Board*, 112 S.Ct. 501, 508-509 (1991); *Stanford v. Texas*, 379 U.S. 476, 484-485 (1964); *A Quantity of Books v. State of Kansas*, 398 U.S. 205, 212 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65-66 (1963). Such regulations cannot be constitutionally validated as an effort to establish community concepts of proper or desirable forms of expression. *Id*; see also *Triplett Grille v. City of Akron*, 816 F.Supp 1249, 1268 (ND Ohio 1993).

Regulations of constitutionally protected speech can only be validated as reasonable time, place and manner restrictions if they are "designed to 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, 47, 50 (1986); *United States v. O'Brien*, 391 U.S. 367 (1968). Such restrictions must be "unrelated to the suppression of free expression," must place no more than "incidental" burdens on protected expression, and must further the governmental interest asserted. *O'Brien, supra*. In addition, there are several other constitutional requirements necessary to support legislation.

To be valid, contrary to just mimicking other similar legislation, legislation such as that contained in Section 6-2 can only be justified if it attempts to regulate the so-called "adverse secondary effects" allegedly engendered by adult entertainment establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Young ; Renton (supra)*. A requirement of this concept is that these adverse secondary effects be established through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). The adverse secondary effects sought to be remedied must be a "legitimate state interest" and the legislation must work in a way that is *rationally related* to the control of any alleged problem. Facial challenges to this type of legislation are the proper method to resolve these issues. See *Dombrowski v. Pfister*, 85 S.Ct. 1116 (1965).

As well stated in *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), the fundamental fairness required by the judicial system clearly mandates that regulations, such as the legislation relied upon by the City, must be based on a clear nexus between regulated activity and the state interest. A look at some of the earlier cases dealing with this area of the law, in contrast to recent decisions, is illuminating. The Supreme Court decision in *Schad*, decided in 1981, is extremely interesting in contrast to the *Erie* decision, decided in 2000:

“...[T]he presumption of validity that traditionally attends a local government’s exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the first Amendment. In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is “narrowly drawn [to] further a sufficiently substantial governmental interest,” ante, at 68, the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as de minimus...

“However, it is not enough for a local government to simply articulate an interest in preventing neighborhood blight; it must be prepared both ‘to articulate and support,’ a reasoned and significant basis for its zoning decisions.” *Schad v. Borough of Mt. Ephraim*, 452 U.S. 67, 101 S.Ct. 2176 (1981) (Blackmun, concurring) (Emphasis added).

The “burden” placed on the government has been clearly established in the decision in *City of Erie v. Pap’s A.M.*, 120 S.Ct. 1382 (2000). This decision recognized the requirement for an adequate “predicate,” and strengthened the Supreme Court’s recognition and respect for “as-applied” challenges to the application of restrictive legislation:

“Here, Kandyland has had ample opportunity to **contest** the council’s findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council’s findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council’s evidentiary proof was lacking. **In the absence of any reason to doubt it**, the city’s expert judgment should be credited.” *Id.*, Justice O’Connor, joined by Justices Kennedy, Rehnquist, and Breyer. (Emphasis added).

The critical issue is that Pinellas County had no evidentiary record to support Sec. 6-2, so any municipal legislation which restricts adult entertainment without this requisite “record evidence,” ultimately does violence to the First Amendment. With only a generic reference to a “cross reference” to Chapter 42, and not reliance on any semblance of evidence or any “incorporation by reference,” of the legislative predicate set forth in Chapter 42, much less any nebulous evidence or other data, the County Court arbitrarily asserted that this was sufficient. That is simply not the case. The County Court erred in this conclusion and the Circuit Court departed from the essential requirements of the law by affirming the erroneous decision of the County Court.

The County is powerless to support the challenged restrictions in Sec. 6-2 by showing that the restrictions in the instant case are *necessary*, reasonable, or “further” the governmental interests asserted in *this* case, since there is no data, no prior judicial decisions, and absolutely nothing to support the restrictions created by the legislation. Clearly, by relying on a simple “cross reference” to “similar” legislation, regardless of whether similar Code sections have been upheld in other legislation or other jurisdictions, the County’s position would be invalid since, under the basic due process considerations in free speech regulations, “merely mimicking” a Code section upheld elsewhere is *not enough*. See *Basiardanes v. City of Galveston*, 682 F2d 1203, 1213 (5th Cir. 1982). Every piece of legislation requires the Court:

“...To examine the strength and legitimacy of the governmental interest behind the Code sections and the precision with which the Code section is drawn. Unless the Code section *advances* significant governmental interests and *accomplishes* such advancement without undue restraint of speech, the Code section is invalid.” *Basiardanes* at 1214, citing *Schad v. Borough of Mt. Ephraim*, 101 S.Ct. at 2183-2184. (Emphasis added).

