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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Civil Action No. 2017-CP-23-03372
Appellate Case No. 2018-001393

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SC Court of Appeals

Greenville Bistro, LLC, a South Carolina Limited Liability Company,
d/b/a Buck's Racks & Ribs, and Frontage Road Associates, Inc.,
a South Carolina Corporation, ... Respondents,

v.

Greenville County, a Political Subdivision of the State of South Carolina,
and Will Lewis, in his Official Capacity as Sheriff of Greenville County, ... Appellants.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

GREENVILLE BISTRO, LLC, a South
Carolina Limited Liability Company, d/b/a
Bucks racks & Ribs, and FRONTAGE
ROAD ASSOCIATES, INC., a South
Carolina Corporation,

C.A. No.: 2017-CP-23-03372

Plaintiffs,

V.

GREENVILLE COUNTY, a Political
Subdivision of the State of South
Carolina, and WILL LEWIS, in his
Official Capacity as Sheriff of
Greenville County,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR TEMPORARY INJUNCTION

This Motion came to be heard before this Court on Defendants' Motion for Temporary Injunction on March 13, 2018. The Court, having heard the arguments of counsel, having reviewed the file and being otherwise fully advised in the premises, finds, for the purposes of this Motion only, as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiffs assert that they are operating a restaurant on the subject property and that offering live entertainment is a customary, accessory use to a restaurant. They rely on the definitions in the County Code to support their argument:

Accessory Use. A use of land or of a building or portion thereof customarily incidental to the principal use of the land or building and located on the same lot with such principal use. ...

Appendix A, Article 4, Greenville County Code

2. Greenville County defines a restaurant – which is a permitted use in the S-1 Zoning District, and thus on the subject site – as:

Restaurant. An establishment that sells prepared food for consumption. Restaurants shall be classified as follows:

b) **General.** An establishment that sells food for consumption on or off the premises. Restaurants have a designated full-service kitchen, dining room equipment, and staff to prepare and serve meals. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic Beverage Licensing Board. *Ibid.*

3. Greenville Bistro sells food for consumption on or off the premises; has a designated full-service kitchen, has dining room equipment, and has a staff to prepare and serve meals. Therefore, it meets the definition of restaurant, offering the customary accessory use of live entertainment.

4. In response to Greenville County's conduct as described in the Complaint, Plaintiffs commenced this action on May 23, 2017. Plaintiffs sought an *ex parte* temporary restraining order, a temporary injunction, and, ultimately, a declaratory judgment in their favor, leading to injunctive relief prohibiting the enforcement of the County's regulations against Plaintiffs on constitutional grounds.

5. Plaintiffs' application for a temporary restraining order was set for oral argument on May 30, 2017, and the application was granted in part on June 2, 2017:¹

Therefore, the Defendants are restrained from closing the Plaintiffs business and from issuing citations based on nonconformity with zoning or operation of an "adult cabaret" contrary to its permit and/or certificate of occupancy pending the hearing on Plaintiffs' Motion for Temporary Injunction. But this does not limit the applicability or enforceability of any other County Ordinances. ...

Order, June 2, 2017.

¹ The Order was signed on June 1, 2017, but was not docketed until June 2, 2017.

6. Greenville County filed an Answer and a Counterclaim for injunctive relief on June 14, 2017.

7. The next day, on June 15, 2017, Greenville County filed its own Motion for Temporary Injunction. Defendants' Motion for Temporary Injunction was subsequently set for hearing for July 1, 2017, which hearing was subsequently cancelled. In the meantime, this Court, (Stillwell, J.), heard oral argument on Plaintiffs' Motion for Temporary Injunction on June 16, 2017 and, on July 17, 2017, partially granted Plaintiffs' Motion for Temporary Injunction.

8. On August 16, 2017, Greenville County filed its Notice of Appeal from the Order partially granting Plaintiffs' Motion for Temporary Injunction. On or about January 19, 2018, Greenville County provided Notice of a hearing on March 13, 2018 for its pending Motion for Temporary Injunction (which had originally been set for hearing on July 1, 2017.)

9. In its Motion for Temporary Injunction, Greenville County, as to Count I, relying solely and wholly on the amendment to its Adult Use Ordinance enacted by Ordinance 4869, seeks:

On Count 1, a temporary injunction prohibiting Plaintiffs from operating or allowing a sexually oriented business, specifically an adult cabaret, at 805 Frontage Road; ...

Defendants' Motion for Temporary Injunction, filed June 15, 2017, page 5.

10. In their Initial Brief on appeal, Defendants identify the issues on appeal as:

When a plaintiff's *prima facie* case depends on a claim that a law is unconstitutional, the trial judge must consider the merits of that claim to determine its likelihood of success on the merits – a required showing for a temporary injunction. Absent such a showing, the plaintiff cannot prove irreparable harm or inadequate remedy at law, as there is neither harm in complying with a valid law, nor an injury to be remedied.

Here, the trial court enjoined enforcement of Ordinance No. 4869 without stating any reason why the Ordinance might be unconstitutional.

Appellants' Initial Brief in *Greenville Bistro, etc., et.al., v. Greenville County and Will Lewis, etc., et.al.*, Appellate Case No. 2017-001747, brief dated December 11, 2017, at page 2.

11. In its Order Partially Granting Plaintiffs' Motion for Temporary Injunction, this Court held:

Defendants, Greenville County and Will Lewis, their officers, agents servants, employees, and attorneys, and those persons in active concert or participation with them are hereby temporarily enjoined from, in any way, enforcing the provisions of Ordinance 4869 as to the Plaintiffs at the subject location;

Order Partially Granting Temporary Injunction, filed July 17, 2017, page 6.

12. On March 12, 2018, this Court heard argument from the parties on the Defendants' Motion for Temporary Injunction.

13. During this hearing, the Defendants argued that the Order Partially Granting Temporary Injunction, filed July 17, 2017, concluded that Plaintiffs were not found to be "successors" to Elephant, Inc.

14. The Defendants argument in support of its Motion was based on the application of the prior "adult entertainment" ordinance 2673.

15. The Defendants also argued that the Order Partially Granting Temporary Injunction provided that "The Plaintiff must comply with any and all applicable laws or ordinances existing at the time of the issuance of the February 9, 2017, Order."

16. The Defendants offered evidence and testimony of the alleged "business model" of the subject business, in an effort to show a variety of violations of Ordinance 2673, even though their Motion made no such distinctions between Ordinance 2673, and Ordinance 4869, which was adopted only a few days after the Plaintiffs began operating the subject establishment.

17. The Defendants also offered the testimony of Steven Smith, a Private Investigator who was a retired SLED Director.

18. Mr. Smith testified about his experiences at the subject business on October 3rd and 4th, 2017, first alleging that various female performers exposed “bare buttocks” and “bare breasts,” but, on cross-examination, conceding that the performers had varying degrees of coverage. He further testified as to his experiences as the “recipient” of various “contact dances” he had with the performers, as well as other activities that he described involving other customers of the subject business. He offered a report into evidence.

19. The next witness called by Defendants was Keith Johnson, also a retired SLED agent.

20. Mr. Johnson also testified about his experiences at the subject business on October 3rd and 4th, 2017, also alleging that various female performers exposed “bare buttocks” and “bare breasts,” and also conceding, on cross-examination, that the performers had varying degrees of coverage. He also testified as to his experiences as the “recipient” of various “contact dances” he had with the performers, as well as other activities that he described involving other customers of the subject business.

21. The next witness called by the Defendants was Shannon Piller, an Investigator with the Greenville County Sheriff’s Office.

22. Deputy Piller testified about his experiences at the subject business on March 7th and 8th, 2018, and he also testified that various female performers exposed “bare buttocks” and “bare breasts,” and described other conduct engaged in by the performers. Ultimately, Deputy Piller testified, on cross-examination, that the performers had varying degrees of coverage. He, too, testified as to his experiences as the “recipient” of various “contact dances” he had with the

performers, as well as other activities that he described involving other customers of the subject business.

II. CONCLUSIONS OF LAW

23. After reviewing all matters, the Court finds that the crux of Defendants' Motion are the issues currently on appeal to the South Carolina Court of Appeals.

24. Rule 205, SCACR provides:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. *Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.*

Rule 205, SCACR, emphasis added.

25. Rule 241, SCACR, provides for automatic stays in many instances. However, the pendency of an appeal from a Temporary Injunction is not one such instance, Rule 241(b)(8). However, Rule 241(c) provides:

(c) Supersedeas or Lifting of Automatic Stay.

(1) After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule. In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision.

Rule 241(c), SCACR.

26. Based on the foregoing, this matter is governed by both Rules 205 and 241(c), SCACR. The South Carolina courts have construed these rules:

The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. The rule provides: ... Under Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal, but is specifically allowed to proceed with matters not affected by the appeal. The rule states: ... Rule 205, SCACR; see also Rule 241(a), SCACR (“The lower court ... retains jurisdiction over matters not affected by the appeal....”). Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court’s power to proceed with the action and address matters not affected by the appeal.³ Rather, the lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a “matter[] affected by the appeal” under Rules 205 and 241(a). See *Arnal v. Fraser*, 371 S.C. 512, 518–19, 641 S.E.2d 419, 422 (2007) (per curiam) (explaining that Rules 205 and 241(a) permit the family court’s action on matters not affected by the appeal and prohibit action on matters that are affected by the appeal).

³ The reference in Rules 205 and 241(a) to the “jurisdiction” of the lower courts does not refer to subject matter jurisdiction. Rather, the rules govern the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the lower court of the power to address a particular issue, or “matter,” during the pendency of the appeal.

Tillman v. Oakes, 398 S.C. 245, 256; 728 S.E.2d 45 51 (S.C. App., 2012), [Footnote 4 omitted].

27. In the case *sub judice*, Greenville County seeks precisely what the rule prohibits: it seeks an injunction, based on the plain language of the Motion filed before the Order granting the Plaintiffs’ relief, enforcing Ordinance 4869, the enforcement of which this Court has already enjoined. Granting Greenville County’s Motion for Temporary Injunction would directly and expressly interfere with the exclusive jurisdiction of the South Carolina Court of Appeals.

28. Rule 205, SCACR has been further applied:

We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal. See Rules 205 & 225, SCACR.

Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112, 122, footnote 7, (S.C. 2008).

29. More directly, the South Carolina Supreme Court acknowledged the importance of the rule, holding:

Furthermore, Rule 205 divests the lower court or administrative tribunal of jurisdiction over “*matters affected by the appeal*,” which necessarily would include a legal malpractice cause of action that is based on the outcome of the appealed verdict, judgment, or ruling. *See Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App.2012) (“[T]he lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a ‘matter affected by the appeal’ under Rules 205 and 241(a).”); *Black’s Law Dictionary* 68 (10th ed. 2014) (defining “affect” as “to produce an effect on; to influence in some way”).

Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 533; 787 S.E.2d 485, 493 (S.C.), [Emphasis in Original].

30. Even a settlement agreement affecting the issues on appeal may not be approved by a lower court during the pendency of the appeal: *Jim Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 138; 742 S.E.2d 867, 868 (S.C., 2013).

31. More directly on point, in *SPAPW v. SC Dept. of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (S.C., 2001), the Court noted with apparent approval, the granting by the Court of Appeals of supersedeas stays to preserve the *status quo* as that case made its way through the Courts, 345 S.C. 598-9.

32. Accordingly, since the relief sought by defendants in their Motion for Temporary Injunction would possibly contravene the relief already granted to Plaintiffs on July 17, 2017, granting the relief sought by Defendants would directly interfere with the jurisdiction of the South Carolina Court of Appeals, in violation of Rule 205, SCACR.

33. As an additional consideration, one circuit court judge cannot constructively overrule an order made by another circuit judge in the same case on the same set of facts. *See Dukes & Dukes, Inc. v. Hygrade Food Products Corp.*, 236 S.C. 69 (SC 1960); *Cook v. Taylor*,

272 S.C. 536 (SC 1979); and *State v. Britain*, 263 S.C. 363 (SC 1974).

34. The Defendants' Motion was predicated on both Ordinance 2673 *and* Ordinance 4869 and no Amended Motion limiting the basis under which they sought relief was filed, and no effort was made under Rule 241(b)(8), SCACR to seek an "exception" to the general rule that a notice of appeal operates as a stay for the duration of the appeal unless lifted by order of the lower court. The Court would note that Defendant's original Motion for Temporary Injunction was filed on June 15, 2017 which sought relief as to both Ordinances 2673 and 4869 and no amended Motion was filed limiting the Motion to Ordinance 2673. Defendant's Counsel argued that its Memorandum filed prior to the hearing on March 8, 2018, 5 days prior to the hearing constituted an appropriate amendment to its original Motion. This confirms that the Defendants' Motion is no different from the issues which are currently pending on appeal.

35. Additionally, while the Defendants are attempting to deviate from their operative Motion and purportedly seek relief under Ordinance 2673, attempting to ignore the adoption of Ordinance 4869, the granting of the Order Partially Granting Temporary Injunction does not result in any finding that Ordinance 4869 has been vitiated or rendered unenforceable, it is simply enjoined.

36. Counties have the authority to enact regulations, resolutions, and ordinances which are not inconsistent with the South Carolina Constitution and general law of the State. S.C.Code Ann. § 4-9-120 (1976). In general, ordinances are repealed by the passage of a new ordinance. *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (Ct.App.1993), citing *Lominick v. City of Aiken*, 244 S.C. 32, 135 S.E.2d 305 (1964).

37. Since the injunction against the enforcement of Ordinance 4869 did not operate to "repeal" that Ordinance, and it is clearly an amendment to Ordinance 2673, this Court does not

have the authority to simply ignore a presumptively valid ordinance, 4869, simply because it is enjoined, nor can the Court look solely to the provisions of Ordinance 2673, since it has effectively been amended by Ordinance 4869.

CONCLUSION

This Court concludes that the Defendants' Motion was predicated on both Ordinance 2673 *and* Ordinance 4869, no Amended Motion limiting the basis under which they sought relief was filed, and no effort was made under Rule 241(b)(8), SCACR to seek an "exception" to the general rule that a notice of appeal operates as a stay for the duration of the appeal unless lifted by order of the lower court.

Any granting of the relief requested by Defendants would clearly impact the pending appeal, which, absent the utilization of the procedures set forth in Rule 241(b)(8), SCACR, this Court has no authority to do. Finally, Ordinance 4869 has not been vitiated or rendered unenforceable, it is simply enjoined, not repealed, so this Court has no authority to ignore presumptively valid Ordinance 4869 simply because it is enjoined and entertain the relief the Defendants seek solely as to the provisions of Ordinance 2673, since it has effectively been amended by Ordinance 4869.

Therefore, the Court finds that the Defendant has not met its burden establishing that it is entitled to an Injunction and its Motion is hereby **DENIED**.

May 16, 2018

Signature Page of Hon. Perry H. Gravely set forth on following page



Greenville Common Pleas

Case Caption: Greenville Bistro LLC , plaintiff, et al vs. Greenville County ,
defendant, et al
Case Number: 2017CP2303372
Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755

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STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
GREENVILLE BISTRO, LLC, a South)
Carolina Limited Liability Company, d/b/a)
Buck's Racks and Ribs, and FRONTAGE)
ROAD ASSOCIATES, INC.,)
a South Carolina Corporation,)
PLAINTIFFS,)
v.)
GREENVILLE COUNTY, a Political)
Subdivision of the State of South Carolina,)
And WILL LEWIS, in his Official Capacity)
as Sheriff of Greenville County,)
DEFENDANTS.)

IN THE COURT OF COMMON PLEAS
OF THE THIRTEENTH JUDICIAL CIRCUIT

**ORDER GRANTING
TEMPORARY RESTRAINING ORDER**

CASE NUMBER: 2017-CP-23-03372

This matter comes before the Court upon Plaintiffs' Motion for Ex Parte Temporary Restraining Order requesting that the County be restrained from taking certain actions against the Plaintiff Greenville Bistro, LLC (Bistro). Notice was provided to all parties and the matter was heard on June 1, 2017. The Court would note that a hearing has been scheduled for June 16, 2017 on the Plaintiffs' Motion for Temporary Injunction.

After reviewing the pleadings and hearing argument of counsel, the Court finds that the Plaintiffs have met the requirements for a Temporary Restraining Order and grants Plaintiffs' Motion on a limited basis as set forth herein. One of the arguments made by the Defendants is that Bistro's operation of the current business violates the zoning ordinance of Greenville County and the nature of the business for which the Permit and/or Certificate of Occupancy was issued and Greenville County had threatened to shut down Bistro's business and had issued citations to

employees for violating various ordinances. Bistro's business is similar to the business previously operated at this location which is defined as an "adult cabaret" and was governed by various Consent Orders from previous Court actions. Bistro argued that it was a "successor" to the previous business and that the prior Consent Orders would apply to Bistro and its operation. The Court finds that there is an issue of whether Bistro has a right to continue operating an "adult cabaret" as a non-conforming business under the previous Orders and as a "successor" to the previous business. Therefore, at this juncture and pending a more thorough hearing on Plaintiffs' Motion for Temporary Injunction, the Plaintiff will be allowed to continue operating as an "adult cabaret" in compliance with existing County Ordinances even though it may be nonconforming with County Ordinance 2673 and other zoning ordinances and its current permit and/or Certificate of Occupancy. Therefore, the Defendants are restrained from closing the Plaintiffs business and from issuing citations based on nonconformity with zoning or operation of an "adult cabaret" contrary to its permit and/or certificate of occupancy pending the hearing on Plaintiffs' Motion for Temporary Injunction. But this does not limit the applicability or enforceability of any other County Ordinances. For this limited restraining Order, the Plaintiffs must post security in the amount of \$1000.

The Court denies the Plaintiffs' Motion for Temporary Restraining Order as to the applicability and enforceability of any County Ordinances except as set forth above and as to all other issues, and the Plaintiffs shall have the right to present arguments on those issues at the hearing at the Motion for Temporary Injunction.

It is so ORDERED.

