

ITEM# 29
DATE: 12/9/14

COUNCIL ACTION FORM

SUBJECT: STATE PREEMPTION OF CITY LAP DANCE ORDINANCE

BACKGROUND:

In September 1996, the City Council adopted an ordinance prohibiting the touching between nude or nearly nude entertainers and customers. It was determined at the time that the physical contact between these parties was a potential health issue and directly correlated to criminal activity, such as assaults and prostitution.

Iowa Code §728.11 gives the State sole authority to regulate “obscene material” as defined in Iowa Code chapter 728. In July 2012, the Iowa Supreme Court determined that “live nude dancing”, while not explicitly included in the definition of “material”, was intended by the legislature to be included in the definition (Mall Real Estate, L.L.C. v. City of Hamburg). **Therefore, the Supreme Court decided that local government is expressly preempted from enacting or enforcing an ordinance that regulates live nude dancing, as it is considered obscene material.**

On November 13, 2013, the Ames Police Department issued two citations to two individuals for exposing a regulated/prohibited private body part in violation of the City’s lap dance ordinance. Both defendants challenged the citations claiming that the Ames ordinance was preempted by State law and was therefore void and unenforceable. At trial in District Associate Court, the Court decided in favor of the City and found the defendants in violation of the Ames ordinance.

The defendants appealed the decision to the District Court. On November 14, 2014, the District Court held that touching of a semi-nude dancer (a violation of Ames’ ordinance) was not distinguishable from “live nude dancing.” Since the Iowa Supreme Court determined that the definition of “live nude dancing” included physical contact, the District Court held that the Ames ordinance was void and unenforceable as it was preempted by state law. **The City may appeal the decision within 30 days of the order, by December 14, 2014. Since the decision, the Ames Police Department has not been enforcing the ordinance.**

Subsequent to the July 2012 Iowa Supreme Court decision, the State Legislature introduced legislation that more clearly defined “material” in Iowa Code chapter 728. The proposed legislation clarified that “live acts, performances, or exhibitions” are excluded from the list of state-regulated obscene material. The proposal also limited the state’s preemption to not restrict a city’s authority to regulate a place of business that permits live nude or semi-nude performances. The proposed legislation (House File 359) passed in the House, but failed to pass in the Senate.

ALTERNATIVES:

1. Direct City staff to seek a change in Iowa Code to provide for local control of live nude dancing.
2. Direct the City Attorney to appeal the decision of the District Court.
3. Direct the City Attorney to repeal Ames Municipal Ordinance §17.31, Touching of Certain Entertainers Regulated.

MANAGER'S RECOMMENDED ACTION:

There are two questions before the City Council.

The first is whether the City Attorney should pursue further appeals in these cases. City staff is not optimistic that the City would ultimately prevail in any further appeals in these cases for a few reasons: (1) the decision interpreting live nude dancing to be state-regulated obscene material came from the Iowa Supreme Court, and (2) the decision determined that live nude dancing is included the "touching" of performers, which is exactly what the Ames ordinance regulates.

The second question is whether City staff should attempt to persuade state legislators to clarify state law, making it clear that cities have the authority to regulate this type of activity. Historically, the City has sought greater local control over issues such as this, because it provides an opportunity for the community to take into account its unique interests, rather than relying on a broad state law.

Assuming the City Council is interested in local control regarding this issue, it is therefore the recommendation of the City Manager that the City Council adopt Alternative No. 1, thereby directing City staff to seek a change in Iowa Code to provide for local control of live nude dancing. This issue can be raised during our upcoming visit with our State legislators.