

*City of Salem v. Lawrow*, 233 Or App 32, \_\_\_ P3d \_\_\_ (December 30, 2009)

This case involves free speech guarantees under the Oregon constitution and a City of Salem code provision that prohibited certain physical contact. The provision was presumably directed at strip clubs, their dancers and their patrons. Defendant Lawrow was a dancer at a Salem strip club and was charged with and convicted in Salem Municipal Court of violating two counts of prohibited touching pursuant to Salem Revised Code (SRC) 96.300(a). Both counts alleged that she “unlawfully received a fee for touching” the body of another person. Lawrow appealed the conviction to Marion County Circuit Court. The circuit court dismissed the charges and the city appealed.

On appeal, Lawrow argued that the law was unconstitutional because it limited her right to freely express herself under Article I, section 8 of the Oregon Constitution. Citing *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the Court of Appeals noted that Oregon courts have established a framework for analyzing laws that implicate Article I, section 8.

That framework considers two types of laws: 1) laws that restrict the *content* of speech and 2) laws that focus on *forbidden results*. Content-based restrictions always violate Article I, section 8, unless the restriction fits into a historical exception (e.g. laws prohibiting defamation). Laws that focus on forbidden results can be divided further into two categories: a) those that expressly prohibit expression used to achieve those forbidden results; and b) those that do not refer to expression at all.

The Court of Appeals found SRC 96.300(a) to be a law that focuses on preventing harmful results or conduct, but expressly restricts expression as one way to limit that harm. Not only did the ordinance regulate sexual contact between participants, but it also prohibited sexual contact between participants “for the purpose of arousing sexual excitement in . . . *any other* person.” In other words, SRC 96.300(a) criminalized the sexual arousal of a third person.

Under the Oregon Constitution, an act intended to arouse an audience is protected speech. See *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005) (statute criminalizing sex acts occurring in context of live public shows restrains free expression). The Court of Appeals noted that even less controversial acts could be subject to criminal sanctions under SRC 96.300(a). For example, had *From Here to Eternity* been filmed in Salem, Burt Lancaster and Deborah Kerr could have been prosecuted for their famous beach scene. Thus, the Court of Appeals determined that the ordinance was too broadly written, criminalized protected speech and affirmed the lower court’s decision to dismiss the charges.

This case is one in a long line of cases highlighting the significant hurdles that the Oregon Constitution - or its interpretation, at least – presents for local governments in attempting to regulate the adult entertainment industry. The task is not impossible, but it is quite difficult. A constitutional law must focus on the negative effects that may flow from adult entertainment (e.g. disproportionately higher police calls to a strip club, if applicable), without criminalizing the expressive aspects of that activity. As always, close consultation with legal counsel is essential prior to enacting such a regulation.