JUNE 1, 2017

Judge's signature on Next Page



Greenville Common Pleas

Case Caption: Greenville Bistro LLC , plaintiff, et al vs. Greenville County ,
defendant, et al
Case Number: 2017CP2303372
Type: Order/Temporary Restraining Order

Motion/Order Granted

s/ Honorable Perry H. Gravely, #2755

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

GREENVILLE BISTRO, LLC, a South
Carolina Limited Liability Company, d/b/a
Buck's Racks & Ribs, and FRONTAGE
ROAD ASSOCIATES, INC., a South
Carolina Corporation,

Plaintiffs,

v.

GREENVILLE COUNTY, a Political
Subdivision of the State of South Carolina,
and WILL LEWIS, in his Official Capacity as
Sheriff of Greenville County,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-03372

**ORDER FOR PARTIAL GRANT AND
PARTIAL DENIAL OF
TEMPORARY INJUNCTIVE RELIEF**

This matter comes before the Court on a Motion filed May 24, 2017, moving the Court to enter a Temporary Injunction enjoining Defendants from enforcing or attempting to enforce certain County Code provisions and ordinances against Plaintiffs. A hearing on Plaintiffs' Motion was held on June 16, 2017. At the call of the case, O. W. Bannister, Luke C. Lirot and Luke A. Burke were present on behalf of Plaintiffs. John Devlin and Scott D. Bergthold were present on behalf of Defendants. The Court has considered all Motions, Memoranda, affidavits, and exhibits filed in this matter, together with the arguments of counsel.

This Court has jurisdiction over this matter pursuant to § 15-53-20, S.C.C., Rule 57, S.C.R.Civ.P., § 15-53-120, S.C.C., and pursuant to Rule 65, S.C.R.Civ.P. The Court also has jurisdiction over Plaintiffs' Federal claims pursuant to 28 U.S.C., §§ 1331, 1343, and 2201 and pursuant to 42 U.S.C. Sec. 1983; 42 U.S.C., Sec.1988, and to the First, Fifth, and Fourteenth Amendments to the Constitution of the United States: *see Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990).

PROCEDURAL HISTORY OF THE CASE

On February 9, 2017, after a long history of controversy between similar businesses at the subject location and Greenville County, Judge Charles B. Simmons entered a Consent Order concerning the establishment of Greenville Bistro's at the subject location. Greenville Bistro represented to the Court that it had no connection with the businesses at the location. Based on that representation, and the like representation of the parties to the suit, Judge Simmons found that there was "no evidence of any connection between Elephant, Inc., Gaines and Greenville Bistro." This Court construes that language as a finding that this Plaintiff, Greenville Bistro, is not a successor to the earlier operator of the business at the location which is the subject of this action. That Order simply allows Greenville Bistro to open and operate a "similar business" to that of the former tenant. Judge Simmons Order further provided that "in the event that Greenville Bistro or any other adult entertainment venue commences operation at the location, full and complete compliance with all applicable laws, ordinances, etc. is expected." Twelve days after this Court entered its Order that had the effect of allowing Greenville Bistro to open and operate, the County adopted Ordinance 4869, which purports to amend the definition of an adult cabaret to regulate establishments offering "semi-nude" entertainment. Once Greenville Bistro commenced its operations, Defendants believed those operations were in violation of various County regulations and ordinances and began to enforce those regulations against Plaintiffs.

Accordingly, Plaintiffs commenced this action on May 23, 2017, and, on May 24, 2017, filed a Motion for Temporary Injunction. Subsequently, on May 30, 2017, Plaintiffs filed a Motion for a Temporary Restraining Order in order to preserve the *status quo* while the Motion for Temporary Injunction was under consideration by the Court.

On June 2, 2017, Judge Perry Gravely entered a Temporary Restraining Order in favor of Plaintiffs granting much of the relief sought by Plaintiffs in their Motion for a Temporary Restraining Order. Subsequently, on June 16, 2017, the undersigned heard oral argument on the Motion for Temporary Injunction and, on July 10, 2017, received Proposed Orders from the parties regarding the Motion for Temporary Injunction.

STANDARD FOR AWARD OF TEMPORARY INJUNCTIVE RELIEF

Rule 65 of the South Carolina Rules of Civil Procedure sets forth the procedure for issuing Temporary Injunctive Relief. Under the relevant case law, a party seeking injunctive relief must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy of law. *Rawlinson Road Homeowners Association, Inc., vs. Jackson*, 395 S.C. 25, 35 (Ct. App. 2011). The Courts recognize that an injunction is a drastic remedy and should be issued only to prevent irreparable harm suffered by the moving party. *AJG Holdings, LLC, vs. Dunn*, 382 S.C. 43 (Ct. App. 2009). The Court must consider each of the three elements to determine whether the drastic remedy of Temporary Injunctive Relief should be granted.

FINDINGS

IRREPARABLE HARM

The loss of First Amendment freedoms constitutes irreparable injury as a matter of law, *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, (1976). Consistent with *Elrod*, the Fourth Circuit has held:

Indeed, the Supreme Court has stated in no uncertain terms that “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); see also

Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978)
 ("Violations of first amendment rights constitute per se irreparable injury."). ...

International Refugee Assistance Project v. Trump, 2017 WL 2273306, *69, (4th Circuit May 25, 2017, *en banc*), partially reversed on other grounds, 2017 WL 2722580, May 25, 2017.

More importantly, the mere showing of a deprivation of First Amendment or other federally protected rights in and of itself establishes both injury and damage. *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965).

Sambo's of Ohio v. City Council of City of Toledo, 466 F.Supp. 177 (N.D. Oh., 1979).

The Court is cognizant of these sound constitutional and legal principles. Further, this Court is particularly sensitive to the free expression of constitutional rights. However, the Plaintiffs have failed to demonstrate how compliance with the provisions of the 2017 Consent Order causes irreparable harm. In that Order, notwithstanding assertions to the contrary by Plaintiff, there is no finding that Greenville Bistro is a successor to previous businesses at the subject location. To the contrary, the Court found, by consent, that there is "*no evidence which establishes a connection between these parties.*" Given the Plaintiff's assertions at the previous hearing before Judge Simmons, the claim of successor status in this suit is a dubious contention. It is problematic, therefore, for the Plaintiffs to claim that they have been harmed by an Order of the Court of which they freely, voluntarily, and readily approved.

The Plaintiffs, however, may have a complaint as to the adaption of Ordinance 4869 soon after the issuance of the February 2017 Order. In keeping with established law, the Plaintiffs would suffer irreparable harm if the subject ordinance abridges its constitutional freedom of expression.

LIKELIHOOD OF SUCCESS ON THE MERITS

When seeking a preliminary injunction, the moving party need not prove an absolute legal right; he need only present “a fair question to raise as to the existence of such a right.” *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). The determination of whether an injunction is granted should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a *prima facie* showing has been made: *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (S.C. App. 2003 (citing *Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969))). “The court must determine only the likelihood of whether [the moving party] will prevail on the merits based on the allegations in his complaint” *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). “Once a *prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

The Plaintiff has met its burden with respect to the issue of enforcement of Ordinance 4869. As discussed above, the Plaintiffs have, however, failed to demonstrate a likelihood of success of the merits for the remaining issues. The Court’s decision is based solely on the moving party’s alleged facts without regard to the ultimate merits of the case.

INADEQUATE REMEDY AT LAW

With regard to the enforcement of Ordinance 4869, Plaintiffs have no adequate remedy at law because Defendants’ efforts to regulate Plaintiffs’ business threaten Plaintiffs with the loss of constitutionally protected rights and freedoms. Therefore, the Plaintiffs have, on this point, met the requisite burden.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Defendants, Greenville County and Will Lewis, their officers, agents servants, employees, and attorneys, and those persons in active concert or participation with them are hereby temporarily enjoined from, in any way, enforcing the provisions of Ordinance 4869 as to the Plaintiffs at the subject location;
2. The remaining temporary relief prayed for by Plaintiffs are respectfully denied. The Plaintiff must comply with any and all applicable laws or ordinances existing at the time of issuance of the February 9, 2017 Consent Order.
3. This Order is without prejudice to any findings of fact or findings of law at the ultimate hearing on the merits; and
4. This injunction shall take effect on the date and time on which it is signed and shall remain in effect pending further order of the Court.

IT IS SO ORDERED.

Robin B. Stilwell, Judge
13th Judicial Circuit

Greenville, South Carolina

Date: _____



Greenville Common Pleas

Case Caption: Greenville Bistro LLC , plaintiff, et al vs. Greenville County ,
defendant, et al
Case Number: 2017CP2303372
Type: Order/Temporary Injunction

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2017-07-17 09:13:49 page 7 of 7

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Greenville Bistro, LLC, a South Carolina
Limited Liability Company, d/b/a Buck's
Racks & Ribs, and Frontage Road Associates,
Inc. a South Carolina Corporation,

Case No: 2017-CP-23-03372

Plaintiffs,

**ORDER GRANTING DEFENDANTS'
MOTION TO ALTER OR AMEND IN
PART, AND DENYING IN PART**

v.

Greenville County, a Political Subdivision of
the State of South Carolina, and Will Lewis in
his Official Capacity as Sheriff of Greenville
County,

Defendants.

This matter comes before the Court upon Defendants' Motion to Alter or Amend the Order Denying Defendants' Motion for Temporary Injunction and Request for Oral Argument. After reviewing the Defendants' Motion, the Court finds that oral argument is not necessary for a final determination of this Motion.

Initially, the Court finds that the Court's May 17, 2018 Order, denying the Defendants' Motion for Temporary Injunction, should be amended to reflect the adoption of Ordinance 4869 as it relates to the issuance of the Plaintiffs certificate of use and occupancy. In the May 17, 2018 Order, the Court found that Ordinance 4869 "was adopted only a few days after the Plaintiffs began operating the subject establishment." (Order at 4, ¶ 16.) However, after reviewing the filings, Ordinance 4869 was adopted a month before the plaintiffs obtained their certificate of use and occupancy until more than a month later. Specifically, Ordinance 4869 was adopted February 21, 2017, and the Plaintiffs certificate of use and occupancy was issued on March 27,

2017. Therefore, the Defendants' Motion to Amend is granted; specifically, Paragraph 16 of the Order is amended to say: "...and Ordinance 4869, which was adopted thirty-four days before the Plaintiffs received their certificate of use and occupancy."

However, the Court finds that this does not affect its previous finding and that there is no basis for further amendments to the May 17 Order. There does not appear to be any additional evidence or grounds to support an amendment to the Order previously filed in this matter. Therefore, the Defendants' Motion to Alter or Amend is granted to the extent it amends paragraph 16; however, the Defendant's Motion is denied with regard to further amendments of the May 17, 2018 Order.

IT IS SO ORDERED.

Perry H. Gravely
Presiding Judge

Greenville, South Carolina

June _____, 2018



Greenville Common Pleas

Case Caption: Greenville Bistro LLC , plaintiff, et al vs. Greenville County ,
defendant, et al
Case Number: 2017CP2303372
Type: Order/Amend

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2018-06-26 13:49:40 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

GREENVILLE BISTRO, LLC, a South
Carolina Limited Liability Company, d/b/a
Buck's Racks & Ribs, and FRONTAGE
ROAD ASSOCIATES, INC., a South Carolina
Corporation,

Plaintiffs,

v.

GREENVILLE COUNTY, a Political
Subdivision of the State of South Carolina, and
WILL LEWIS, in his Official Capacity as
Sheriff of Greenville County,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-_____

SUMMONS

(JURY TRIAL DEMANDED)

To: The Defendant(s) Above Named:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the Complaint upon the subscriber at 401 Pettigru Street, Greenville, SC 29603, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, a judgment by default will be rendered against you for the relief demanded in the Complaint.

BANNISTER, WYATT & STALVEY, LLC

Dated: May 23, 2017

s/O. W. Bannister

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SUBJECT TO ADMISSION PRO HAC VICE

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

GREENVILLE BISTRO, LLC, a South Carolina Limited Liability Company, d/b/a Buck's Racks & Ribs, and FRONTAGE ROAD ASSOCIATES, INC., a South Carolina Corporation,

Plaintiffs,

v.

GREENVILLE COUNTY, a Political Subdivision of the State of South Carolina, and WILL LEWIS, in his Official Capacity as Sheriff of Greenville County,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-_____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(JURY TRIAL DEMANDED)

Plaintiffs, GREENVILLE BISTRO, LLC, d/b/a "*Buck's Racks & Ribs*," and FRONTAGE ROAD ASSOCIATES, INC., for their cause of action against Defendants GREENVILLE COUNTY, a political subdivision of the State of South Carolina and WILL LEWIS in his official capacity as Sheriff of Greenville County allege as follows:

I. JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked pursuant to S.C. Code Ann. §15-53-20 (1976), which provides:

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

and pursuant to Rule 57, S.C.R.C.P.

2. This Court has jurisdiction to grant the injunctive relief sought pursuant to S.C. Code Ann. §15-53-120 (1976), which provides that the Court may grant: "Further relief based on a declaratory judgment or decree ...," with an injunction being the typical manner in which a declaratory judgment is enforced.

3. Likewise, this Court has jurisdiction to grant the temporary injunction pursuant to Rule 65, S.C.R.C.P.

4. The jurisdiction of this Court is also invoked pursuant to 28 U.S.C. §§ 1331, 1343, and 2201 and pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1988, and to the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

5. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ... (§ 1983)

6. Pursuant to *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990), this Court has concurrent jurisdiction over the Federal claims herein.

7. For the purposes of jurisdiction and venue, all parties are residents of Greenville County, South Carolina, which is within the geographic jurisdiction of the Greenville County Court of Common Pleas.

8. All events complained of herein occurred in Greenville County, South Carolina.

9. Accordingly, venue is proper in the Court of Common Pleas for Greenville County.

II. THE PARTIES

10. Plaintiff GREENVILLE BISTRO, LLC, is a South Carolina Limited Liability Company doing business as “*Buck’s Racks & Ribs*,” at 805 Frontage Road in unincorporated Greenville County (“Greenville Bistro”).

11. Plaintiff FRONTAGE ROAD ASSOCIATES, INC. is a South Carolina Corporation which owns the real property at 805 Frontage Road in unincorporated Greenville County, the property on which Greenville Bistro has operated and wishes to operate its business (“Frontage Road”).

12. Defendant GREENVILLE COUNTY is a political subdivision of the State of South Carolina (the “County”), duly organized and operating pursuant to the Constitution and Laws of the State of South Carolina.

13. Defendant WILL LEWIS is the duly authorized Sheriff of Greenville County (the “Sheriff” or “Lewis”), who is charged with enforcing the laws and ordinances of the State of South Carolina and of Greenville County. Defendant LEWIS is sued in his official capacity only.

III. GENERAL ALLEGATIONS

A. THE HISTORY OF THE PROPERTY

14. The subject property was operated from 1999 through 2015 as a nightclub named “*Platinum Plus*,” presenting female entertainers who, while scantily clad, did not display “specified anatomical areas,” or appear “semi-nude,” both as defined by the Greenville County Code, and was, therefore, not considered to be an Adult Use.

15. The property which is the subject of this action is located in unincorporated Greenville County.

16. *Platinum Plus* was licensed by the State of South Carolina to sell alcoholic beverages by the drink.

17. *Platinum Plus* was operated by an entity known as Elephant, Inc., which is a South Carolina corporation.

18. There are three other clubs in Greenville County: *Lust, the Trophy Club* (formerly "Scores") and *Lady Godiva*, operating using the same business model and all of which competed with *Platinum Plus*.

19. *Platinum Plus* began operating in 1999 and initially operated without incident.

20. Apparently beginning in late 2000 or early 2001, controversies arose between Elephant, Inc. and Greenville County.

21. Those controversies led Elephant, Inc. to file suit against the County on March 20, 2001, *Elephant, Inc. v. Greenville County*, Greenville County Court of Common Pleas, Case No. 01-CP-23-1793.

22. This 2001 litigation was disposed of on January 24, 2002.

23. The disposition of the 2001 litigation was by means of a Consent Order memorializing an agreement between the parties, as shown by Exhibit A, attached hereto and made a part hereof by reference. This Order (hereinafter the "2002 Order"), was entered on January 24, 2002, the same day that the case was disposed of.

24. After another several years of operation, starting in 2015, the business, as then operated by Elephant, Inc., began to attract disparate and intense scrutiny from law enforcement. For unknown reasons, the other three similarly situated clubs did not, and do not, draw the same concentrated scrutiny as did *Platinum Plus*.

25. As a result of this increased scrutiny, on April 17, 2015, the County, through the

Solicitor's Office, brought a nuisance abatement action (Case No. 2015-CP-23-02597), under S.C. Code Ann. §15-43-10 (1976), *et. seq.*, against *Platinum Plus*.

26. This civil action resulted in a Consent Order filed June 4, 2015 (the "2015 Order"), which Consent Order, as more fully set out in Count I herein, adopted the earlier "2002 Order." It is this "2002 Order" that is the subject of Count I of the instant complaint.

27. The 2015 Order resulted in Elephant, Inc., shuttering the doors of *Platinum Plus* for approximately 180 days. A copy of this 2015 Order is attached hereto and incorporated herein as Exhibit B.

28. Upon reopening, Elephant, Inc. was alleged to have again violated the Consent Order, with the result that *Platinum Plus* was again shuttered from approximately July 2016, until February 7, 2017. Portions the second order closing *Platinum Plus* are presently on appeal to the South Carolina Court of Appeals. A copy of this 2017 Order is attached hereto and incorporated herein as Exhibit C.

29. Thereafter, Frontage Road and Elephant, Inc. terminated their business relationship and Frontage Road and Greenville Bistro entered into a Lease Agreement, with a critical addendum (Exhibit D, attached hereto and made a part hereof by reference), by which Greenville Bistro undertook to resume the operation in essentially the same form as *Platinum Plus*, as a *successor*, against resuming the previously compliant business format and continuing to provide food service on the premises.

30. This Court, in Case No, 2015-CP-23-02597, on February 9, 2017, issued a new Order (the "2017 Order"), which found in part:

The Court must be mindful of the fact that the previous Orders of this Court were based upon the conduct allowed and/or condoned by Elephant, Inc. and Kenwood Gaines, [principal of Elephant, Inc.,] which conduct constituted a violation of the 2002 Order and

was also found to be a nuisance within the applicable statutes. The removal of Elephant, Inc. and Kenwood Gaines from possession of the property at 805 Frontage Road and their subsequent abandonment of the lease and the premises appears to have effectively abated the nuisance.