Common sense would indicate that such differences would advise against expedient comparisons, but case law also supports reasoned distinctions. As identified by Justice Souter in the *Alameda Books* decision, there is both a reliable and “just” method to “test the hypothesis” of whether or not “adult uses,” or whether specific *types* of adult uses, cause secondary effects. See *Encore Videos, Inc. v. City of Antonio*, 330 F. 3d 288 (5th Cir. 2003) and *Erotique Shop Inc. v. City of Grand Prairie*, 2006 U.S. Dist. Lexis 85992 (N.D. TX. 2006). This theory has proven to be elusive to some courts, but one of the most accurate articulations of the evidentiary requirements establishing secondary effects as a prerequisite to adopting adult entertainment

restrictions in *Alameda Books* is set forth in *Giggles World Corp. V. Town of Wappinger*, 341 F. Supp. 2d 427 (S.D.N.Y. 2004):

“...The burden is upon Wappinger to *produce evidence in support of its belief that businesses such as Giggles are likely to produce harmful secondary effects.* See *City of Los Angeles v. Alameda Books*, 535 U.S. 426, 438, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002) (stating that “this is not to [9] say that a municipality can get away with shoddy data or reasoning. [HN12] *The municipality’s evidence must fairly support the municipality’s rationale for the Code section.*”) While Defendants’ *motion for summary judgment may demonstrate that various studies show the harmful secondary effects of adult use businesses in other municipalities, Defendants still must show some evidence that Giggles’ business poses a risk of causing the same type of harm.”***

Id., 341 F. Supp. 2d 427, 430-31 (S.D.N.Y. 2004), (emphasis added).

Contrary to the position taken by the County, the County Court and the Circuit Court on appeal, the blind application of the “secondary effects doctrine” in the context of Twenty-first Amendment regulations is not supported. Any previous distinction between the general exercise of the “police power” and a seemingly “relaxed” legislative burden for alcoholic beverage regulations has now been totally invalidated by the Supreme Court. At the time Code section 06-26 was adopted, the decision of *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), established that the Supreme Court had abandoned any earlier distinctions, and held by majority opinion that the use of the Twenty-First Amendment could not, by itself, justify restrictions abridging the freedom of speech embodied in the First Amendment. The *44 Liquormart* case was a return to sanity and respect for due process and emphasized that the burden was on the government to show that the proposed restrictions contained in any such legislation would advance any alleged governmental interest “to a material degree.”

*All performances come before the Trial Court or any other court presumptively protected by the First Amendment,*¹ and only after a full and fair evidentiary hearing is held and (and after the legislation is appropriately subjected to an “as applied” challenge) can any conclusions be made as to whether or not the expressive conduct at issue is or is not protected by the First Amendment. Indeed, pure conduct can be protected speech, such as the wearing of a black armband to object to the war in Viet Nam, and such conduct can only be restricted if it causes “material disruption” or “involves substantial disorder or invasion of the rights of others.” See *Tinker v. Des Moines*, 89 S.Ct. 733 (1969).

To further support the Petitioners' position, and explore in greater depth the new authority so refreshingly relied on herein, on May 13, 2002, the United States Supreme Court issued their decision in *Alameda Books*, *supra*.

In this fractured opinion, four Justices (O'Connor, Rehnquist, Scalia, and Thomas) found that the City of Los Angeles *could* rely on a prior 1977 “study,” (which focused on adult motels, massage parlors, and sexual encounter studios, entirely different then the adult cabarets at issue herein) as an appropriate “legislative predicate” for the adoption of a 1983 ordinance restricting two adult businesses at one location. Critically, for the purposes of the instant petition even these four Justices have validated the “challenge to the findings” the Petitioner herein fought for and successfully established, a fact ignored by the Trial Court:

“The Court of Appeals misunderstood the implications of the 1977 study. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, areas with high concentrations of adult establishments are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the findings of the

¹*Roaden v Kentucky*, 93 S.Ct. 2796 (1973); *Doran v. Salem Inn, Inc.*, 95 S.Ct. 2561 (1974); *Heller v. New York*, 93 S.Ct. 2803 (1972); and *Schad v. Borough of Mt. Ephraim*, 101 S.Ct. 2176 (1981).

1977 study, and thus reasonable, for Los Angeles to *suppose* that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity. The *assumption* behind this theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity, much as minimalls and department stores similarly attract the crowds of consumers. Brief for Petitioner 28. Under this view, it is rational for the city to *infer* that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.

...

“In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may *rely on any evidence* that is “*reasonably* believed to be *relevant*” for demonstrating a *connection* between speech and a substantial, independent government interest. 475 U.S., at 51- 52, 106 S.Ct. 925; see also, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). *This is not to say that a municipality can get away with shoddy data or reasoning.* The municipality's *evidence must fairly support* the municipality's rationale for its ordinance. *If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton.* *If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.* See, e.g., *Erie v. Pap's A.M.*, 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily correct.

