

MEMORANDUM OF LAW

DATE: August 5, 1991

TO: Councilmember Judy McCarty, District Seven

FROM: City Attorney

SUBJECT: Supreme Court Ruling on Nude Dancing

By memorandum you ask whether the recent Supreme Court decision banning "nude dancing" has any impact on our local laws.

Response

The City of San Diego already bans nude entertainment in the same manner as the Indiana statute considered by the Supreme Court.

Analysis

Nude entertainment has been regulated in the City of San Diego since 1978. In 1987 the San Diego Municipal Code (SDMC) was modified to include "adult cabarets."

The current statutory scheme found in Division 36 "Nude Entertainment Business and Nude Entertainers" provides the following definition of nude: "(a) 'Nude' shall mean devoid of an opaque covering which covers the genitals, pubic hair, buttocks, perineum, anus or anal region of any person, or any portion of the breast at or below the areola thereof of any female person." SDMC Section 33.3604(a).

Our ordinance almost mimics the Indiana statute reviewed by the Supreme Court in *Barnes v. Glen Theatre, Inc.*, 91 Daily Journal D.A.R. 7362 (copy attached). In *Barnes*, Indiana Code 35-45-1-1 (1988) provided that nudity "means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state." 91 D.A.R. at 7365.

There are a number of establishments (e.g., *Les Girls* and the *Body Shop*) in San Diego that fall under a unique theater exemption. As a theater these establishments are not subject to the majority of regulatory provisions for nude entertainment.

In the *Barnes* case the Attorney General of Indiana conceded the public nudity statute in question did not apply in the case of theatrical productions. Additionally, there was no evidence that the state had attempted to apply the statute to nudity in performances such as plays, ballets or operas. *Id.* at 7370.

It would appear therefor that the regulation of nude entertainment in the City of San Diego is consistent with that recently approved by the

Supreme Court and that no further action is required at this time.
If you have any further questions regarding this matter, do not
hesitate to contact me.

JOHN W. WITT, City Attorney

By

Victoria C. Gilner

Deputy City Attorney

VCG:mk:520.1(x043.2)

Attachments

ML-91-54