Order, February 9, 2017, in Case No. 15-CP-23- 02597, p. 3, attached hereto as Exhibit C.

31. While the Court noted that Greenville Bistro intended “to commence operations of a similar business” (*Ibid.*), the Court also noted that the previous findings of a nuisance and orders of closure were “directed personally to Gaines, and Elephant, Inc.” (*Id.*, Exhibit C, at 4).

32. Even though the entertainers do not display “specified anatomical areas,” the entertainment to be provided by Greenville Bistro constitutes free expression protected by the First Amendment to the Constitution of the United States and by Article I, § 2 of the Constitution of the State of South Carolina.

B. THE COUNTY’S ADULT-ORIENTED ENTERTAINMENT ESTABLISHMENT REGULATIONS

33. The first reference to Adult-Oriented Entertainment Establishments in the Greenville County Code was as section 2-5.71 of the 1976 Code.¹

34. The current Adult-Oriented Entertainment Establishments were established by Ordinance 2673, adopted in 1995.

35. Portions of the regulations found in Chapter 2.5 of the Greenville County Code have been modified by judicial decisions: *see, e.g. Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 S.C. 2000).

36. Although *Buck’s Racks & Ribs* is operated so that dancers do not display “specified anatomical areas,” or engage in “specified sexual activities,” Greenville County is

¹ Likely as a result of the Supreme Court approving this type of regulation in June, 1976: *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440 (1976).

now treating the business as a “Sexually-oriented Entertainment Establishment,” in spite of the fact that Greenville Bistro is a *successor* to the original beneficiaries of the 2002 Order.

37. Based upon information and belief, in response to this Court’s explicit approval of Greenville Bistro commencing operation, Greenville County made efforts to adopt Ordinance 4869, which purported to adopt a new definition of “semi-nude,” banning a form of expression already prohibited by the Consent Order(s) applicable to *Buck’s Racks & Ribs*.

38. Further, despite this Court explicitly approving *Buck’s Racks & Ribs* operating a similar business, Greenville County is now trying to prevent *any* form of entertainment or expression at the subject property. See Exhibit E, Notices of Violation issued by the County to the subject location, attached hereto and incorporated herein.

COUNT I
DECLARATORY AND INJUNCTIVE RELIEF
VIOLATION OF THE 2002 ORDER

39. Plaintiffs re-allege and incorporate paragraphs 1 through 38 above as if set forth fully herein.

40. Apparently beginning in late 2000 or early 2001, controversies arose between Elephant, Inc. and Greenville County.

41. These controversies led Elephant, Inc. to file suit against the County on March 20, 2001, *Elephant, Inc. v. Greenville County*, Greenville County Court of Common Pleas, Case No. 01-CP-23-1793.

42. This 2001 litigation was disposed of on January 24, 2002.

43. The disposition of the 2001 litigation was by means of a Consent Order memorializing an agreement between the parties, Exhibit A, attached hereto and made a part hereof by reference. This Order (the “2002 Order”), was entered on June 24, 2002, the same day

that the case was disposed of.

44. Subsequently, in 2015, Greenville County claimed that Elephant, Inc. was operating *Platinum Plus* in violation of the 2002 Order.

45. Accordingly, on April 17, 2015, Greenville County filed suit against Elephant, Inc. and Frontage Road, alleging that Elephant, Inc. was violating the 2002 Order.

46. Greenville County subsequently sought a temporary injunction in the 2015 matter.

47. The 2002 Order (itself attached as Exhibit B to Greenville County's Memorandum of Law in support of a Motion for Temporary Injunction), was filed in the 2015 matter on April 22, 2015.

48. Accordingly, the authenticity and relevance of this Order are beyond dispute.

49. The 2002 Order provides in relevant part:

In accordance with the agreement reached by the parties, Plaintiffs agree on behalf of themselves and their successors and assigns to the following:

1. Plaintiffs and their successors and assigns shall not permit any person at any time to appear in a "state of nudity" while in or on the premises of Plaintiffs' businesses. "State of Nudity" is currently defined in Greenville County Ordinance 2673 as "the appearance of a human bare buttock, anus, male genitals, female genitals, or female breasts. **County agrees** that under the definition currently set forth in Ordinance 2673, a person at Plaintiffs' place of businesses would be considered to be in a "state of nudity" when any one or more of the following occur:
 - a. A female breast is shown with anything less than a completely opaque covering of the entire areola. As an illustration, a "pastie" or other covering which is both completely opaque and completely covering the areola, would be sufficient minimum coverage to avoid the "state of nudity" as currently defined in Ordinance 2673; or
 - b. A human buttock is exposed with anything less than

a completely opaque covering of the genitalia and anus and a completely opaque covering over the buttocks with a minimum width of two (2) or more inches, at the sacrum. As an illustration, completely opaque “thongs”, bikini bottoms, and “T-bar” forms of apparel that both completely cover the genitalia and anus and cover two (2) or more inches, at the sacrum would be sufficient minimum coverage to avoid the “state of nudity” as currently defined in Ordinance 2673; or

- c. Male or female genitals are exposed with anything less than a completely opaque covering.

Elephant, Inc. v. Greenville County, Greenville County Court of Common Pleas, Case No. 01-CP-23-1793, Consent Order, January 24, 2002. [**Bold Emphasis Added**, underscoring emphasis in original. Exhibit A hereto.]

50. The 2002 Order applies to the *successors and assigns* of Elephant, Inc. *Id.*, *seriatim*.

51. Violations of the 2002 Order “shall be punishable as contempt of Court.” *Id.*, at page 4.

52. In an Order dated February 9, 2017, this Court found that Greenville Bistro, LLC, was a *successor* to Elephant, Inc., and, for the purposes of releasing the earlier Contempt Order, was also unaffiliated with Elephant, Inc. See Exhibit C.

53. Previously, on June 3, 2015, Elephant, Inc., Frontage Road and Greenville County entered into a new Consent Order in this matter, Exhibit B, attached hereto and made a part hereof by reference (the “2015 Order”).

54. The 2015 Order specifically incorporates the 2002 Order (at page 5).²

55. After the issuance of this Court’s Order of February 9, 2017, finding Greenville Bistro to be a *successor* to, but unaffiliated with, Elephant, Inc., Greenville Bistro began to make

² The 2015 Order refers to a “2003” Order, but the attached Exhibit is the 2002 Order attached hereto as Exhibit A.

preparations to operate a restaurant: *Buck's Racks & Ribs* at the subject location. See Exhibit C.

56. In particular, *Buck's Racks & Ribs* applied for a new Certificate of Occupancy, which was granted on March 27, 2017, Exhibit F, attached hereto and made a part hereof by reference.

57. Greenville County's review of the application noted that it was for a "Change of tenant/no plan review." See Exhibit F.

58. In other words, no change of use or occupancy occurred when Greenville Bistro began to operate the business in full compliance with that allowable in the 2002 Order, when the business was operated by Elephant, Inc.: a change in tenant only, which this Court properly noted would be a "similar business."

59. In the operation of *Buck's Racks & Ribs*, Greenville Bistro complied scrupulously with the 2002 Order as incorporated into the 2015 Order.

60. Specifically, no employee or agent of, or independent contractor at, *Buck's Racks & Ribs*:

- a. Appears in a state of nudity;
- b. Engages in any "specified sexual activities;" or
- c. Displays any "specified anatomical areas;"

as defined in 2002 (see Exhibit A, the 2002 Order) or as defined today.

61. Further, 12 days after this Court entered its Order that had the effect of allowing Greenville Bistro to open and operate, the County adopted Ordinance 4869, (Exhibit H, attached hereto and made a part hereof by reference), which purports to amend the definition of an adult cabaret to regulate establishments offering "seminude" entertainment, defined as:

"(13) Semi-nude or a state of semi-nudity means the showing of the female breast below a horizontal line across the top of the

areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.”

Ordinance 4869, Exhibit G, page 2.

62. This “new” definition of “semi-nudity” is essentially indistinguishable from the definition of nudity set forth in the 2002 Order.

63. No employee or agent of, or independent contractor at, *Buck's Racks & Ribs*, appears “semi-nude,” as now defined.

64. Notwithstanding 18 years of operation as a place of entertainment offering live entertainment, and notwithstanding not one, but two, Consent Orders acknowledging the live but non-adult entertainment business format on the subject property, Greenville County has, on the pretext of some alleged change of use or occupancy, attempted to stop and restrain the offering of live entertainment on the property. This attempt to close the successor business, Greenville Bistro, on the subject property and silence protected speech was in the form of:

- a. Citations issued to one employee and one independent performer, on a form entitled “Uniform Traffic Ticket,” Exhibit H , attached hereto and made a part hereof by reference; and
- b. “Official Notices” of violation, requiring the immediate cessation of all live entertainment on the property, Exhibit E, attached hereto and made a part hereof by reference.

65. These citations and demand for immediate cessation of the operation at *Buck's Racks & Ribs* are deliberately violative of the mutual Consent Order entered in 2002 (the 2002

Order) and re-adopted in the 2015 Consent Order (the 2015 Order).

66. All the actions of the Defendant County and Defendant Sheriff have been committed under color of state law.

67. The Plaintiffs have retained the undersigned attorneys to represent them in this action, for which they have agreed to pay a reasonable fee.

WHEREFORE, Plaintiffs respectfully request the Court to grant the following relief:

1. Entering a Declaratory Judgment declaring that, Greenville Bistro is a "successor," as identified in the 2002, 2015 and 2017 Orders, and may operate its business in compliance with said Orders;
2. That, based on the Defendants' willful, repeated and unabated violations of the relevant provisions of the 2002 Order, as re-adopted in the 2015 Order, Defendant County and Defendant Sheriff be found in contempt of said Orders and be sanctioned to the maximum extent allowed by law;
3. Order that Plaintiff Greenville Bistro be permitted to exercise its free speech rights as permitted by the 2002 Consent Order, such that Plaintiff Frontage Road may enjoy the benefits of its leasehold interest.
4. Appropriately set and hold a hearing, and temporarily enjoin Defendants from applying and enforcing the County's Sexually-oriented Entertainment Establishment Code, in whole or in part, against Plaintiffs, with the subsequent entry of a permanent injunction after proper administration of the complaint herein;
5. Awarding Plaintiffs the costs of this action, any attorney's fees to

which they may be entitled, and such other relief as may be just and proper.

COUNT II
DECLARATORY AND INJUNCTIVE RELIEF
ORDINANCE 4869 VIOLATES PLAINTIFFS' FREE SPEECH RIGHTS

68. Plaintiffs re-allege and incorporate paragraphs 1 through 67 above as if set forth fully herein.

69. The entertainment to be offered by Greenville Bistro, whether or not it includes the display of "specified anatomical areas," is free expression protected by the First Amendment to the Constitution of the United States and by Article I, § 2 of the Constitution of the State of South Carolina.

70. Chapter 2.5 of the Greenville County Code as adopted by Ordinance 2673 and now as amended by Ordinance 4869, silences protected speech by, by way of example and not limitation:

- a. Failing to comport with the applicable Consent Orders previously applied to the subject property;
- b. Failing to provide adequate alternative avenues of communication for sexually oriented speech;
- c. Being arbitrary and capricious on its face because it lacks any sort of predicate that supports the adoption of the underlying ordinances and the County's contention that the Code is designed to combat "adverse secondary effects" and thus does not advance any legitimate governmental interest;
- d. Being arbitrary and capricious as applied because, even if there were justification for the some aspects of the Code, there is no justification for the

requirement in § 2.5-82 that a Sexually-oriented Entertainment Establishment be located 1,500 feet from a disqualifying land use;

e. Ordinance 4869 comprises a Bill of Attainder designed to legislatively punish Plaintiffs for their efforts to present protected speech;

f. Violating the doctrine of laches by refusing to permit what this Court had identified as a “similar business,” at the subject location;

g. Being unconstitutionally vague in that operative terms of Chapter 2.5 fail to give a person of ordinary intelligence fair notice that his conduct is forbidden by the Chapter;

h. Being, on its face and as applied, overbroad in that the Chapter criminalizes conduct that was previously acceptable to Greenville County and is beyond the legitimate use of its police power by the County;

i. Operating to deny Plaintiffs equal protection of the law;

j. Operating as a taking of protected property rights without just compensation; and

k. Having, as applied to Plaintiffs, an improper and impermissible purpose.

WHEREFORE, Plaintiffs respectfully request the Court to grant the following relief:

1. Entering a Declaratory Judgment declaring that Chapter 2.5 of the Greenville County Code, as adopted by Ordinance 2673 and as amended by Ordinance 4869, violates the Constitutions of the United States and of the State of South Carolina for the reasons set out in this Count;

2. Appropriately set and hold a hearing, and temporarily

enjoin Defendants from applying and enforcing the County's Sexually-oriented Entertainment Establishment Code, in whole or in part, against Plaintiffs, with the subsequent entry of a permanent injunction after proper administration of the complaint herein;

3. Awarding Plaintiffs the costs of this action, any attorney's fees to which they may be entitled, and such other relief as may be just and proper.

DEMAND FOR A JURY TRIAL

A jury trial is demanded for all issues so triable.

REQUEST FOR ATTORNEY'S FEES

This is an action to enforce rights and privileges guaranteed by the Constitution of the United States. As such, Plaintiffs are entitled to an award of attorney's fees, pursuant to 42 U.S.C. § 1988.

BANNISTER, WYATT & STALVEY, LLC

Dated: May 23, 2017

s/O. W. Bannister

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SUBJECT TO ADMISSION PRO HAC VICE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No. 2017-CP-23-03372
	)	
Greenville Bistro, LLC, a South Carolina,	)	
Limited Liability Company, d/b/a Buck's	)	
Racks & Ribs, and Frontage Road Associates,	)	
Inc. a South Carolina Corporation,	)	
	)	
Plaintiffs,	)	DEFENDANTS' ANSWER AND
	)	COUNTERCLAIM FOR INJUNCTION
	)	
v.	)	
	)	
Greenville County, a Political Subdivision of	)	
the State of South Carolina, and Will Lewis,	)	
in his Official Capacity as Sheriff of	)	
Greenville County,	)	
	)	
Defendants.	)	

Defendants Greenville County ("County") and Will Lewis ("Sheriff"), answering the Complaint of the Plaintiffs, and setting forth their counterclaim for injunctive relief, would show this Court as follows:

FOR A FIRST DEFENSE

1. All allegations not expressly admitted, modified, or explained are denied.
2. Paragraph 1 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.
3. Paragraph 2 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.
4. Paragraph 3 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.
5. Paragraph 4 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

6. Answering paragraph 5, County and Sheriff would admit that 42 U.S.C. § 1983 contains the provision set forth in said paragraph.

7. Paragraph 6 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

8. Answering paragraph 7, the County and Sheriff would admit that they both are within the geographic jurisdiction of the Greenville County Court of Common Pleas.

9. On information and belief, paragraph 8 is admitted.

10. Paragraph 9 is admitted.

11. County and Sheriff are without information as to the allegations of paragraph 10 to the extent it alleges the corporate status of Plaintiff Greenville Bistro, LLC. On information and belief, the County and Sheriff would admit that that entity is doing business as set forth therein at the location set forth therein.

12. On information and belief, paragraph 11 is admitted.

13. Paragraph 12 is admitted.

14. Paragraph 13 is admitted.

15. Answering paragraph 14, County and Sheriff would admit that the subject property had previously been operated for approximately the period of the time set forth therein as "Platinum Plus," but would deny the remainder of the allegations in paragraph 14.

16. Paragraph 15 is admitted.

17. On information and belief, paragraph 16 is admitted.

18. On information and belief, the County and Sheriff admit that Platinum Plus was operated by Elephant, Inc.

19. Answering paragraph 18, the County and Sheriff are without information as to whether the entities described therein are “operating using the same business model” as the former Platinum plus, and therefore deny same.

20. The County and Sheriff lack information sufficient to form a belief as to paragraph 19, and therefore deny the same.

21. Answering paragraph 20, the County and Sheriff would admit that in approximately the time frame set forth therein, Elephant, Inc. began litigation against Greenville County.

22. Answering paragraph 21, the County and Sheriff are without information as to precisely what led Elephant, Inc. to file suit against the County, and therefore denies the same.

23. Answering paragraph 22, the County and Sheriff would admit only that this Court entered an order on January 24, 2002 in the 2001 case between Elephant, Inc. and the County, which order dismissed the case.

24. Answering paragraph 23, the County and Sheriff would admit that a Consent Order was filed in the Elephant, Inc. litigation, and that said consent agreement appears to be Exhibit “A” to Plaintiffs’ Complaint.

25. Answering paragraph 24, the County and Sheriff would admit only that in 2015 Elephant, Inc. was found to be in near-constant violation of its obligations under the 2002 Consent Order, and that law enforcement became involved. All other allegations of said paragraph are denied.

26. Answering paragraph 25, the County and Sheriff would admit that the action set forth therein was brought against, among others, Platinum Plus. All other allegations of said paragraph are denied.

27. Answering paragraph 26, the County and Sheriff would admit that the “2015 Order” was filed in the litigation against Platinum Plus. Further answering said paragraph, the County and Sheriff would crave reference to its precise language for what it may or may not have adopted.

28. Answering paragraph 27, the County and Sheriff would admit that as a result of multiple violations of the 2002 Order, the 2015 Order required Elephant, Inc. to close Platinum Plus for 180 days. The County and Sheriff would crave reference to that 2015 Order for its terms. Further answering said paragraph, the County and Sheriff would admit that said 2015 Order is in fact attached to Plaintiffs’ Complaint as Exhibit “B”.

29. Answering paragraph 28, the County and Sheriff would admit that Elephant, Inc. violated the Consent Order upon reopening and was closed for a period of time thereafter. Further answering said paragraph, the County and Sheriff are without information as to whether or not any portion of the Order closing Platinum Plus are on appeal, and therefore deny the same. Further answering said paragraph, the County and Sheriff would admit that that the Order closing Platinum Plus, as filed with the Clerk of Court on July 27, 2016, is attached to Plaintiffs’ Complaint as an unmarked exhibit after Exhibit “B”.