Therefore, we conclude that the city, *at this stage of the litigation*, has complied with the evidentiary requirement in *Renton*.” (Emphasis added).

Justice Kennedy, the “swing vote,” after establishing the “intermediate scrutiny” test as applicable, made the following observations:

“At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice SOUTER. See *post*, at ---- 5. The rationale of the ordinance must be that it will suppress secondary effects--and not by suppressing speech...

“Only after identifying the proposition to be proved can we ask the second part of the question presented: *is there sufficient evidence to support the proposition?* ...

“If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny...” Id, Kennedy, J., concurring (Emphasis added).

Even harsher was the dissenting opinion authored by Justice Souter, joined by Justices Stevens, Ginsberg, and Breyer. Quite candidly, Justice Souter essentially stated that the “empirical studies” that the other Justices believed could be asserted “at trial,” should be asserted as a prerequisite to the adoption of any such legislation.

Needless to say, on the strength of the *Alameda Books* decision, the Petitioners’ position is virtually unassailable, but it must be stressed that the Supreme Court’s rationale in *Alameda Books* did not spring from nowhere. The necessity of a solid legislative predicate has been

critical for decades. Each individual ordinance must be evaluated by the specific “governmental interests” asserted as the justification for the regulation. See *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). Any thing less is a denial of due process, as made clear by *Alameda Books*.

As cited above, the *Erie* case makes clear that an aggrieved party may challenge the “findings” of such legislation. *Erie* has been relied on favorably in the Middle District of Florida. However, in *City of Erie* the Supreme Court also emphasized that adult entertainment establishments bear the burden of showing that the city's secondary effects evidence is inadequate:

“Kandyland has had ample opportunity to contest the council's findings about secondary effects-before the council itself, through the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by *amicus curiae* does not cast any legitimate doubt on the Erie city council's judgment about Erie...

"In this case, however, Plaintiffs have proffered substantial evidence that casts some doubt on the County of Pasco's findings about secondary effects. The Plaintiffs have presented testimony explaining the flaws in the County's foreign studies, and the Plaintiffs have also presented their own evidence showing comparatively minimal secondary effects emanating from their own businesses." *Robert Mann Enterprises, et al. v. Pasco County*, 2001 WL 1868513 (M.D. Fla. 2001).

Under *any* analysis, laws must be necessary and reasonable and one's right to a hearing into this matter, when properly called into question, is absolute. See *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987 (1962). This right is also unequivocally set forth in *Helseth v. DuBose*,

99 Fla. 812, 128 So. 4 (1930), and *Davis v. Sails*, 318 So.2d 214 (Fla. 1stDCA 1975). The concept is also clearly stated in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687; 119 S. Ct. 1624 (1999), which deals with property rights, and *Prior v. White*, 180 So. 347 (1938), which deals with one's right to engage in their chosen occupation (which, in the context of the instant Petitioners, is "expressive conduct").

The validity of an ordinance is determined by its practical operation and its effect on particular persons. See *State ex rel. Taylor v. City of Tallahassee*, 177 So. 719 (Fla. 1937). An ordinance may be found unreasonable by a state of facts that affect its operation. It may be adjudged reasonable to one state of facts and unreasonable when applied to circumstances of a different character. See *City of Miami Beach v. The Texas Company*, 141 Fla. 616 (1940); *Ex parte Wise*, 141 Fla. 222, 192So. 872 (1940); *State v. Walker*, 444 So.2d 1137 (Fla. 2d DCA 1984); and *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1999).

The cases relied on by the Trial Court where similar restrictions were upheld is *not* dispositive of the issue, or even relevant to the instant action, as to whether or not the restriction in the instant case is *necessary*, reasonable, or "furthers" the governmental interests asserted in *this* case. Under federal law, "merely mimicking" an ordinance upheld elsewhere is *not enough*. *Basiardanes v. City of Galveston*, 682 F2d 1203, 1213 (5th Cir. 1982). Every Ordinance requires the Court:

"...To examine the strength and legitimacy of the governmental interest behind the ordinances and the precision with which the ordinance is drawn. Unless the ordinance *advances* significant governmental interests and *accomplishes* such advancement without undue restraint of speech, the ordinance is invalid." *Basiardanes* at 1214, citing *Schad v. Borough of Mt. Ephraim*, 101 S.Ct. at 2183-2184. (Emphasis added).

