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ALCOHOLIC BEVERAGES

Alcoholic Beverages: Prohibit Nudity and Sexual Conduct on Premises Where Alcoholic Beverages are Sold or Dispensed for Consumption

CODE SECTIONS:	O.C.G.A. §§ 3-3-40 to -46 (new)
BILL NUMBER:	HB 516
ACT NUMBER:	905
SUMMARY:	The Act prohibits nudity and sexual conduct on premises where alcoholic beverages are sold or dispensed for consumption on the premises and provides for penalties for violations of the Act.
EFFECTIVE DATE:	July 1, 1988

History

HB 516 creates a new article regulating the sale of alcoholic beverages. The Act regulates the manner and circumstances in which such beverages can be sold or dispensed on premises where the beverages are to be consumed.¹ Rather than prohibiting nude dancing,² the Act is intended to allow the revocation of a liquor license as a means of controlling certain prohibited conduct and undesirable activities thought by some to be associated with the combination of nudity and liquor consumption.³ The combination of nudity and liquor consumption is believed to attract undesirable activities such as prostitution,⁴ drug trafficking, drug abuse, and sexual violence.⁵ The purpose of HB 516 is to eradicate the “degrading, health threatening, and lawless environments” these combined activities foster.⁶

Legislative committee members heard testimony from law enforcement personnel, public safety commissioners, and county court commissioners regarding instances of unlawful or hazardous conduct on and about premises that dispense alcoholic beverages and provide nude dancing en-

1. O.C.G.A. §§ 3-3-40 to -46 (Supp. 1988).

2. Telephone interview with Representative Luther S. Colbert, House District No. 23 (Mar. 30, 1988) [hereinafter Colbert Interview].

3. *Id.*

4. *Id.*

5. Telephone interview with Fulton County Solicitor General Jimmy Webb (Mar. 31, 1988) [hereinafter Webb Interview].

6. *Id.*

tainment.⁷ Certain legislators believed that the testimony evidenced society's need to control criminal activities incident to the combination of liquor consumption and nudity.⁸ Religious groups interested in eradicating nude dancing lobbied for the enactment of legislation to control the perceived undesirable activity through the regulation of liquor licensing.⁹

HB 516 also is viewed as a public health measure. The combination of nudity and alcohol consumption was portrayed during legislative hearings as a "mecca" for prostitution, drug trafficking, and sodomy.¹⁰ Some consider the situation to be a source for the transmission of acquired immune deficiency syndrome (AIDS).¹¹

Regulation of the sale of alcoholic beverages, nude dancing, and the combination of the two has been litigated in the United States Supreme Court.¹² In *Schad v. Borough of Mount Ephraim*,¹³ the Court held that an ordinance barring live entertainment was unconstitutional because of overbreadth; the Court stated that an entertainment program cannot be prohibited "solely because it displays the nude human figure."¹⁴ The Court went on to state that "nude dancing is not without its First Amendment protections from official regulation."¹⁵

States rely on the twenty-first amendment as a source of authority in attempting to regulate entertainment in nightclubs and bars.¹⁶ The amendment is interpreted to allow states to regulate the "manufacture, sale, transportation, or possession of intoxicants."¹⁷ Thus, a state "may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them."¹⁸ The twenty-first amendment grants the states broad power to regulate the time, place, and circumstances under which alcoholic beverages may be sold.¹⁹

7. Colbert Interview, *supra* note 2.

8. *Id.*; Webb Interview, *supra* note 5.

9. Telephone interview with Senator Frank Albert, Senate District No. 23 (Mar. 31, 1988) [hereinafter Albert Interview].

10. Webb Interview, *supra* note 5.

11. *Id.*

12. *See, e.g.*, *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *California v. LaRue*, 409 U.S. 109 (1972); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939).

13. 452 U.S. 61 (1981).

14. *Schad v. Borough of Mount Ephraim*, 452 U.S. at 66.

15. *Id.*

16. Section 2 of the twenty-first amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *See LaRue*, 409 U.S. 109 (1972).

17. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

18. *Id.*

19. *Id.*; *see also New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972); *Filligim v. Boone*, 835 F.2d 1389 (11th Cir. 1988).

In *California v. LaRue*,²⁰ the Supreme Court evaluated the constitutionality of regulations promulgated by the Department of Alcoholic Beverage Control which sought to prohibit certain types of entertainment in nightclubs and bars. The Court evaluated the district court's finding that the regulations were unconstitutional because they regulated rights protected under the first amendment.²¹ The Court found that the regulations proscribed the combination of nude dancing and intoxicating beverages but did not generally ban such performances.²² Because the state sought to reach permissible ends, it had wide latitude under the twenty-first amendment to regulate liquor licensing, especially when self-regulation of the industry was not a viable alternative.²³

Generally, the state may limit the time, place, and manner of the exercise of first amendment rights.²⁴ Even if the prohibited acts are not obscene, a state can regulate such acts in connection with regulations pertaining to the time, place, and circumstances under which intoxicating beverages are sold.²⁵

The wide latitude granted to states under the twenty-first amendment to proscribe certain first amendment rights whenever those rights are connected to a state's regulation of intoxicating beverages is not without criticism. The granting of a liquor license by a state upon the condition that the licensee limit certain first amendment rights is a conditional privilege that the Court has held to be unconstitutional in other situations.²⁶

Because regulation of entertainment is speech-related, it should be examined with a high degree of "suspicion."²⁷ When states are permitted to regulate nude entertainment under the guise of regulating intoxicating beverages, protected first amendment rights may be at risk. States should not rely on the twenty-first amendment in order to avoid the constraints of the first amendment.²⁸ Allowing the regulation of a first amendment activity because it is exercised in combination with the consumption of alcohol arguably could prohibit political discussions on premises where alcohol is consumed, since the combination of these activities often leads

20. 409 U.S. 109 (1972).

21. *LaRue*, 409 U.S. at 113.

22. *Id.* at 118.

23. *Id.* at 116.

24. *Id.* at 117 n.4

25. *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 715—16 (1981); *see also* *Filligim v. Boone*, 835 F.2d 1392, 1394 (11th Cir. 1988) ("Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment.").

26. *LaRue*, 409 U.S. at 136—37 (Marshall, J., dissenting). For example, conditional privileges are unconstitutional when connected with welfare benefits, unemployment compensation, tax exemptions, public employment, and mailing privileges. *Id.*

27. *Id.* at 138 (Marshall, J., dissenting).

28. *See id.* at 127—31 (Marshall, J., dissenting).

to disorderly conduct, assaults, and even murder.²⁹

HB 516 is intended to assist law enforcement personnel by providing specific regulations which prohibit the particular combination of nudity and alcohol consumption believed to result directly in undesirable activity.³⁰ A secondary purpose of HB 516 is to present to tourists visiting Georgia the more desirable attractions in the state, rather than the "sleazy" ones.³¹

HB 516

HB 516 regulates alcoholic beverages sold or dispensed on premises where certain types of entertainment occur.³² The Act applies to "any premises in which alcoholic beverages are sold or dispensed for consumption on the premises and shall include any premises which are required by law to be licensed to sell or dispense alcoholic beverages for consumption on the premises."³³ The Act applies to the "owner, license holder, operator, manager, and person in charge of any licensed premises."³⁴

The Act prohibits specific acts or simulation of acts, including "[s]exual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law."³⁵ Acts or simulations of acts constituting "[t]he touching, caressing, or fondling of the breast, buttocks, anus, or genitals" are also prohibited by the Act.³⁶ The Act prohibits "any portion of the female breast below the top of the areola" from being displayed.³⁷ The display of "any portion of any person's pubic hair, anus, cleft of the buttock, vulva, or genitals" also is prohibited.³⁸ The use of "artificial devices or inanimate objects to perform, simulate, or depict any of the prohibited conduct or activities" is prohibited.³⁹ The Act not only prohibits live forms of entertainment but also prohibits the showing, display, or exhibition of "any film, still picture, electronic reproduction, or any other visual reproduction or image" of any of the prohibited acts or conduct.⁴⁰

The Act prohibits employees or persons working on licensed premises in any capacity from soliciting or encouraging patrons to purchase drinks for them.⁴¹ Additionally, the operator of the licensed premises shall not

29. *Bellanca*, 452 U.S. at 719 (Stevens, J., dissenting).