30. Answering paragraph 29, the County and Sheriff are without information as to the business relationship between Frontage Road and its several tenants. Further answering said paragraph, the County and Sheriff would deny that any lease agreement was attached to Plaintiffs’ Complaint, and would further deny that any “critical addendum” was attached to said Complaint. All other allegations of said paragraph are denied.

31. Answering paragraph 30, the County and Sheriff would admit that in the 2015 litigation, the Court issued an Order on February 9, 2017 which contained the language quoted in said paragraph. Further answering said paragraph, the County and Sheriff would deny that said

Order was originally attached to Plaintiffs' Complaint as Exhibit "C" but would admit that it was filed thereafter.

32. Answering paragraph 31, the County and Sheriff would crave reference to the February 9, 2017 Order for its terms.

33. Answering paragraph 32, the County and Sheriff contend that said paragraph contains only legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

34. Paragraph 33 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

35. Paragraph 34 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

36. Paragraph 35 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

37. Answering paragraph 36, the County and Sheriff would admit that citations have been issued to various persons within Buck's Racks & Ribs for violation of various ordinances to which they are subject. Further answering said paragraph, the County and Sheriff would deny that Greenville Bistro, LLC is a "successor to the original beneficiaries of the 2002 Order."

38. Answering paragraph 37, the County and Sheriff would admit that Ordinance 4869 was adopted by Greenville County, but would deny Plaintiffs' contention as to the reason for that adoption. Further answering said paragraph, the County and Sheriff would crave reference to that Ordinance for its terms. All other allegations of said paragraph are denied.

39. Answering paragraph 38, the County and Sheriff would deny that the February 9, 2017 Order “explicitly approv[ed] Buck’s Racks & Ribs operating a similar business.” All other allegations of said paragraph are denied.

40. Answering paragraph 39, the County and Sheriff would incorporate its previous responses set forth herein.

41. Answering paragraphs 40 through 43, the County and Sheriff would incorporate their responses to paragraphs 20 through 23, which are substantially the same allegations.

42. Answering paragraph 44, the County and Sheriff would admit that in 2015 the Solicitor claimed that Elephant, Inc. was operating Platinum Plus in violation of the 2002 Order. This Court agreed.

43. Answer paragraph 45, the County and Sheriff would admit that the Solicitor filed suit against Elephant, Inc. and Frontage Road, alleging that Elephant, Inc. was violating the 2002 Order.

44. Answering paragraph 46, the County and Sheriff would crave reference to the pleadings in the 2015 suit for its requests for relief.

45. Answering paragraph 47, the County and Sheriff would crave reference to the public record for the filings in the 2015 matter.

46. Answering paragraph 48, the County and Sheriff would admit that the 2002 Order, attached to Plaintiffs’ Complaint as Exhibit “A” is an authentic copy of said Order. Further answering said paragraph, the relevance of that Order is a legal issue to which the County and Sheriff need not respond. To the extent any response is required, any allegations therein stand denied.

47. Answering paragraph 49, the County and Sheriff would crave reference to the 2002 Order for its terms.

48. Answering paragraph 50, the County and Sheriff would admit that, at various points within, the 2002 Order states that it is binding upon any successors and assigns of the plaintiffs in that case.

49. Answering paragraph 51, the County and Sheriff admit that the 2002 Order contained the language set forth in said paragraph.

50. Answering paragraph 52, the County and Sheriff would crave reference to the terms of the February 9, 2017 Order for its language.

51. Answering paragraph 53, the County and Sheriff would crave reference to the terms of the 2015 Order for its language.

52. Answering paragraph 54, the County and Sheriff would crave reference to the terms of the 2015 Order for its language.

53. The County and Sheriff are without information as to the allegations of paragraph 55, and therefore deny the same.

54. On information and belief, paragraph 56 is admitted.

55. Answering paragraph 57, the County and Sheriff would crave reference to the Certificate of Occupancy documents for their terms.

56. Paragraph 58 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

57. The County and Sheriff are without information as to the allegations contained in paragraph 59 and therefore deny the same.

58. The County and Sheriff are without information as to the allegations contained in paragraph 60 and therefore deny the same.

59. Answering paragraph 61, the County and Sheriff would admit that the Greenville County Council adopted the ordinance set forth therein, which ordinance speaks for itself.

60. Paragraph 62 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

61. Paragraph 63 is denied.

62. Responding to paragraph 64, the County and Sheriff would admit so much of said paragraph as alleges that citations have been issued and official notices to cease and desist have been served. The citations and official notices speak for themselves. All other allegations of said paragraph are denied.

63. Paragraph 65 is denied.

64. Paragraph 66 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

65. The County and Sheriff are without information as to the allegations contained in paragraph 67 and therefore deny the same. The County and Sheriff deny that Plaintiffs are entitled to any of the relief requested in the prayer for relief immediately following paragraph 67.

66. Answering paragraph 68, The County and Sheriff incorporate their previous responses herein where consistent.

67. Paragraph 69 sets forth a legal conclusion to which no response is required. To the extent any response is required, any allegations therein stand denied.

68. Paragraph 70, including all subparts, is denied. The County and Sheriff deny that Plaintiffs are entitled to any relief requested in the prayer for relief following paragraph 68.

FOR A SECOND DEFENSE

69. The County and Sheriff incorporate their previous responses herein where consistent.

70. To the extent Plaintiffs' Complaint seeks relief sounding in equity, it is barred by the doctrine that he who seeks equity must come into court with clean hands.

FOR A THIRD DEFENSE

71. The County and Sheriff incorporate their previous responses herein where consistent.

72. Plaintiffs' Complaint is barred by the doctrine of judicial estoppel.

FOR A FOURTH DEFENSE

73. The County and Sheriff incorporate their previous responses herein where consistent.

74. Plaintiffs' Complaint is barred by the affirmative defense of misrepresentation.

FOR A FIFTH DEFENSE

75. The County and Sheriff incorporate their previous responses herein where consistent.

76. As to Count II, Ordinance 4869 is presumed constitutional and, as a matter of law, is constitutional and legally valid in all respects.

FOR A SIXTH DEFENSE

77. The County and Sheriff incorporate their previous responses herein where consistent.

78. Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action, and should therefore be dismissed.

COUNTERCLAIM FOR INJUNCTIVE RELIEF AGAINST ALL PLAINTIFFS

79. The County and Sheriff incorporate their previous responses herein where consistent.

80. The Court has jurisdiction to grant injunctive relief per Rule 65, S.C.R.C.P., and the County has the authority to seek injunctive relief. *See* S.C. Code Ann. § 4-9-30(14) (“County officials are further empowered to seek and obtain compliance with ordinances and regulations issued pursuant thereto through injunctive relief in courts of competent jurisdiction.”).

81. Additionally, Section 17 of Greenville County Ordinance No. 2673 (the “Sexually Oriented Business Ordinance,” “SOB Ordinance,” or the “Ordinance”), adopted February 7, 1995, provides that “[a] person who operates or causes to be operated a sexually oriented business . . . in violation of Section 12 of this ordinance is subject to a suit for injunction as well as prosecution for criminal violations.” (*See* Ordinance No. 2673, attached hereto as Exhibit 1.)

82. Section 12(a) of the SOB Ordinance states that “[a]ll sexually oriented businesses shall be located within an S-1 district.” Moreover, Section 12(b) of the SOB Ordinance prohibits a sexually oriented business (“SOB”) from operating within 1,500 feet of specified land uses and zoning districts, including “[t]he property line of a lot devoted primarily to residential use” and “[a] boundary of a residential district.”

83. Section 12(e) of the Ordinance specifies that the measurement shall be “from the nearest portion of the building or structure used as part of the premises where a sexually oriented business is conducted, to the nearest property line” of the land uses required to be buffered.

84. Several adult businesses challenged the SOB Ordinance, resulting in the South Carolina Supreme Court’s decision in *Harkins v. Greenville County*, 340 S.C. 606 (June 12, 2000). As modified on rehearing, the June 12, 2000 *Harkins* decision invalidated the permitting

requirements of the Ordinance, but specifically upheld the location restrictions in Section 12 set forth in the previous paragraph. 340 S.C. at 621.

85. After our Supreme Court upheld the location restrictions, the County sued, inter alia, the prior tenants at 805 Frontage Road—Kenwood Enterprises, Inc., and Elephant, Inc. d/b/a Platinum Plus, and Ken Wood (collectively, “Platinum Plus”)—to enjoin them from operating a sexually oriented business at that location because it is in violation of Section 12’s prohibitions on the operation of a sexually oriented business within 1,500 feet of a residential zone or a lot devoted primarily to residential use.

86. On January 19, 2001, Judge Saunders of this Court granted the County’s motion for summary judgment. As for Platinum’s violation of the Section 12 location restrictions, Judge Saunders held that “Platinum is located within 1,500 feet of a church, the boundary of residential districts, the property lines of lots devoted primarily to residential use, and a family oriented recreation facility.” (January 2001 Injunction in *Greenville County v. Kenwood Enterprises, Inc., et al.* C.A. No. 2000-CP-23-4645 (“January 2001 Injunction”) Exhibit 2 attached hereto, at 7.)

87. Judge Saunders held that “Platinum also knew that it could not operate a sexually oriented business at its current location. Indeed, following discussions with County officials regarding this fact, Platinum affirmatively represented to County officials that it would not be operating as an adult entertainment establishment.” (*Id.* at 7-8.)

88. In the same order, the Court granted the County a permanent injunction against the Platinum Plus defendants, stating:

In light of my rulings herein, summary judgment is hereby entered in favor of Greenville County. Defendants are hereby enjoined from further operation of their businesses in violation of Ordinance 2673 and **are ordered to comply with the Ordinance by ceasing the operation of their businesses as sexually-oriented businesses at their current locations.** Platinum and Heartbreakers were not in

business at the time County Council adopted the Ordinance and are not entitled to any amortization period.

(January 2001 Injunction, attached hereto as Exhibit 2, at 7.)

89. On January 27, 2003, the Supreme Court of South Carolina upheld Ordinance No. 2673 and the 2001 injunction, as entered, in a published opinion. *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157 (2003).¹

90. After the January 2001 Injunction was entered, Elephant, Inc. d/b/a Platinum Plus, Kenwood Enterprises, Inc., Ken Wood, and Nepals, Inc. brought an action for declaratory relief against the County, C.A. 01-CP-23-1793, which resulted in a January 24, 2002 Order by Judge Kittredge (the “2002 Order,” attached as Exhibit A to Plaintiffs’ Complaint herein).² The 2002 Order set forth an agreement between the parties and then dismissed the case without prejudice. (Complaint Exhibit A at 4.) In the 2002 Order, the Platinum Plus plaintiffs agreed that they would *not* “engage in activities that if conducted, would constitute their business as a ‘sexually oriented business’ as that term is defined in Greenville County Ordinance 2673,” as a sexually oriented business at 805 Frontage Road would be “in violation of the locational requirements set forth in Section 12” of that Ordinance. (*Id.* at 2.) The 2002 Order stated that it was binding on the Plaintiffs therein and “their successors or assigns,” a term which Judge Kittredge defined when he stated as follows: “Plaintiffs agree that if they transfer their interest in their businesses, they will inform their successors and assigns of the agreements set forth in this Order and this Order shall be binding upon Plaintiff’s successor’s and assigns.” (*Id.* at 3.)

¹ One portion of the *Kenwood Enterprises* decision that is not relevant here—which deals with the rule for stating a takings claim—was overruled by *Byrd v. City of Hartsville*, 365 S.C. 650 (2005).

² Paragraphs 90 through 95 herein are unnecessary for the Defendants’ counterclaim for injunction against Greenville Bistro and Frontage Road. This is because the County’s claim for injunction is straightforward: County ordinances have continuously prohibited a sexually oriented business from operating at 805 Frontage Road since 1995. But because Greenville Bistro relies on various court orders—which did not involve, and do not apply to it—to argue that it *can* operate a sexually oriented business at 805 Frontage Road, the County includes these paragraphs to show otherwise.

91. In 2015, the Solicitor brought a public nuisance action against several Platinum Plus-related entities and persons (collectively, the “Respondents”), including Frontage Road Associates, Inc., the owner of the property at 805 Frontage Road. On May 6, 2015, Judge Simmons entered a temporary injunction closing Platinum Plus. On June 4, 2015, Judge Simmons entered a Consent Order (the “2015 Order”) wherein Respondents Elephant, Inc. and Ken Gaines “stipulate[d] that the Solicitor possesses and could present sufficient evidence . . . that a presiding judge could find that Platinum Plus Greenville constituted a public nuisance within the meaning of the Nuisance Statute.” (Complaint Exh. B. at 3.) The 2015 Order required Platinum Plus to close for 180 days and, upon reopening, to comply with extensive monitoring requirements. The 2015 Order also incorporated the 2002 Order’s terms, mandating Platinum Plus’s “full compliance” with same. (*Id.* at 3-5.)

92. On April 27, 2016, the Solicitor filed a Verified Petition seeking contempt findings against Elephant, Inc. and Ken Gaines for violating the 2015 Order. On July 27, 2016, Judge Simmons found that Elephant, Inc. and Gains were blatantly operating Platinum Plus in violation of the 2015 Order, and entered criminal and civil contempt sanctions against them, including a \$100,000 fine payable to the Clerk of Court, extension of the monitoring requirements, and an additional 180-day closure. (Complaint, Unmarked Exhibit,³ 2016 Order at 4-5 (factual findings), 13-16 (contempt sanctions).)

93. Following the second closing of Platinum Plus for violations of court orders, Elephant, Inc. abandoned its leasehold interest in the property.

³ Judge Simmons’s July 27, 2016 Order appears after Exhibit B and before Exhibit D to the Complaint as originally filed.

94. Aware that the previous court orders imposed significant and expensive restrictions on the ability of a successor to Platinum Plus to operate, Plaintiff Frontage Road Associates, Inc., thereafter sought to install a new tenant, Greenville Bistro, LLC.

95. On December 5, 2016, Frontage Road filed a motion in the Solicitor's 2015 case to have the Court determine that its new tenant, Plaintiff Greenville Bistro, LLC, was *not* a successor to Platinum Plus, and thus is not burdened by those restrictions. In support of its claim, Greenville Bistro, LLC, provided to this court an affidavit from one of its principals, Jason Mohny, expressly disavowing any relationship between his entity and Elephant, Inc. or Platinum Plus. (*See Mohny Affidavit, attached hereto as Exhibit 3.*)

96. In late 2016 and early 2017, Frontage Road was exchanging correspondence about the property with the County Attorney's office. In a letter dated January 13, 2017, County Attorney Mark Tollison wrote Bill Bannister, attorney for Frontage Road, to remind him that neither a nightclub nor a sexually oriented business may be operated at 805 Frontage Road: "As you are aware, the property is zoned S-1, which does not allow nightclubs. Further, it should be noted that the property did not meet the setbacks for a sexually oriented business per County ordinance in 1999-2000, and is currently ineligible to operate regulated adult uses under County Ordinances Nos. 2673 and 4869." (January 13, 2017 Tollison Letter to Bannister, attached hereto as Exhibit 4, at 1.)

97. The County Attorney's January 13, 2017 Letter emphasized that the new tenant "cannot operate a nightclub or sexually oriented business, as either of these uses will be in violation of the County Zoning Ordinance and the new amendments to the County's Adult Entertainment Ordinance." (Exh. 4 at 2.) The County Attorney was explicit:

I have enclosed a copy of County Ordinances No. 2673 and No. 4869. Any new tenant on S-1 zoned property operating nude or semi-nude entertainment, even under the moniker of

a “restaurant”, will have to meet the setbacks under the County’s Adult Entertainment Ordinance. As I indicated above, 805 Frontage Road has never met, and does not currently meet, the County’s setback requirements for a sexually oriented business.

(Exh. 4 at 2.)

98. On January 26, 2017, Judge Simmons conducted a hearing in the Solicitor’s 2015 case, wherein Mr. Bannister again emphasized that Greenville Bistro, LLC, had no connection with the prior tenants at 805 Frontage Road. Thereafter, on February 10, 2017, Judge Simmons entered an order (the “2017 Order,” attached hereto as Exhibit 5), which stated: “Prior to the hearing before this Court, Frontage Road caused to be filed an Affidavit by one Jason Mohny who alleges he established Greenville Bistro, LLC and that that limited liability company has no connection with Elephant, Inc., Kenwood Gaines, or the business named Platinum Plus.” (Exh. 5 at 3.)

99. The February 10, 2017 Order therefore released the premises, finding that “the former tenants to whom the Court’s previous Orders were directed have now vacated the premises” and that “the Court is without authority to continue or impose the previously ordered ongoing requirements, which were directed personally to Gaines and Elephant, Inc., on a new tenant.” (Exh. 5 at 4.)

100. On February 24, 2017, County Attorney Tollison wrote Jason Mohny directly to reiterate that neither a sexually oriented business nor a nightclub is permitted at 805 Frontage Road. (February 24, Tollison Letter to Mohny, attached hereto as Exhibit 6.) The February 24 letter stated:

The Adult Entertainment Ordinance includes several provisions that directly impact the 805 Frontage Road property. The setback provisions in the Adult Entertainment Ordinance require a sexually oriented business (which includes any establishment that features persons who appear in a state of nudity or semi-nudity) to be 1,500 from several types of properties and land uses, including the boundary of a residential zoning district. Today, there are two residential boundaries that are less than 1,500 feet from the building at 805

Frontage Road. One is the Roper Mountain Apartments, which is zoned RM-2 (a residentially zoned district); and the other is Bradford Place, which is a single-family residential subdivision, zoned R-M20 (a residentially zoned district). These two properties, and potentially others, will prohibit the operation of a sexually oriented business at 805 Frontage Road.

Additionally, since 805 Frontage Road is zoned S-1, any use of the property must now conform to the regulations governing the S-1 district. Nightclubs are a permitted use only in a C-2 zoning district and are not allowed in the S-1 district.