Under Florida law, “*No* court decision is authority on any question not raised or considered, though involved.” *Helseth v Dubose*, 99 Fla 812 128 So. 4 (Fla 1930) (Emphasis added). An examination of the cases relied on by the Trial Court shows their inapplicability. As far back as the decision in *Prior v. White*, 180 So. 347, 352 (Fla. 1938), courts have been occasionally cognizant of such authorities. As presumptively protected expressive conduct, as well as being a chosen and legitimate profession, the dance performances, and the livelihood earned by those individuals providing those dance performances, *must* be evaluated under the standards articulated in *Prior v. White*:

“It has been the trend of the decisions of this court to give effect to the constitutional guaranties of personal liberty and private property when the common good *did not fully justify or require* their abridgement or curtailment to some extent by legislative measures, or to protect those rights fully and completely when they were of that inalienable and sacred character which the language of the Constitution protects from any invasion whatever, *regardless of the temporary will of majorities* or the *supposed* requirements of the general welfare. Indeed, our decisions recognize the fact that the principles embodied in our Declaration of Rights have their roots deep in the past and are the rich fruitage of centuries of bitter struggle by our forefathers against the exercise of arbitrary, oppressive, and autocratic governmental power in all its forms.

“...*the presumption* is that it is reasonable, unless its unreasonable character appears upon its face. But the courts will declare an ordinance to be void because unreasonable *upon a state of facts being shown* which makes it unreasonable. If the ordinance is not inherently unfair, unreasonable or oppressive, the person attacking it must assume *the burden of affirmatively* showing that as applied to him it is unreasonable, unfair, and oppressive. And an ordinance general in its scope may be adjudged reasonable as applied to one state of acts and unreasonable when applied to circumstances of a different character.” *Id.* at 354. Emphasis added.

The Circuit Court order affirming the trial court's order, denying Petitioner's Motion to Dismiss manifests a clear departure from the essential requirements of the law. Instead of providing some basis for its decision, the Circuit Court simply expressed admiration for the trial judge's order, which it then adopted as its own order and opinion. This is not sufficient, nor does it clarify where in the "naked" (pun intended) record of Sec. 6-2 any actual evidence was introduced or considered. This has been the unequivocal state of the law ever since the Supreme Court "etched in stone" this requirement. See, *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. April 29, 2003); *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004); *Giovani Carandola, Limited v. Bason*, 303 F.3d 507 (4th Cir. 2002) (reversed on other ground); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida*, 337 F.3d 1251 (11th Cir. 2003), cert. den.; *Doctor John's, Inc. v. City of Sioux City, Iowa*, 305 F.Supp.2d 1022 (N.D. Iowa 2004); *Dima Corp. v. High Forest Township*, 2003 WL 22736561 (D. Minn. 2003) (Slip Cover); *Erie Boulevard Triangle Corp. v. City of Schenectady*, 250 F.Supp.2d 22 (N.D.N.Y. March 11, 2003); *Sakas v. City of Suffolk*, No.: 204cv88 (E.D. Va. May 26, 2004) (Unpublished); *Dr. John's, Inc. v. City of Sioux City, Iowa*, 389 F.Supp. 2d 1096 (N.D. Iowa, 2005); and *Video-Home-One, Inc. v. Carl Brizzi*, 2005 WL 3132336 (S.D. Ind. 2005).

The Circuit Court's decision in this matter is a departure of the essential requirements of the law. The Circuit Court failed to follow the United States Supreme Court decision of *City of Los Angeles v. Alameda Books, Inc., et al*, 122 S.Ct. 1728 (2002), which fully supports evidentiary challenges to the reasonability and necessity of legislation, such as this, which is subject to numerous Constitutional challenges. As shown above, the Petitioners presented ample evidence to satisfy the requisite criteria to justify the granting of the Motion to Dismiss. The Respondent, however, presented virtually no evidence to support a showing the existence of any

adverse secondary effects caused by the activities criminalized through the adopted legislation. Therefore, the Circuit Court failed to make an accurate determination as to whether the record contains competent substantial evidence to support the Respondent's enactment of Pinellas County Code Section 6-2, which has resulted in a miscarriage of justice.

CONCLUSION

The County Court, in denying the Petitioners' Motion to Dismiss, failed to hold the County to the constitutional evidentiary standards, and infringed on the Petitioners' constitutional right to free speech. The Circuit Court departed from the essential requirements of law by denying the appeal. More specifically, the Circuit Court failed to apply the correct law, by not evaluating whether the record before it demonstrated competent substantial evidence to support adoption of the challenged ordinance. Accordingly, under Rule 9.100 of the Florida Rules of Appellate Procedure, this Honorable Court should grant this Petition for Writ of Certiorari, quashing the Circuit Court's Order, and further remanding the cause to the County Court, with directions to grant the Petitioners' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: State Attorneys Office, 14250 49th St. N., Clearwater, FL 33762; and the County Attorneys Office, 415 Court Street, Clearwater, FL 33756, on this ____ day of February, 2011.

Luke Lirot, Esquire
Florida Bar Number 714836