30. Colbert Interview, *supra* note 2.

31. *Id.*

32. O.C.G.A. §§ 3-3-40 to -46 (Supp. 1988).

33. O.C.G.A. § 3-3-40(1) (Supp. 1988).

34. O.C.G.A. § 3-3-40(2) (Supp. 1988).

35. O.C.G.A. § 3-3-41(a)(1) (Supp. 1988).

36. O.C.G.A. § 3-3-41(a)(2) (Supp. 1988).

37. O.C.G.A. § 3-3-41(a)(3) (Supp. 1988).

38. *Id.*

39. O.C.G.A. § 3-3-41(b) (Supp. 1988).

40. O.C.G.A. § 3-3-41(c) (Supp. 1988).

41. O.C.G.A. § 3-3-42 (Supp. 1988).

“knowingly permit any person in the licensed premises to view from the licensed premises, by glass partition or other artifice,” a proscribed act.⁴² The Act further provides that the operator shall not “knowingly permit any person to remove any alcoholic beverage sold or dispensed on the licensed premises to adjacent or other premises for the purpose of viewing any conduct or activity prohibited on the licensed premises by this article”⁴³

Under the Act, the operator is prohibited from employing, encouraging, permitting, or assisting “any person to engage in any conduct or activity” which violates the article.⁴⁴ Finally, the Act provides for “suspension and revocation of any and all alcoholic beverage licenses issued to such operator” for violating the article’s provisions.⁴⁵ Anyone violating the article “shall be guilty of a misdemeanor of a high and aggravated nature.”⁴⁶

HB 516 was introduced initially in the House during the 1987 legislative session.⁴⁷ The Senate Committee on Consumer Affairs recommended that the bill not pass.⁴⁸ However, this committee’s report was challenged in the Senate. A majority of votes overturned the committee report, enabling HB 516 to get back on the calendar for a Senate vote.⁴⁹ The Senate passed HB 516 without further amendment.⁵⁰

HB 516 contains problems related to overbreadth and vagueness. Some groups opposed the bill because it addresses problems of local concern which can best be dealt with by local licensing boards.⁵¹ Others say the Act affects not only nude dancing bars and clubs but also the High Museum of Art, movie houses, and other establishments in which the prohibited conduct is accepted as inoffensive and adhering to community standards.⁵² The type of entertainment shown on television screens in bars and clubs offering cable television entertainment may be affected.⁵³

Whether movie houses, draft houses, and the High Museum of Art will be closed for violating the Act is a matter of enforcement and, therefore, subject to the discretion of county solicitors.⁵⁴ Another problem with enforcement may exist because the prohibited exposure of body parts is not

42. O.C.G.A. § 3-3-43 (Supp. 1988).

43. O.C.G.A. § 3-3-44 (Supp. 1988). The removal of alcoholic beverages to a person’s place of abode or home is exempted from this Code section.

44. O.C.G.A. § 3-3-45 (Supp. 1988).

45. O.C.G.A. § 3-3-46(a) (Supp. 1988).

46. O.C.G.A. § 3-3-46(b) (Supp. 1988).

47. Final Composite Status Sheet, Mar. 7, 1988.

48. Albert Interview, *supra* note 9.

49. *Id.*

50. Final Composite Status Sheet, Mar. 7, 1988.

51. Albert Interview, *supra* note 9.

52. *Id.* The Act was not intended to close down the High Museum of Art. Colbert Interview, *supra* note 2.