(Exh. 6 at 1.)

101. Despite this actual knowledge of the zoning problems inherent in locating a nightclub or a sexually oriented business at 805 Frontage Road, Greenville Bistro, through Jason Mohney, filled out a Commercial Zoning Application for a “restaurant” to operate at that location. (See Signed Application attached hereto as Exhibit 7.) On March 27, 2017, the County granted a Certificate of Use and Occupancy for only a “restaurant” at that location. (See Certificate of Use and Occupancy, attached hereto as Exhibit 8.)

102. Thereafter, Frontage Road Associates, Inc. entered into a lease agreement with Greenville Bistro, LLC, and moved the Court to release the property to Greenville Bistro to facilitate its current operation as a sexually oriented nightclub, in violation of County ordinances.

103. Greenville Bistro, LLC opened “Bucks Racks & Ribs” and began operating the business as a sexually oriented business, specifically, an “adult cabaret,” in violation of County Ordinances.

COUNT 1 – AN INJUNCTION PROHIBITING PLAINTIFFS FROM OPERATING OR ALLOWING A SEXUALLY ORIENTED BUSINESS AT 805 FRONTAGE ROAD

104. The definition of “adult cabaret” was set forth in Ordinance No. 2673, and amended by Ordinance No. 4869, to read as follows:

Adult cabaret means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

- (a) Persons who appear in a state of nudity, or in a state of semi-nudity; or
- (b) Live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
- (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

105. "State of semi-nudity" is defined as follows:

Semi-nude or a *state of semi-nudity* means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.

106. "Specified sexual activities" is defined as follows:

Specified sexual activities means any of the following:

- (a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- (c) Masturbation, actual or simulated; or
- (d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

107. Greenville Bistro d/b/a Bucks, Racks & Ribs operates as an adult cabaret because it regularly features persons who appear in a state of semi-nudity and live performances characterized by an emphasis on specified sexual activities. Witnesses have observed both semi-nudity and certain specified sexual activities, as defined in the Sexually Oriented Business Ordinance, on the premises at 805 Frontage Road since Bucks, Racks & Ribs opened.

108. Sexually oriented businesses, including adult cabarets, have been, and continue to be prohibited at 805 Frontage Road because that location does not meet the separation requirements for sexually oriented businesses set forth in Section 12 of Ordinance No. 2673.

109. Pursuant to Section 17 of Ordinance No. 2673, S.C. Code Ann. § 4-9-30(14), and Rule 65, S.C.R.C.P., the County is entitled to temporary and permanent injunctive relief prohibiting Plaintiffs from operating, or allowing, a sexually oriented business at 805 Frontage Road.

**COUNT 2 – INJUNCTION PROHIBITING PLAINTIFFS FROM OPERATING OR
ALLOWING A NIGHTCLUB AT 805 FRONTAGE ROAD**

110. Pursuant to the Greenville County Zoning Ordinance (the “Zoning Ordinance” or “ZO”), the property at 805 Frontage Road is zoned S-1.

111. Article 6 (“Use Regulations”) of the Zoning Ordinance specifies, in § 6:1, that “[p]rinciple uses shall be allowed within the base zoning districts of this ordinance in accordance with Table 6.1,” the Table of Uses. (Zoning Ordinance, Article 6 at 1, attached hereto as Exhibit 9.)

113. Article 6 also provides, in § 6:1.4, that a blank cell in the Table “indicates that a use type is not permitted in the respective zoning district, unless it is otherwise expressly allowed by other regulations of this ordinance.” (Exh. 7 at 1.)

114. The Table of Uses specifies that a “Nightclub” is permitted in a C-2 zoning district, but in there is a blank cell in the S-1 zoning column across for “Nightclub.” Thus, nightclubs are prohibited in the S-1 zoning district. (Exh. 7 at 7.)

115. Article 4 of the Zoning Ordinance defines “nightclub” as follows:

Any establishment, whether public or a private club, including cocktail lounges, etc., serving a predominantly adult clientele, and whose primary business is the sale of alcoholic

beverages, including beer and wine, for consumption on the premises in conjunction with dancing or live performances. The purchase of food is at the option of the customers and not required by the operator. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic-Beverage Licensing Board.

(Zoning Ordinance, Article 4 Excerpts at 1, attached hereto as Exhibit 10.)

116. Greenville Bistro operates, and Frontage Road allows, a “nightclub” as defined above at 805 Frontage Road, in violation of the Zoning Ordinance.

117. Section 13:3 of the Zoning Ordinances provides that violations of the Zoning Ordinance are misdemeanors, and that “[t]he Zoning Administrator or other appropriate county official may also seek injunctive relief or any other appropriate action in courts of competent jurisdiction to enforce the provisions of this Ordinance.” (Zoning Ordinance, Article 13 at 1, attached hereto as Exhibit 11.)

118. Pursuant to Section 13:3 of the Zoning Ordinance, S.C. Code Ann. § 4-9-30(14), and Rule 65, S.C.R.C.P., the County is entitled to temporary and permanent injunctive relief prohibiting Plaintiffs from operating, or allowing, a sexually oriented business at 805 Frontage Road.

WHEREFORE, having fully set forth their Answer and Counterclaim, the Defendant County and Sheriff would pray as follows:

AS TO PLAINTIFFS’ COMPLAINT

- A. For an order dismissing the Complaint with prejudice;
- B. For an award of the costs and attorney fees incurred in defending this matter; and
- C. For such other and further relief as this Court deems just and proper.

AS TO DEFENDANTS' COUNTERCLAIM

- A. On Count 1, a temporary and permanent injunction prohibiting Plaintiffs from operating or allowing a sexually oriented business, specifically an adult cabaret, at 805 Frontage Road;
- B. On Count 2, a temporary and permanent injunction prohibiting Plaintiffs from operating or allowing a nightclub at 805 Frontage Road;
- C. For an award of the costs and attorney fees incurred in prosecuting this matter; and
- D. For such other and further relief as this Court.

DEVLIN & PARKINSON, P.A.

s/ John R. Devlin, Jr.

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Attorneys for Defendants

Dated: June 14, 2017
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No. 2017-CP-23-03372
	)	
Greenville Bistro, LLC, a South Carolina,	)	
Limited Liability Company, d/b/a Buck's	)	
Racks & Ribs, and Frontage Road Associates,	)	
Inc. a South Carolina Corporation,	)	
	)	
Plaintiffs,	)	DEFENDANTS' MOTION FOR
	)	TEMPORARY INJUNCTION
	)	
v.	)	
	)	
Greenville County, a Political Subdivision of	)	
the State of South Carolina, and Will Lewis,	)	
in his Official Capacity as Sheriff of	)	
Greenville County,	)	
	)	
Defendants.	)	
	)	

Greenville County ("County") and Will Lewis ("Sheriff") (collectively, "Defendants"), pursuant to Rule 65(a), S.C.R.C.P., move this Court for the entry of a temporary Injunction, temporarily restraining Plaintiffs Greenville Bistro, LLC d/b/a Buck's Racks & Ribs ("GB"), and Frontage Road Associates, Inc. ("Frontage"), from violating the County's Sexually Oriented Business ("SOB") Ordinance and the County's Zoning Ordinance (collectively, the "Ordinances").

Since at least 1995, SOBs have been prohibited at 805 Frontage Road. GB applied for a zoning certificate to operate only a "restaurant" there, and obtained a certificate of occupancy for only that. Nevertheless, GB opened and began operating a nightclub featuring women dancing in only pasties and G-strings, i.e., women dancing in a "state of semi-nudity" as defined in the SOB Ordinance. Thus, GB is an "adult cabaret" as defined in the SOB Ordinance. Additionally, the Zoning Ordinance prohibits nightclubs at that location.

The County has answered Plaintiffs' complaint and has filed a two-count counterclaim for injunction. By this motion, the County seeks a temporary injunction under each count. First, the

Court should enjoin Plaintiffs from operating or allowing an SOB at 805 Frontage Road, because that is prohibited by the SOB Ordinance. Second, the Court should enjoin Plaintiffs from operating or allowing a nightclub at 805 Frontage Road, because that is prohibited by the Zoning Ordinance.

Plaintiffs' motion for temporary injunction—which is essentially an effort to prevent the County from enforcing the Ordinances against Buck's—is without merit.

I. The County's motion for temporary injunction should be granted.

South Carolina law specifically provides that a county may obtain an injunction to prevent violations of its ordinances. S.C. Code Ann. § 6-29-950. For a governmental entity to “get an injunction for a zoning violation they must show (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance.” *County of Richland v. Simpkins*, 348 S.C. 664, 669 (2002) (quoting *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282 (2000)).

A. The County is entitled to a temporary injunction prohibiting Plaintiffs from operating or allowing a sexually oriented business at 805 Frontage Road.

GB is an “adult cabaret,” one kind of SOB regulated by the County's SOB Ordinance. There are three relevant definitions in that Ordinance. First, the definition of “adult cabaret” was set forth in Ordinance No. 2673, and amended by Ordinance No. 4869, to read as follows:

Adult cabaret means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

- (a) Persons who appear in a state of nudity, or in a state of semi-nudity; or
- (b) Live performances which are characterized by the exposure of “specified anatomical areas” or by “specified sexual activities”; or
- (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of “specified sexual activities” or “specified anatomical areas.”

(Ord. No. 4869, Compl. Ex. G at 2; Ord. No. 2673, Ans. and Countercl. Ex. 1 at 3.)

Second, “state of semi-nudity” is defined as follows:

Semi-nude or a *state of semi-nudity* means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.

(Ordinance No. 4869, Compl. Ex. G at 2.)

Third, “specified sexual activities” is defined as follows:

Specified sexual activities means any of the following:

- (a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- (c) Masturbation, actual or simulated; or
- (d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

(Ord. No. 2673, Ans. and Countercl. Ex. 1 at 4-5.)

GB operates as an adult cabaret because it regularly features persons who appear in a state of semi-nudity, i.e., showing the lower portion of the female breast and the buttocks. On multiple occasions since May 1, Greenville County Sheriff’s deputies have observed and documented women showing the lower portion of their breasts, and their buttocks, on Buck’s premises. GB is also an adult cabaret because it regularly features live performances by dancers erotically touching their own, and others, buttocks, breasts, and genital areas. Witnesses have observed both semi-nudity and these specified sexual activities (including lap dances), as defined in the SOB Ordinance, on the premises at 805 Frontage Road since Buck’s opened.

Sexually oriented businesses, including adult cabarets, have been and continue to be prohibited at 805 Frontage Road because that location does not meet the separation requirements

for sexually oriented businesses set forth in Section 12 of Ordinance No. 2673. Specifically, 805 Frontage Road is within 1500 feet of a church, a residentially-zoned district, and a lot devoted to residential use. Our Supreme Court upheld this 1500-ft. buffer—and a permanent injunction against operating an SOB at 805 Frontage Road—in *Kenwood Enterprises, Inc. v. Greenville County*, 353 S.C. 157 (2003).¹ The evidence will show that GB is operating, and Frontage is allowing, an SOB to operate at 805 Frontage Road. Per Section 17 of Ordinance No. 2673, S.C. Code Ann. § 4-9-30(14), and Rule 65(a), the County is entitled to temporary injunctive relief prohibiting Plaintiffs from operating, or allowing, a sexually oriented business at that location.

B. The County is entitled to a temporary injunction prohibiting Plaintiffs from operating or allowing a nightclub at 805 Frontage Road.

The Zoning Ordinance prohibits a “nightclub” at 805 Frontage Road. Because GB is operating a nightclub at that location, the County is entitled to a temporary injunction prohibiting the ongoing violation of the County’s Zoning Ordinance.

Under the Zoning Ordinance, property at 805 Frontage Road is zoned S-1. Article 6 (“Use Regulations”) of the Zoning Ordinance specifies, in § 6:1, that “[p]rinciple uses shall be allowed within the base zoning districts of this ordinance in accordance with Table 6.1,” the Table of Uses. (Zoning Ordinance Article 6, Ans. and Countercl. Ex. 9 at 1.)

Article 6 also provides, in § 6:1.4, that a blank cell in the Table “indicates that a use type is not permitted in the respective zoning district, unless it is otherwise expressly allowed by other regulations of this ordinance.” (*Id.*) The Table of Uses specifies that a “Nightclub” is permitted in a C-2 zoning district, but in there is a blank cell in the S-1 zoning column across for “Nightclub.” Thus, nightclubs are prohibited in the S-1 zoning district. (*Id.* at 7.)

¹ One portion of the *Kenwood Enterprises* decision that is not relevant here—which deals with the rule for stating a takings claim—was overruled by *Byrd v. City of Hartsville*, 365 S.C. 650 (2005).

Article 4 of the Zoning Ordinance defines “nightclub” as follows:

Any establishment, whether public or a private club, including cocktail lounges, etc., serving a predominantly adult clientele, and whose primary business is the sale of alcoholic beverages, including beer and wine, for consumption on the premises in conjunction with dancing or live performances. The purchase of food is at the option of the customers and not required by the operator. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic-Beverage Licensing Board.

(Zoning Ordinance Article 4 Excerpts, Ans. and Countercl. Ex. 10 at 1.)

Greenville Bistro operates, and Frontage Road allows, a “nightclub” as defined above at 805 Frontage Road, in violation of the Zoning Ordinance. Section 13:3 of the Zoning Ordinances provides that violations of the Zoning Ordinance are misdemeanors, and that “[t]he Zoning Administrator or other appropriate county official may also seek injunctive relief or any other appropriate action in courts of competent jurisdiction to enforce the provisions of this Ordinance.”

(Zoning Ordinance Article 13 Excerpts, Ans. and Countercl., Ex. 11 at 1.)

Per Zoning Ordinance § 13:3, S.C. Code Ann. § 4-9-30(14), and S.C.R.C.P. 65(a), the County is entitled to temporary injunctive relief as follows:

WHEREFORE, the Defendants would pray that this Court issue the following relief:

- A. On Count 1, a temporary injunction prohibiting Plaintiffs from operating or allowing a sexually oriented business, specifically an adult cabaret, at 805 Frontage Road; and
- B. On Count 2, a temporary injunction prohibiting Plaintiffs from operating or allowing a nightclub at 805 Frontage Road.

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Dated: June 15, 2017
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

GREENVILLE BISTRO, LLC, a South Carolina Limited Liability Company, d/b/a Buck's Racks & Ribs, and FRONTAGE ROAD ASSOCIATES, INC., a South Carolina Corporation,

Plaintiffs,

v.

GREENVILLE COUNTY, a Political Subdivision of the State of South Carolina, and WILL LEWIS, in his Official Capacity as Sheriff of Greenville County,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-03372

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION FOR
TEMPORARY INJUNCTION**

I. STATEMENT OF FACTS

Plaintiff, GREENVILLE BISTRO, LLC, is attempting to do business as "*Buck's Racks & Ribs*," at 805 Frontage Road in unincorporated Greenville County, on property owned by Plaintiff, FRONTAGE ROAD ASSOCIATES, INC. The business which Plaintiffs are attempting to offer is live entertainment at a restaurant, which entertainment is the presentation of exotic dance by dancers who are "scantily clad," but who are neither "nude" nor "semi-nude" as those terms are defined by Greenville County.

The format of the dance which Plaintiffs seek to offer is similar to that presented on the site by previous tenants of Frontage Road Associates. This form of exotic dance is protected expression pursuant to the First Amendment to the Constitution of the United States: *Barnes v. Glen Theatre, Inc.*, 502 U.S. 560, 111 S.Ct. 2456 (1991); *City of Erie v. Pap's A.M.*, 529 U.S.

277, 120 S.Ct. 1382 (2000).¹ Constitutional protection for exotic dance has been acknowledged by the South Carolina courts: *Harkins v. Greenville County*, 340 S.C. 606, 613; 533 S.E.2d 886 (S.C. 2000).

Defendant, GREENVILLE COUNTY, and Defendant, WILL LEWIS, who is the duly authorized Sheriff of Greenville County, charged with enforcing the laws and ordinances of the State of South Carolina and of Greenville County, are attempting to prevent Plaintiffs from presenting protected speech and from operating their lawful business. As set out in the Complaint herein, the parties are bound by the Consent Orders entered by this Court in 2002, 2015 and 2017, which Orders specifically apply to successors to the original parties.

In the 2017 Order, this Court has found (Complaint Exhibit C), that Plaintiff, Greenville Bistro, is a successor to, but unaffiliated with, a party in the original action, Elephant, Inc., and that Greenville Bistro wishes to operate “a similar business as Platinum Plus in the [same] location.” In violation of this Court’s Orders, Defendants have ordered Plaintiffs to cease, not only the operation of a “similar business” to that previously existing at the location, but to cease preventing any form of live entertainment at the site, thereby silencing multiple forms of protected speech.

Defendants have also unlawfully attempted to apply Chapter 2.5 of the Greenville County

¹ This Court’s jurisdiction over Plaintiffs’ federal civil rights claims is invoked pursuant to *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990) for claims that would otherwise be brought in the United States District Court for the District of South Carolina. Accordingly, Federal Fourth Circuit Court of Appeals precedent is binding in the analysis of these issues: ... Lower court judges are certainly free to note their disagreement with a decision of this Court... But the Supremacy Clause forbids state courts to dissociate themselves from federal law... The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.” (citing U.S. Const., Art. VI, cl. 2 ; *Howlett v. Rose* , 496 U.S. 356, 371, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) ; ...

Parsons v. John Weiland Homes, 418 S.C. 1, 791 S.E.2d 128, 132, (S.C. 2016).

Code to Plaintiffs' business (Complaint, Exhibits E and H), when this Chapter has never applied to the business at the location, including the similar business Plaintiffs seek to operate. In particular, on May 24, 2017, after the Complaint herein was filed, agents of Defendants,' by way of example and not limitation, violated the consent orders and attempted to enforce Chapter 2.5 of the Greenville County Code against Plaintiffs, by:

- a. Dispatching four sheriff's deputies and a code enforcement officer to Plaintiff's premises, who arrived at approximately 8.27 p.m.;
- b. Arbitrarily compelling an entertainer to leave the stage, stopping her presentation of protected speech;
- c. Compelling the entertainer described in the preceding paragraph and a second entertainer to submit to scrutiny of their bikini bathing suits;
- d. Scrutinizing three other performers' swimsuits and, arbitrarily, without measuring the swimsuits, or, in any way, shape or form, identifying, let alone referring to, any objective standards, decreeing that three of the five entertainers who were examined, were not in compliance with an ordinance that does not apply to Plaintiffs' business;
- e. The code enforcement officer stating that she was shutting the business immediately, without due process, and without an opportunity to be heard;
- f. The code enforcement officer stating that she was revoking the business' Certificate of Occupancy immediately, without due process, and without an opportunity to be heard;
- g. Requiring the Plaintiffs to immediately clear the building of all customers;
- h. Subsequently, modifying the demands made by Defendants as described above, to

the immediate cessation of all forms of live entertainment – expression protected by the First Amendment to the Constitution of the United States and by Article I, § 2 of the Constitution of the State of South Carolina – and limiting the use of Plaintiffs’ constitutionally protected property to the presentation of recorded music and the serving of food and beverages; and

- i. Issuing tickets to three entertainers and two employees charging said entertainers and employees with alleged, but generally unspecified, violations of the Greenville County Zoning Ordinance.

In an extrajudicial fashion, on the pretext of enforcing inapplicable code provisions, Defendants are requiring Plaintiffs to suspend their ordinary and general business, without an opportunity to be heard in this matter, let alone even a modicum of due process. Defendants are also attempting to silence speech protected by the Constitutions of the State of South Carolina and of the United States.

II. PROCEDURAL POSTURE OF THE CASE

Plaintiffs filed this action on Tuesday, May 23, 2017, and, on May 24, 2017, filed their Motion for Temporary Injunction. Also on May 24, 2017, Defendants began their “enforcement actions” complained of above.²

Although subsequently modified, on May 24, 2017, Defendants’ agents initially

- a. Demanded that the business be closed immediately;
- b. Demanded that all customers immediately vacate the premises; and
- c. Stated that the Certificate of Occupancy was immediately revoked.

All of these actions to occur without due process and without an opportunity to be heard.

² It is unclear whether or not Defendants’ agents had knowledge of this action of the time of their May 24, 2017, enforcement actions.

Rule 65 (e), S.C.R.C.P., provides:

(e) Injunction to Suspend Business. No temporary restraining order shall be granted to suspend the general and ordinary business of an individual, partnership, association or corporation. Same may be suspended only by injunction after notice.

Based on this Rule, it was immediately clear to Plaintiffs pursuant to Rule 65, (b), S.C.R.C.P., that Defendants were attempting to do by extra-judicial means what cannot be done by proper judicial means: requiring the suspension of Plaintiffs' general and ordinary business without notice and without an opportunity to be heard.

The urgency of Plaintiffs obtaining relief became apparent when the then earliest date available for a hearing on Plaintiffs' Motion for Temporary Injunction was June 16, 2017. Accordingly, on May 26, 2017, Plaintiffs filed their Motion for an *Ex Parte* Temporary Restraining Order. Subsequently, the Court was able to advance the hearing on the Motion for Temporary Restraining Order on its calendar and that Motion is now set for hearing on June 1, 2016. This Memorandum of Law is submitted for consideration in support of both Motions, to the extent necessary and applicable.

III. ARGUMENT AND CITATIONS OF AUTHORITY

A. STANDARDS FOR TEMPORARY INJUNCTIONS

The Supreme Court of South Carolina has articulated the standards for the consideration of a Temporary Injunction:

The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. The remedy of an injunction is a drastic one and ought to be applied with caution. In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction which seems most consistent with justice and equity under the circumstances of the case.

Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006).

More recently, the same Court has held:

... An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *Cnty. Of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). One of the elements the applicant must establish is that he has a likelihood of success on the merits. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); see *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) (“It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.”). A temporary injunction is granted without prejudice to the rights of either party pending a hearing on the merits, and “when other issues are brought to trial, they are determined without reference to the temporary injunction.” *Heles v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (citing *Alston v. Lime house*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) (stating “no fact decided upon such motion [for a temporary injunction] is concluded thereby, and when the other issues are brought to trial they are to be determined without reference to said orders”)). The purpose of a temporary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

Allegro v. Scully, 409 S.C. 392, 762 S.E.2d 54 (Ct. App. 2014), *rev'd on other grounds*, 418 S.C. 24, 791 S.E.2d 140 (2016).

A preliminary injunction is appropriate when the party seeking relief establishes that “(1) it would suffer irreparable harm if the injunction is not granted (2) the party seeking injunction will likely succeed in the litigation, and (3) there is an inadequate remedy at law.” *Strategic Resources, supra*, at 689.

B. IRREPARABLE HARM

The loss of First Amendment freedoms constitutes irreparable injury as a matter of law, *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, (1976). Consistent with *Elrod*, the Fourth Circuit has held:

Indeed, the Supreme Court has stated in no uncertain terms that “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); see also *Johnson v. Berglund*, 586 F.2d 993, 995 (4th Cir. 1978) (“Violations of first amendment rights constitute per se irreparable injury.”). ...

International Refugee Assistance Project v. Trump, 2017 WL 2273306, *24, (4th Circuit May 25, 2017, *en banc*).³

More importantly, the mere showing of a deprivation of First Amendment or other federally protected rights in and of itself establishes both injury and damage. *Batista v. Weir*, 340 F.2d 74 (3d Cir. 1965).

Sambo's of Ohio v. City Council of City of Toledo, 466 F.Supp. 177 (N.D. Oh., 1979).

Further demonstrating the irreparable harm caused by Defendants' actions are the following cases:

Deprivations of constitutional rights are usually held to constitute irreparable injury as a matter of law. *American Fed. of Gov. Employees, Loc. 1858 v. Callaway*, [398 F.Supp. 176 (N.D. Al. 1975)]; *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974).

International Association of Firefighters v. City Sylacauga, 436 F.Supp. 482 (N.D. Al. 1977).

... Irreparable injury inevitably occurs where there are property or other rights which are violated and for which there is no remedy other than injunctive relief. ...

³ See footnote 1 for the relevance of Federal law.

National Association of Radiation Survivors v. Walters, 589 F.Supp. 1302 (N.D. Ca. 1984); *reversed on other grounds*, 473 U.S. 305, 105 S.Ct. 3180 (1985).

... irreparable injury is assumed to flow from a constitutional violation and plaintiffs are not required to show harm beyond that violation. 11 Wright & Miller's [Federal Practice and Procedure] § 2948 at 440.

Decker v. United States Department of Labor, 473 F.Supp. 770 (E.D. Wi. 1979).

C. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs have a substantial likelihood of success on the merits because the actions of Greenville County complained of herein do not enjoy a presumption of validity:

...[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 minimis*. ...

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 (1981) (Blackmun, concurring) (Emphasis added).

Further, in the First Amendment context, "irreparable harm," (conclusively demonstrated in § III B), is closely linked to the likelihood of success on the merits:

... As we have previously recognized, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 190 (4th Cir. 2013) (*en banc*) (*quoting Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 471 (D. Md. 2011)).

Accordingly, our finding that Plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that in the absence of an injunction, they will suffer irreparable harm.

Trump, supra, at 69.

The “regulations” which Greenville County is attempting to enforce against Plaintiffs are clearly an effort to regulate the “content” of the expression, *i.e.*, the nature of the entertainment being offered. This is constitutionally impermissible: *See Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (“[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker’s views” (internal quotation marks omitted)).

A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least-restrictive narrow tailoring to serve it, *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) *since* merely protecting listeners from offense at the message, the “primary effect,” is not a legitimate interest of the government. *See also Cohen v. California*, 403 U.S. 15, 24-25 (1971), where, as frequently quoted, “strict scrutiny leaves few survivors.” The Greenville County regulations are destined to meet this fate.

In the instant case, the County has not commissioned or considered any studies specific to the current characteristics or impact of Plaintiffs’ business. Plaintiffs have shown a likelihood of success on these issues.

D. INADEQUATE REMEDY AT LAW

Beyond the irreparable harm demonstrated in § III. B, it is clear that Plaintiffs have no adequate remedy at law because Defendants’ efforts to unconstitutionally regulate Plaintiffs’

business threaten Plaintiffs with several forms of irreparable harm. The first form of irreparable harm for which, as a matter of law, there is no adequate remedy at law, is found in the loss of Constitutional rights and freedoms – as set out in the Complaint herein. These rights and freedoms include the right to free speech, the right to due process of law; the right to equal protection of the law; and right to have the orders of this Court obeyed.

... If an injury cannot be adequately remedied at law, because damages would be either inadequate or unascertainable, the injury is generally held irreparable.

Ohio Oil Co. v. Conway, 279 U.S. 813, 49 S.Ct. 256, (1929).

There is no remedy at law for the irreparable injuries being inflicted on Plaintiffs by Defendants' actions.

The complaint herein shows that Greenville County's actions unlawfully and unconstitutionally deprive Plaintiffs of their First Amendment rights without due process of law and unlawfully and unconstitutionally impairs a wide variety of other Constitutional rights. Thus, Greenville County's actions represent the loss of Constitutional freedoms which, even for a minimal period of time, constitutes irreparable harm for which there is no adequate remedy at law.

Second, the loss of income from Plaintiffs' business is also irreparable harm which is ripe for injunctive relief and for which there is no adequate remedy at law:

... Numerous cases support the conclusion that loss of customers, loss of goodwill, and threats to a business' viability can constitute irreparable harm. See *Tri State Generation [v. Shoshone River Power, Inc.]*, 805 F.2d 351 (10th Cir. 1986); *Roso-lino Beverage Distributors, Inc. v. Coca Cola Bottling Co.*, 749 F.2d 124, 125-26 (2d Cir. 1984); *Otero Savings & Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981); *Federal Leasing, Inc., v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981); *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980); *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 28-29 (2d

Cir. 1978), cert. denied, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970); *Associated Producers Co. v. City of Independence*, 648 F.Supp. 1255, 1258 (W.D. Mo. 1986); *Stanley Fizer Associates, Inc. v. Sport-Billy Productions Rolf Deyhle*, 608 F.Supp. 1033, 1035 (S.D. N.Y. 1985); *Great Salt Lake Minerals & Chemicals Corp. v. Marsh*, 596 F.Supp. 548, 557 (D.Utah 1984).

Zurn Constructors, Inc. v. B.F. Goodrich Company, 685 F.Supp. 1172 (D.Kan. 1988).

The Fourth Circuit elaborated on *Federal Leasing, Inc., v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981) in an opinion directly applicable and relevant to the instant case:

The district court found that RPM would be more harmed by the absence of an injunction than would MCAR if an injunction were issued. This finding is not erroneous, given evidence that RPM is likely to suffer economic injury severe enough to put it out of business if MCAR is allowed to provide photographic information to the customers RPM now services. While purely economic injury does not constitute irreparable harm sufficient to warrant injunctive relief, we have held that the right to continue a business is not measurable solely in economic terms. *See Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981); *Blackwelder, [Furniture Co. v. Seilig Mfg. Co.]*, 550 F.2d at 189, 196 (4th Cir. 1977)] 550 F.2d at 197.

Montgomery County Assoc. of Realtors v. Realty Photo Master, 993 F.2d 1538 (Table), (4th Cir. 1993).

If Greenville County is permitted to continue its violation of this Court's Orders and take enforcement actions including expelling all of Plaintiffs' customers, revoking Plaintiffs' Certificate of Occupancy and shuttering Plaintiffs' business by requiring the immediate cessation of the offering of protected speech, then Plaintiffs will suffer economic damage sufficient to put them out of business, irreparable harm for which there is no adequate remedy at law.

Finally, any measurable financial harm is counter-balanced by the hardship on Plaintiffs, which implicates basic principles of judicial obedience and cannot be valued in monetary terms: *Feller v. Brock*, 802 F.2d 722, 727, (4th Cir. 1986). Accordingly, Greenville County's failure to

comply with this Court's Order also constitutes irreparable harm for which there is no adequate remedy at law.

IV. CONCLUSION

South Carolina law sets out a three part test for the grant or denial of a Temporary Injunction: (1) it would suffer irreparable harm if the injunction is not granted (2) the party seeking injunction will likely succeed in the litigation, and (3) there is an inadequate remedy at law. As demonstrated by the pleadings filed to date, and throughout this Memorandum of Law, Plaintiffs meet each test for the granting of a Temporary Injunction. Accordingly, the requested Temporary Injunction should be granted.

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Dated: June 15, 2017

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SUBJECT TO ADMISSION PRO HAC VICE

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

GREENVILLE BISTRO, LLC, a South Carolina Limited Liability Company, d/b/a Buck's Racks & Ribs, and FRONTAGE ROAD ASSOCIATES, INC., a South Carolina Corporation,

Plaintiffs,

v.

GREENVILLE COUNTY, a Political Subdivision of the State of South Carolina, and WILL LEWIS, in his Official Capacity as Sheriff of Greenville County,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-03372

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY
INJUNCTION**

Plaintiffs GREENVILLE BISTRO, LLC, d/b/a "*Buck's, Racks and Ribs*," and FRONTAGE ROAD, ASSOCIATES, INC., respectfully submit this, their Supplemental Memorandum of Law in support of their Motion for Temporary Injunction, and in support thereof, would state as follows:

I. STATEMENT OF FACTS RELVANT TO THIS SUPPLEMENT

Plaintiff, GREENVILLE BISTRO, LLC., is attempting to do business as "*Buck's, Racks and Ribs*," at 805 Frontage Road in unincorporated Greenville County, on property owned by Plaintiff, FRONTAGE ROAD ASSOCIATES, INC. The business which Plaintiffs are attempting to offer is live entertainment at a restaurant, which entertainment is the presentation of exotic dance by dancers who are "scantily clad," but who are neither "nude" nor "semi-nude" as those terms are defined by Greenville County. The points and authorities set forth in the prior

Memorandum are incorporated herein, however, to the extent necessary to lend coherence to this instant submittal, some repetition is necessary. The format of the dance which Plaintiffs seek to offer is similar to that presented on the site by previous tenants of Frontage Road Associates. This form of exotic dance is protected expression pursuant to the First Amendment to the Constitution of the United States: *Barnes v. Glen Theatre, Inc.*, 502 U.S. 560, 111 S.Ct. 2456 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382 (2000).¹ Constitutional protection for exotic dance has been acknowledged by the South Carolina courts: *Harkins v. Greenville County*, 340 S.C. 606, 613; 533 S.E.2d 886 (S.C. 2000).

Defendant, GREENVILLE COUNTY, and Defendant, WILL LEWIS, who is the duly authorized Sheriff of Greenville County, were attempting to prevent Plaintiffs from presenting protected speech and from operating their lawful business. The specifics of these issues, the prior Court Orders, and the applicable exhibits are set out in the operative Complaint in this action.

The Defendants have unlawfully attempted to ignore the benefits provided by the 2002 Consent Order, and apply Chapter 2.5 of the Greenville County Code to Plaintiffs' business (Complaint, Exhibits E and H), when this Chapter was never applied to the business at the location, including the similar business Plaintiffs seek to operate. In the prior hearing on the Plaintiffs' efforts to obtain a Temporary Restraining Order, the Court granted the relief, in part,

¹ This Court's jurisdiction over Plaintiffs' federal civil rights claims is invoked pursuant to *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990) for claims that would otherwise be brought in the United States District Court for the District of South Carolina. Accordingly, Federal Fourth Circuit Court of Appeals precedent is binding in the analysis of these issues:

... Lower court judges are certainly free to note their disagreement with a decision of this Court... But the Supremacy Clause forbids state courts to dissociate themselves from federal law... The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." (citing U.S. Const., Art. VI, cl. 2 ; *Howlett v. Rose* , 496 U.S. 356, 371, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) ; ...

Parsons v. John Weiland Homes, 418 S.C. 1, 791 S.E.2d 128, 132, (S.C. 2016).

however the Order required compliance with this “new” ordinance.

In this Supplemental Memorandum, the Plaintiffs will refer to new supporting affidavits that provide evidence and testimony meeting the criteria for the grant of a temporary injunction. These affidavits include the Affidavit of Tony Kabolati, showing the “irreparable harm” caused by the actions of the Defendant. Additionally, it will be shown through the Affidavit of Jason Mohnney, the original entrepreneur looking to establish the operation of “Buck’s Racks and Ribs” and the Affidavit of Thomas Schweitzer, landlord and principal of FRONTAGE ROAD ASSOCIATES, INC., that the entirety of the negotiations and establishment and execution of the lease for the subject property between the Plaintiffs was always in contemplation of Greenville Bistro being the “successor” operator of a business in compliance with the 2002 Order, and. Most importantly, any nuisance abatement closure imposed on the predecessor tenant, Elephant, Inc. was completely involuntary and should have no impact on the validity of the 2002 Order, particularly since no mention of any “abandonment” was included in the Court’s February 7, 2017 Order.

As an alternative argument, while vigorously arguing that the “new” ordinance does not apply to the current operation on the subject property, Plaintiffs will show, through the Affidavit of R. Bruce McLaughlin, AICP (American Institute of Certified Planners) that the zoning restrictions of the legislation, as amended by the “new” ordinance, impose restrictions on the available locations for “adult oriented” businesses (as well as any restaurant providing any form of “female entertainment,” such as Hooters, Twin Peaks, Tilted Kilt, etc.) which do not provide sufficient “alternative avenues of communication,” thus rendering the applicable legislation unconstitutional for failing to provide sufficient available locations for a community the size and population of Greenville County.

III. ARGUMENT AND CITATIONS OF AUTHORITY

A. PLAINTIFFS WOULD INCORPORATE THE PREVIOUSLY CITED STANDARDS FOR TEMPORARY INJUNCTIONS

The Supreme Court of South Carolina has articulated the standards for the consideration of a Temporary Injunction, and Plaintiffs have already set forth the applicable criteria in their Memorandum of law in Support of Motion for temporary Injunction.