53. Albert Interview, *supra* note 9.

54. Webb Interview, *supra* note 5.

clearly defined in the Act.⁵⁵

The Solicitor General of Fulton County states that the Act will not be enforced beyond its obvious intent, which is to control the sale of alcoholic beverages in circumstances proscribed by the Act.⁵⁶ The issue of selective enforcement will be dealt with as it occurs.⁵⁷ Because the primary purpose of the Act is to prevent undesirable activity associated with the combination of nudity and alcohol consumption, it appears that the places at risk for active enforcement are those in which undesirable criminal activities occur.⁵⁸ In the instance of selective enforcement, it is important to note that the twenty-first amendment does not override the due process or equal protection clauses of the fourteenth amendment.⁵⁹ Thus, the Act may be found to be unconstitutional on the basis of discriminatory enforcement.⁶⁰

Another area of concern about HB 516 is the lack of control that may result when the connection between alcohol consumption and nude dancing is severed. In the absence of this connection, nude dancing facilities may operate on a twenty-four hour basis and, in the absence of liquor dispensing, such facilities may be accessible to minors.⁶¹ If the connection is severed, the rise of "juice bars" could pose an even greater nuisance to the community.⁶²

The Act precludes "brown bagging" by prohibiting patrons from purchasing intoxicating beverages in one area of the bar or club and bringing it to the nude entertainment area.⁶³ However, the Act does not preclude patrons from consuming alcohol in one area of the club and removing themselves to an adjacent area without their alcoholic beverages. The adjacent area providing the prohibited entertainment must be under operation by someone other than the liquor licensee, operator, or employee.⁶⁴ Also, the adjacent area must not dispense or sell intoxicating

55. Telephone interview with Tony Hightower, representative of club owners (Mar. 30, 1988) [hereinafter Hightower Interview]. For example, the law prohibits the display of any portion of the female breast below the top of the areola. Portions of the breast below the top of the areola may be exposed in clothing such as a swimsuit. A woman may be subject to liability for violating the statute if she wears such a swimsuit while consuming intoxicants provided on licensed premises. *Id.* Attire exposing cleavage, however, is not intended to be covered by the Act. Colbert Interview, *supra* note 2. Additionally, pubic hair could be inadvertently exposed and individuals wearing swimsuits or short pants arguably could be in violation of the Act. *Id.*

56. Webb Interview, *supra* note 5.

57. *Id.*

58. Colbert Interview, *supra* note 2.

59. California v. LaRue, 409 U.S. 109, 135 (Marshall, J., dissenting).

60. *See id.*

61. Hightower Interview, *supra* note 55.

62. *Id.*

63. O.C.G.A. §§ 3-3-43 to -44 (Supp. 1988).

64. O.C.G.A. §§ 3-3-43 to -45 (Supp. 1988).

beverages.⁶⁵

A final area of ambiguity in the Act is its prohibition against employees or individuals working in licensed premises from soliciting or encouraging patrons to buy them drinks.⁶⁶

This Code section apparently applies regardless of the context in which the drink is solicited and regardless of whether or not the employee is "on duty."⁶⁷ It does not distinguish between whether the employee or worker is on the premises during working hours or after-hours in a social context. The prohibition does not differentiate between alcoholic and nonalcoholic drinks. Prohibiting the purchase of nonalcoholic beverages goes beyond the regulation of intoxicating beverages and would not come within the purview of the powers granted by the twenty-first amendment.

On June 30, 1988, Judge Luther Alverson issued a temporary restraining order prohibiting the state from "implementing and enforcing in any manner" the Act.⁶⁸ According to Judge Alverson, the "Order applies in favor of all [liquor licensees and any person or entity arguably covered by the Act] because to do otherwise would cause the Courts to be flooded with Petitions prior to July 1, 1988 and would also leave unprotected substantial Constitutional Rights guaranteed by the Georgia Constitution."⁶⁹

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65. O.C.G.A. § 3-3-44 (Supp. 1988).

66. O.C.G.A. § 3-3-42 (Supp. 1988).

67. *See id.*

68. *Entertainment Systems, Inc. v. Webb*, No. D-56790 Civ. (Fulton County Super. Ct. June 30, 1988).

69. *Id.*