A preliminary injunction is appropriate when the party seeking relief establishes that “(1) it would suffer irreparable harm if the injunction is not granted (2) the party seeking injunction will likely succeed in the litigation, and (3) there is an inadequate remedy at law.” As the affidavits provided contemporaneously with this submittal will show, Plaintiffs meet all the necessary criteria and should be granted this relief.

B. IRREPARABLE HARM

As previously stated, the loss of First Amendment freedoms constitutes irreparable injury as a matter of law, *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, (1976). The 4th Circuit has clearly adopted this view in *International Refugee Assistance Project v. Trump*, 2017 WL 2273306, *24, (4th Circuit May 25, 2017, *en banc*).

Simply stated, as the affidavit of Mr. Kabolati clearly shows, the following conduct by Defendants meets this threshold, where he states that there was a history of charges levelled, at ignoring the validity of the 2002 Order, and reaching a crescendo on May 24, 2017, where Defendants began their “enforcement actions” complained of above. Although subsequently modified, on May 24, 2017, Defendants’ agents initially

- A. Demanded that the business be closed immediately;
- b. Demanded that all customers immediately vacate the premises; and

- c. Stated that the Certificate of Occupancy was immediately revoked.

C. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs have a substantial likelihood of success on the merits because the actions of Greenville County violate Plaintiffs state and federal rights, as previously articulated. By way of Supplementation, Plaintiffs again stress that, in the First Amendment context, “irreparable harm” is presumed. Not only do the “regulations” which Greenville County is attempting to enforce against Plaintiffs clearly show an effort to regulate the “content” of the expression, *i.e.*, the nature of the entertainment being offered, but, as emphasized in this memorandum, the County has insufficient locations for the establishment of presumptively protected entertainment.

In *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), supra, both the plurality opinion of Justice Stevens and the concurring opinion of Justice Powell upheld Detroit's adult entertainment zoning ordinance, only upon a factual showing being made that the ordinance would not have an overall negative impact upon the continuing availability of adult entertainment to the residents of the City of Detroit. Writing for the plurality, Justice Stevens stated:

The ordinances are not challenged on the ground that they impose a limit on the total of adult theaters which may operate in the city of Detroit. There is no claim that distributors or Exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained. 427 U.S. at 62, 96 S. Ct. at 2438.

Later on in the opinion, Justice Stevens made it absolutely clear that the foregoing factual finding of an unrestrained market for adult entertainment, was absolutely essential to the plurality's reasoning in upholding the Detroit ordinance. Justice Stevens wrote:

The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that “[t]he Ordinances to

do affect the operation of existing establishments but only the location of new ones.

This principle was most recently reaffirmed by the Eighth Circuit in *Blue Moon Entertainment, LLC v. City of Bates City, Mo.*, 441 F.3d 561 (8th Cir. March 10, 2006), in which the Eighth Circuit vacated and remanded a District Court denial of a preliminary injunction, holding that an adult use subject to a discretionary conditional use permit requirement could bring a facial challenge to the ordinance without applying for a permit. There are myriad locations in the city of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight. 373 F. Supp., at 370.

Similarly, Justice Powell, in his concurring opinion, made it absolutely clear that it was only because the ordinance in question **did** not result in suppression or restricted access to adult entertainment that he voted to uphold the constitutionality of the ordinance. Justice Powell wrote:

In this case, there is no indication that the application of the Anti-Skid Row Ordinance to adult theaters has the effect of suppressing production of or, to any significant degree, restricting access to adult movies. Norton [one of the adult theaters challenging the constitutionality of the ordinance] conceitedly will not be able to Exhibit adult movies at its present location, and the ordinance limits the potential location of the proposed Pussy Cat [the other theater challenging the ordinance]. The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage. [Citation omitted.]

The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii), Does it restrict in any significant way the viewing of those movies by those who desire to see them? On the record in this case, these inquiries must be answered in the negative. At most the impact of the ordinance on these interests is incidental and minimal (footnote omitted). Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere

with content. Nor is there any significant overall curtailment of adult movie presentations, nor the opportunity for message to reach an audience. On the *basis* of the District Court's findings [citations omitted], it appears that if a sufficient market exists to support them, the number of adult movies theaters in Detroit will remain approximately the same, free to purvey the same message. 427 U.S. at 77-79, 96 S. Ct. at 2456.

Since *Young*, courts have not hesitated to invalidate adult entertainment zoning ordinances, even facially patterned after *Young*, when the ordinances would have the effect of substantially reducing the availability of sexually explicit, but constitutionally-protected speech. See, for example, *Alexander v. City of Minneapolis*, 698 F. 2d 936 (8th Cir. 1983), hereinafter referred to as *Alexander II Walnut Properties, Inc. v. City of Whittier*, 861F. 2d 1102 (9th Cir. 1988); and *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696 (M.D. Fla. 1978); *Avalon Cinema Corp. V. Thompson*, 667 F. 2d 659 (8th Cir. 1981); *Marco Lounge, Inc. v. City of Federal Heights.*, 625 P. 2d 982 (Colo. 1981); *Basiardanes v. City of Galveston*, 682 F. 2d 1203 (5th Cir. 1981); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981); and *Christy v. City of Ann Arbor*, 824 F. 2d 489 (6th Cir. 1987).

The question was addressed by the United States Court of Appeals for the Sixth Circuit in *Executive Arts Studio, Inc. v. City of Grand Rapids*, 391 F. 3d 783 (6th Cir. 2004). In that case, the court held that, in a city with over 2500 parcels of commercially usable real estate, having no more than half dozen available was inadequate to meet First Amendment constitutional standards. In so doing, the court cited with approval the standard adopted by the court in *Dia v. City of Toledo*, 937 F. Supp. 673, 678 (N.D. Ohio 1996): Courts have generally found the number to be inadequate if fewer than a dozen sites or under 1 % of the city acreage, is potentially available.

A similar holding was reached in *University Books and Videos, Inc. v. Miami-Dade County, Fla.*, 132 F. Supp. 2d 1008 (S.D. Fla.) here the court stated:

The developed area of unincorporated Miami-Dade County which is subject to the challenge regulation is over 432,000 acres, based upon the above findings of fact and is stipulated by the parties. Thus, available BU-3 area is only 0.0092 percent of the developed area of Miami-Dade County. This percentage is exceedingly low.

In *Renton*, the Supreme Court approved a zoning law that left some 5 percent of the total land area available. The circumstances here, however, are much different than those in *Renton*. In contrast with the acres offered to adult businesses for a mall Seattle suburb here, the county offers a few dozen acres in a large metropolitan area where the population of well over a million. Adult businesses could legally operate anywhere within 5 % of *Renton's* land area - the ordinance did not require that they be distanced from each other, as is the case here, so the entire 5% of the city of Renton was in fact legally available. Here, the percent of land available is minuscule - less than three-fourths of one percent of the area zoned for business and an infinitesimal percentage of the entire land area involved. The disbursal requirement establishes an overwhelming restraint when superimposed on the ordinances other geographical limitations. *Id.* at 1014.

In this regard, it should be noted that the percentage of total land available in Morrison County is only slightly more than what the court in *University Books* called "exceedingly low" and "infinitesimal."

Judged by these standards, the impact of the statute on constitutionally protected speech is obvious. To begin with, as already noted above, the author of the statute was quoted as stating that the very purpose of selecting the large separation requirement from other uses was to assure that no adult entertainment business could ever locate within a small community. More significant is the fact that, even in a county as large as Greenville County, the separation requirements of the subject legislation, as amended essentially prevents a new adult entertainment business such as that operated by Greenville Bistro, L.L.C., from locating anywhere within the County.

Based on this, there is the substantial likelihood that Plaintiffs will show that the ordinance does not comply with the *Young-Renton* standards, acknowledging McLaughlin's findings, as set out in his affidavit. This fact is readily apparent when the standards of *Topanga Press, Inc. v. City of Los Angeles*, 989 F. 2d 1524 (9th Cir. 1993), are considered. In that case, the court stated that in determining the

adequacy of locations for adult businesses under a zoning scheme, two questions arise: First, whether the sites provided to a business may be considered part of an actual business real estate market, and secondly, whether, after excluding those sites not properly considered part of the relevant real estate market, there are an adequate number of potential sites. *Id.* at 1530.

With respect to the first question, whether the sites are actually part of a relevant business real estate market, the court considered the following factors:

First, although *Renton* stressed that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility...here we need determine only that property is not 'potentially' available when it is unreasonable to believe that we would ever become available to any commercial enterprise.

Second and focusing our attention on relocation sites which are within manufacturing or industrial zones, relocation sites that are reasonably accessible to the general public may also be part of the market. Third, areas in manufacturing zones which have a proper infra-structure such as sidewalks, roads and lighting may be included in the market. Fourth, when a relocation site suits some generic commercial enterprise, although not ever particular enterprise, it too may be said to be part of the real estate market. While it is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the particular needs of an adult business (emphasis in original), potential sites must be reasonable relocation sites for some commercial enterprises before they can be considered part of the relevant market. Consequently, whether one defines a warehouse, a swamp or a sewage treatment plant as physically or economically, it is not reasonable to define these sites as part of the real estate market that any business would choose (footnote omitted).

Fifth, and most obvious, those relocation sites which are commercially zoned are part of the market.

We emphasize that assuming a relocation site is part of the relevant market, it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even proved to be commercial unfeasibly for an adult business. The issue is whether any site is part of an actual market for commercial generally (emphasis supplied). *Id.* at 1531.

Judged by these standards, the inadequacy of the sites as exhibited in the McLaughlin

affidavit are readily apparent, thus Plaintiffs should prevail on this argument.

IV. CONCLUSION

South Carolina law sets out a three part test for the grant or denial of a Temporary Injunction: (1) it would suffer irreparable harm if the injunction is not granted (2) the party seeking injunction will likely succeed in the litigation, and (3) there is an inadequate remedy at law. As demonstrated by the pleadings filed to date, and throughout this Memorandum of Law, Plaintiffs meet each test for the granting of a Temporary Injunction. Accordingly, the requested Temporary Injunction should be granted.

Respectfully submitted,

BANNISTER, WYATT & STALVEY, LLC

Dated: June 15, 2017

s/Luke A. Burke

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SUBJECT TO ADMISSION

PRO HAC VICE

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

GREENVILLE BISTRO, LLC, a South
Carolina Limited Liability Company, d/b/a
Buck's Racks & Ribs, and FRONTAGE
ROAD ASSOCIATES, INC., a South Carolina
Corporation,

Plaintiffs,

v.

GREENVILLE COUNTY, a Political
Subdivision of the State of South Carolina, and
WILL LEWIS, in his Official Capacity as
Sheriff of Greenville County,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-03372

REPLY TO COUNTERCLAIM

(JURY TRIAL DEMANDED)

Plaintiffs, GREENVILLE BISTRO, LLC, and FRONTAGE ROAD ASSOCIATES, Inc.,
by and through the undersigned counsel, respectfully replies to Defendant's Counterclaim as
follows:

REPLY TO AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1 - 68. Plaintiffs re-allege and reassert each and every paragraph of their Complaint as if
fully set out herein.

SECOND AFFIRMATIVE DEFENSE

69. Plaintiffs re-allege and reassert each and every paragraph of their Complaint as if
fully set out herein.

70. Plaintiffs deny that they come before the court with unclean hands.

THIRD AFFIRMATIVE DEFENSE

71. Plaintiffs re-allege and reassert each and every paragraph of their Complaint as if fully set out herein.

72. Plaintiffs deny that their Complaint is barred by the doctrine of judicial estoppel.

FOURTH AFFIRMATIVE DEFENSE

73. Plaintiffs re-allege and reassert each and every paragraph of their Complaint as if fully set out herein.

74. Plaintiffs deny that their Complaint is barred by misrepresentation.

FIFTH AFFIRMATIVE DEFENSE

75. Plaintiffs re-allege and reassert each and every paragraph of their Complaint as if fully set out herein.

76. Plaintiffs deny that Ordinance 4869, and the underlying Ordinance 2673, are presumed to be constitutional: the contrary is true: it is well-settled that any ordinance affecting the exercise of First Amendment rights is inherently suspect and bears a heavy presumption against its constitutional validity. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969); *New York Times v. United States*, 403 U.S. 713, 91 S.Ct. 2140 (1971). Likewise, the Ordinances are presumptively invalid.

SIXTH AFFIRMATIVE DEFENSE

77. Plaintiffs re-allege and reassert each and every paragraph of their Complaint as if fully set out herein.

78. Plaintiffs deny that their Complaint fails to state a cause of action upon which relief may be granted.

REPLY TO COUNTERCLAIM

79. Plaintiffs re-allege and reassert each and every paragraph of their Complaint as if fully set out herein.

80. Admitted that this Court has jurisdiction over this matter and admitted for jurisdictional purposes only that the County has the right to seek injunctive relief in courts of competent jurisdiction. Denied that the County has the right to seek injunctive relief to enforce unconstitutional ordinances.

81. Admitted for jurisdictional purposes only. Denied that the County has the right to seek injunctive relief to enforce unconstitutional ordinances.

82. The ordinances speak for themselves. Denied that the County has the right to seek injunctive relief to enforce unconstitutional ordinances.

83. The ordinances speak for themselves.

84. The cases speak for themselves: further, this paragraph asserts a legal conclusion that does not require an answer.

85. Without knowledge as to the County's purpose in filing the previous litigation and therefore denied and strict proof thereof demanded.

86. The document speaks for itself.

87. The document speaks for itself.

88. The document speaks for itself.

89. The case speaks for itself.

90. Denied in its entirety and strict proof thereof demanded. This paragraph violates Rule 8 (e) of the South Carolina Rules of Civil Procedure which Rule requires that: "Each averment of a pleading shall be simple, concise, and direct. ..."

91. Denied in its entirety and strict proof thereof demanded. This paragraph violates Rule 8 (e) of the South Carolina Rules of Civil Procedure which Rule requires that: "Each averment of a pleading shall be simple, concise, and direct. ..."

92. Denied in its entirety and strict proof thereof demanded. This paragraph violates Rule 8 (e) of the South Carolina Rules of Civil Procedure which Rule requires that: "Each averment of a pleading shall be simple, concise, and direct. ..."

93. Admitted.

94. Admitted that Frontage Road sought to install a new tenant at the subject property; otherwise denied and strict proof thereof demanded.

95. The documents speak for themselves.

96. Denied and strict proof thereof demanded.

97. Admitted as to the contents of the letter; denied that the claims therein were factually or legally accurate or appropriate.

98. Denied in its entirety and strict proof thereof demanded because this paragraph violates Rule 8 (e) of the South Carolina Rules of Civil Procedure which Rule requires that: "Each averment of a pleading shall be simple, concise, and direct. ..."

99. The Order speaks for itself.

100. Admitted as to the contents of the letter; denied that the claims therein were factually or legally accurate or appropriate.

101. Denied in its entirety and strict proof thereof demanded. This paragraph violates Rule 8 (e) of the South Carolina Rules of Civil Procedure which Rule requires that: "Each averment of a pleading shall be simple, concise, and direct. ..."

102. Admitted that Frontage Road and Greenville Bistro entered into a lease agreement; denied that the Greenville Bistro's business is a sexually oriented nightclub and denied that Greenville Bistro's operation violates County ordinances and strict proof thereof demanded.

103. Admitted that Greenville Bistro opened *Bucks, Racks and Ribs*; denied that the business is operating as a sexually oriented business or as an adult cabaret and denied that Greenville Bistro's operation violates any lawful and constitutional Greenville County ordinance, law, rule or regulation, and strict proof thereof demanded.

COUNT I

104. The document speaks for itself.

105. The document speaks for itself.

106. The document speaks for itself.

107. Denied in its entirety and strict proof thereof demanded. This paragraph violates Rule 8 (e) of the South Carolina Rules of Civil Procedure which Rule requires that: "Each averment of a pleading shall be simple, concise, and direct. ..."

108. Admitted that 805 Frontage Road does not meet the segregation requirements of § 12 of Ordinance 2673; denied that those requirements are lawful and constitutional and that they lawfully prohibit the operation of a sexually-oriented Adult Use on the subject property and strict proof thereof demanded.

109. Denied and strict proof thereof demanded.

COUNT 2

110. Admitted.

111. The document speaks for itself.

112. Paragraph number "112" not assigned to any text.

113. The document speaks for itself.

114. The document speaks for itself.

115. The document speaks for itself.

116. Denied, and strict proof thereof demanded.

117. The document speaks for itself.

118. Denied and strict proof thereof demanded.

FIRST AFFIRMATIVE DEFENSE

119. For their first Affirmative Defense, Plaintiffs allege that Defendants come before this Court with unclean hands and are, therefore, not entitled to equitable relief.

SECOND AFFIRMATIVE DEFENSE

120. For their second Affirmative Defense, Plaintiffs allege that Ordinance 2673 as amended by Ordinance 4869 is presumptively unconstitutional.

THIRD AFFIRMATIVE DEFENSE

121. For their third Affirmative Defense, Plaintiffs allege that Ordinance 2673 as amended by Ordinance 4869 is based on the fraudulent premise that sexually-oriented Adult Uses cause unique "adverse secondary effects."

FOURTH AFFIRMATIVE DEFENSE

122. For their fourth Affirmative Defense, Plaintiffs allege that the regulations which Greenville County seeks to enforce against Plaintiffs are unconstitutional and thus illegal.

FIFTH AFFIRMATIVE DEFENSE

123. For their fifth Affirmative Defense, Plaintiffs allege that the regulations which Greenville County seeks to enforce against Plaintiffs were improperly adopted in violation of

South Carolina law, and are thus illegal.

SIXTH AFFIRMATIVE DEFENSE

124. For their sixth Affirmative Defense, Plaintiffs allege that the actions taken by Plaintiffs in attempting to comply with Ordinance 4869, and the underlying Ordinance 2673, were taken under duress.

SEVENTH AFFIRMATIVE DEFENSE

125. For their seventh Affirmative Defense, Plaintiffs allege that Defendants' cause of action is barred by the doctrine of judicial estoppel based on the February 9, 2017 Order of this Court.

EIGHTH AFFIRMATIVE DEFENSE

126. For their eighth Affirmative Defense, Plaintiffs allege that Defendants misrepresented the law and the facts in their letters to Plaintiffs, Counterclaim Exhibits 4 and 6.

NINTH AFFIRMATIVE DEFENSE

127. For their ninth Affirmative Defense, Plaintiffs allege that ¶¶ 82, 90, 91, 92, 98, 101, and 107 of the Counterclaim violate Rule 8 (e) of the South Carolina Rules of Civil Procedure which Rule requires that: "Each averment of a pleading shall be simple, concise, and direct. ..."

TENTH AFFIRMATIVE DEFENSE

128. For their tenth Affirmative Defense, Plaintiffs allege that the Counterclaim fails to state a cause of action for which relief may be granted.

DEMAND FOR A JURY TRIAL

A jury trial is demanded for all issues so triable.

Respectfully submitted,

BANNISTER & WYATT, LLC

Dated: July 14, 2017

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Co-Counsel for Plaintiffs
Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 17, 2017, the foregoing document was electronically filed with the Clerk of Court using E-Filing and is also being served on counsel of record listed in the attached service list in the manner specified, either via transmission of Notice of Electronic Filing generated by E-Filing or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

s/O. W. Bannister
Attorney

SERVICE LIST

**GREENVILLE BISTRO, LLC, a South Carolina Limited Liability Company, d/b/a Buck's
Racks & Ribs, and FRONTAGE ROAD ASSOCIATES, INC., a South Carolina
Corporation**

v.

**GREENVILLE COUNTY, a Political Subdivision of the State of South Carolina, and
WILL LEWIS, in his Official Capacity as Sheriff of Greenville County
C.A. No.: 2017-CP-23-03372**

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Civil Action No. 2017-CP-23-03372

RECEIVED

AUG 17 2017

SC Court of Appeals

Greenville Bistro, LLC, a South Carolina Limited Liability Company,
d/b/a Buck's Racks and Ribs, and Frontage Road Associates, Inc.,
a South Carolina Corporation, ... Respondents,

v.

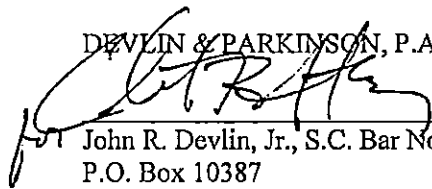
Greenville County, a Political Subdivision of the State of South Carolina,
and Will Lewis, in his Official Capacity as Sheriff of Greenville County, ... Appellants

NOTICE OF APPEAL

Pursuant to S.C. Code Ann. § 14-3-330(4), Greenville County and Will Lewis, in his official capacity as Sheriff of Greenville County, appeal that portion of this Court's July 17, 2017 Order for Partial Grant and Partial Denial of Temporary Injunctive Relief that temporarily enjoins the enforcement of Greenville County Ordinance 4869 as to Plaintiffs/Appellants. The Order was issued by the Honorable Robin B. Stilwell. Appellants received written notice of entry of the Order on July 17, 2017, and this Notice of Appeal is being filed within 30 days thereof.

Respectfully submitted,

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Dated: August 15, 2017
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Civil Action No. 2017-CP-23-03372

RECEIVED

AUG 17 2017

SC Court of Appeals

Greenville Bistro, LLC, a South Carolina Limited Liability Company,
d/b/a Buck's Racks and Ribs, and Frontage Road Associates, Inc.,
a South Carolina Corporation, ... Respondents,

v.

Greenville County, a Political Subdivision of the State of South Carolina,
and Will Lewis, in his Official Capacity as Sheriff of Greenville County, ... Appellants.

PROOF OF SERVICE

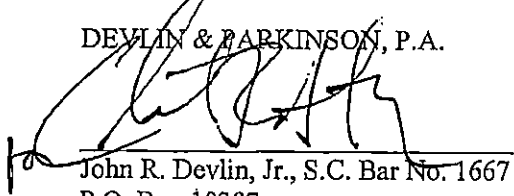
I certify that on August 15, 2017, I served the Notice of Appeal on Respondents Greenville
Bistro, LLC, d/b/a Buck's Racks & Ribs, and Frontage Road Associates, Inc. by depositing a
copy of the same in the United States Mail, postage prepaid, addressed to their attorneys of
record, listed below:

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Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John R. Devlin, Jr.", is written over a horizontal line.

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Dated: August 15, 2017
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

GREENVILLE BISTRO, LLC, a South
Carolina Limited Liability Company, d/b/a
Buck's Racks & Ribs, and FRONTAGE
ROAD ASSOCIATES, INC., a South
Carolina Corporation,

Plaintiffs,

v.

GREENVILLE COUNTY, a Political
Subdivision of the State of South Carolina,
and WILL LEWIS, in his Official Capacity as
Sheriff of Greenville County,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-03372

ORDER FOR PARTIAL GRANT AND
PARTIAL DENIAL OF
TEMPORARY INJUNCTIVE RELIEF

RECEIVED

AUG 17 2017

SC Court of Appeals

This matter comes before the Court on a Motion filed May 24, 2017, moving the Court to enter a Temporary Injunction enjoining Defendants from enforcing or attempting to enforce certain County Code provisions and ordinances against Plaintiffs. A hearing on Plaintiffs' Motion was held on June 16, 2017. At the call of the case, O. W. Bannister, Luke C. Lirot and Luke A. Burke were present on behalf of Plaintiffs. John Devlin and Scott D. Bergthold were present on behalf of Defendants. The Court has considered all Motions, Memoranda, affidavits, and exhibits filed in this matter, together with the arguments of counsel.

This Court has jurisdiction over this matter pursuant to § 15-53-20, S.C.C., Rule 57, S.C.R.Civ.P., § 15-53-120, S.C.C., and pursuant to Rule 65, S.C.R.Civ.P. The Court also has jurisdiction over Plaintiffs' Federal claims pursuant to 28 U.S.C., §§ 1331, 1343, and 2201 and pursuant to 42 U.S.C. Sec. 1983; 42 U.S.C., Sec.1988, and to the First, Fifth, and Fourteenth Amendments to the Constitution of the United States: *see Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990).

PROCEDURAL HISTORY OF THE CASE

On February 9, 2017, after a long history of controversy between similar businesses at the subject location and Greenville County, Judge Charles B. Simmons entered a Consent Order concerning the establishment of Greenville Bistro's at the subject location. Greenville Bistro represented to the Court that it had no connection with the businesses at the location. Based on that representation, and the like representation of the parties to the suit, Judge Simmons found that there was "no evidence of any connection between Elephant, Inc., Gaines and Greenville Bistro." This Court construes that language as a finding that this Plaintiff, Greenville Bistro, is not a successor to the earlier operator of the business at the location which is the subject of this action. That Order simply allows Greenville Bistro to open and operate a "similar business" to that of the former tenant. Judge Simmons Order further provided that "in the event that Greenville Bistro or any other adult entertainment venue commences operation at the location, full and complete compliance with all applicable laws, ordinances, etc. is expected." Twelve days after this Court entered its Order that had the effect of allowing Greenville Bistro to open and operate, the County adopted Ordinance 4869, which purports to amend the definition of an adult cabaret to regulate establishments offering "semi-nude" entertainment. Once Greenville Bistro commenced its operations, Defendants believed those operations were in violation of various County regulations and ordinances and began to enforce those regulations against Plaintiffs.

Accordingly, Plaintiffs commenced this action on May 23, 2017, and, on May 24, 2017, filed a Motion for Temporary Injunction. Subsequently, on May 30, 2017, Plaintiffs filed a Motion for a Temporary Restraining Order in order to preserve the *status quo* while the Motion for Temporary Injunction was under consideration by the Court.

On June 2, 2017, Judge Perry Gravely entered a Temporary Restraining Order in favor of Plaintiffs granting much of the relief sought by Plaintiffs in their Motion for a Temporary Restraining Order. Subsequently, on June 16, 2017, the undersigned heard oral argument on the Motion for Temporary Injunction and, on July 10, 2017, received Proposed Orders from the parties regarding the Motion for Temporary Injunction.

STANDARD FOR AWARD OF TEMPORARY INJUNCTIVE RELIEF

Rule 65 of the South Carolina Rules of Civil Procedure sets forth the procedure for issuing Temporary Injunctive Relief. Under the relevant case law, a party seeking injunctive relief must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy of law. *Rawlinson Road Homeowners Association, Inc., vs. Jackson*, 395 S.C. 25, 35 (Ct. App. 2011). The Courts recognize that an injunction is a drastic remedy and should be issued only to prevent irreparable harm suffered by the moving party. *AJG Holdings, LLC, vs. Dunn*, 382 S.C. 43 (Ct. App. 2009). The Court must consider each of the three elements to determine whether the drastic remedy of Temporary Injunctive Relief should be granted.

FINDINGS

IRREPARABLE HARM

The loss of First Amendment freedoms constitutes irreparable injury as a matter of law, *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, (1976). Consistent with *Elrod*, the Fourth Circuit has held:

Indeed, the Supreme Court has stated in no uncertain terms that “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); see also

Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978)
 ("Violations of first amendment rights constitute per se irreparable injury."). ...

International Refugee Assistance Project v. Trump, 2017 WL 2273306, *69, (4th Circuit May 25, 2017, *en banc*), partially reversed on other grounds, 2017 WL 2722580, May 25, 2017.

More importantly, the mere showing of a deprivation of First Amendment or other federally protected rights in and of itself establishes both injury and damage. *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965).

Sambo's of Ohio v. City Council of City of Toledo, 466 F.Supp. 177 (N.D. Oh., 1979).

The Court is cognizant of these sound constitutional and legal principles. Further, this Court is particularly sensitive to the free expression of constitutional rights. However, the Plaintiffs have failed to demonstrate how compliance with the provisions of the 2017 Consent Order causes irreparable harm. In that Order, notwithstanding assertions to the contrary by Plaintiff, there is no finding that Greenville Bistro is a successor to previous businesses at the subject location. To the contrary, the Court found, by consent, that there is "*no evidence which establishes a connection between these parties.*" Given the Plaintiff's assertions at the previous hearing before Judge Simmons, the claim of successor status in this suit is a dubious contention. It is problematic, therefore, for the Plaintiffs to claim that they have been harmed by an Order of the Court of which they freely, voluntarily, and readily approved.

The Plaintiffs, however, may have a complaint as to the adaption of Ordinance 4869 soon after the issuance of the February 2017 Order. In keeping with established law, the Plaintiffs would suffer irreparable harm if the subject ordinance abridges its constitutional freedom of expression.

LIKELIHOOD OF SUCCESS ON THE MERITS

When seeking a preliminary injunction, the moving party need not prove an absolute legal right; he need only present “a fair question to raise as to the existence of such a right.” *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). The determination of whether an injunction is granted should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a *prima facie* showing has been made: *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (S.C. App. 2003 (citing *Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969))). “The court must determine only the likelihood of whether [the moving party] will prevail on the merits based on the allegations in his complaint” *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). “Once a *prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

The Plaintiff has met its burden with respect to the issue of enforcement of Ordinance 4869. As discussed above, the Plaintiffs have, however, failed to demonstrate a likelihood of success of the merits for the remaining issues. The Court’s decision is based solely on the moving party’s alleged facts without regard to the ultimate merits of the case.

INADEQUATE REMEDY AT LAW

With regard to the enforcement of Ordinance 4869, Plaintiffs have no adequate remedy at law because Defendants’ efforts to regulate Plaintiffs’ business threaten Plaintiffs with the loss of constitutionally protected rights and freedoms. Therefore, the Plaintiffs have, on this point, met the requisite burden.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Defendants, Greenville County and Will Lewis, their officers, agents servants, employees, and attorneys, and those persons in active concert or participation with them are hereby temporarily enjoined from, in any way, enforcing the provisions of Ordinance 4869 as to the Plaintiffs at the subject location;
2. The remaining temporary relief prayed for by Plaintiffs are respectfully denied.
The Plaintiff must comply with any and all applicable laws or ordinances existing at the time of issuance of the February 9, 2017 Consent Order.
3. This Order is without prejudice to any findings of fact or findings of law at the ultimate hearing on the merits; and
4. This injunction shall take effect on the date and time on which it is signed and shall remain in effect pending further order of the Court.

IT IS SO ORDERED.

Robin B. Stilwell, Judge
13th Judicial Circuit

Greenville, South Carolina

Date: _____



Greenville Common Pleas

Case Caption: Greenville Bistro LLC , plaintiff, et al vs. Greenville County ,
defendant, et al
Case Number: 2017CP2303372
Type: Order/Temporary Injunction

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2017-07-17 09:13:49 page 7 of 7

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No. 2017-CP-23-03372
	)	
Greenville Bistro, LLC, a South Carolina,	)	
Limited Liability Company, d/b/a Buck's	)	
Racks & Ribs, and Frontage Road Associates,	)	
Inc. a South Carolina Corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Greenville County, a Political Subdivision of	)	
the State of South Carolina, and Will Lewis,	)	
in his Official Capacity as Sheriff of	)	
Greenville County,	)	
	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

On June 15, 2017, Defendants filed a motion for temporary injunction. The motion sought to enjoin Plaintiffs from operating a sexually oriented business in violation of Ordinances 2673 or 4869 at 805 Frontage Road, and from operating a nightclub at that location in violation of applicable zoning ordinances. The following day, the Court (Stilwell, J.) held a hearing on Plaintiffs' previously-filed motion for injunctive relief. On July 17, 2017, Judge Stilwell issued an order granting Plaintiffs' motion in part, and denying it in part. Specifically, the Court held:

1. Defendants, Greenville County and Will Lewis, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them are hereby temporarily enjoined from, in any way, enforcing the provisions of Ordinance 4869 as to the Plaintiffs at the subject location.
2. The remaining temporary relief prayed for by Plaintiffs are respectfully denied. **The Plaintiff must comply with any and all applicable laws or ordinances existing at the time of the issuance of the February 9, 2017 Consent Order.**

(July 17 Order at 6.)

Despite this clear language, GB has *not* complied with all applicable laws and ordinances. Plaintiffs have not complied with Ordinance 2673 or the County's Zoning Ordinance, both of which have been in effect since before February 9, 2017.¹ Evidence presented at the June 16, 2017 hearing, and evidence to be presented at the March 13, 2018 hearing, show that the County is entitled to injunctive relief under those two ordinances.

I. Standard of Review and Burden of Proof

South Carolina law provides that a county may obtain an injunction to prevent violations of its ordinances. S.C. Code Ann. § 6-29-950; § 4-9-30(14). For a county to "get an injunction for a zoning violation they must show (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance." *County of Richland v. Simpkins*, 348 S.C. 664, 669 (2002) (quoting *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282 (2000)).

II. The County is entitled to a temporary injunction against operation of a sexually oriented business at 805 Frontage Road in violation of Ordinance No. 2673.

GB is an "adult cabaret," one kind of business regulated by the County's Sexually Oriented Business ("SOB") Ordinance, Ordinance No. 2673. There are three relevant definitions therein:

Adult cabaret means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

- (a) Persons who appear in a state of nudity; or
- (b) Live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
- (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

Nudity or a *state of nudity* means the appearance of a human bare buttock, anus, male

¹ The County does not seek relief under Ordinance 4869, which was temporarily enjoined and is on appeal.

genitals, female genitals, or female breast.

Specified sexual activities means any of the following:

- (a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- (c) Masturbation, actual or simulated; or
- (d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

(Ord. No. 2673, Ans. and Countercl. Ex. 1 at 3-5.)

GB operates an adult cabaret because it regularly features persons who appear in a state nudity, i.e., showing bare buttocks and breasts, and because it regularly features live conduct by dancers erotically touching their own, and others, buttocks, breasts, and genital areas. Witnesses have observed these activities, as defined in the SOB Ordinance, at GB on several occasions. (*See* Redman Aff., Hrg. Ex. 14 (observing performers on multiple occasions with exposed buttocks and with exposed breasts and only pasties on the nipples); Hunnicutt Aff., Hrg. Ex. 15 (observing same and also a performer dancing in a sexually suggestive manner); Hayden Aff., Hrg. Ex. 16 (observing performers on multiple occasions exposing their buttocks, and describing lap dance where performer masturbated, grinded her buttocks against the officer's covered genitals, and pressed her breasts against the officer's face); Arflin Aff., Hrg. Ex. 17 (observing performers exposing buttocks and labia, simulating intercourse on stage, erotically rubbing her breast and crotch, and receiving lap dances where performer grinded genitals on officer's covered genitals); Whitmore Aff. Hrg. Ex. 18 (same).)

GB's operation of an SOB—specifically, an adult cabaret—is illegal because 805 Frontage Road does not meet the location requirements for SOBs. Ordinance No. 2673 has always

prohibited SOBs from operating within 1,500 feet of certain sensitive land uses, such as churches and residences. (Ord. No. 2673, Hrg. Ex. 1 at 10, Sec. 12(b).) And 805 Frontage Road is within 1,500 feet of a church, a lot devoted primarily to residential use, a nursing care facility, and a licensed child care facility. (Hanning Aff., Hrg. Ex. 19 ¶ 4; Map, Hrg. Ex. 19a.) Although there are more than 80 parcels in the S-1 district (and hundreds elsewhere in the County) that meet the location standards for adult cabarets, GB's adult cabaret is prohibited at 805 Frontage Road.

Indeed, the South Carolina Supreme Court has previously upheld a permanent injunction prohibiting operation of an adult cabaret, as defined in Ordinance No. 2673, at that very location. *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 169-170 (2003).² Thus, this Court should grant an injunction prohibiting the current operation of an adult cabaret at that location.

III. The County is entitled to a temporary injunction prohibiting Plaintiffs from operating or allowing a nightclub at 805 Frontage Road in violation of the Zoning Ordinance.

The Zoning Ordinance prohibits a “nightclub” at 805 Frontage Road. Because GB is operating a nightclub at that location, the County is entitled to a temporary injunction prohibiting the ongoing violation of the County's Zoning Ordinance.

The property at 805 Frontage Road is zoned S-1. Zoning Ordinance § 6:1 specifies that “[p]rinciple uses shall be allowed within the base zoning districts of this ordinance in accordance with Table 6.1,” the Table of Uses. (Zoning Ordinance Article 6, Ans. and Countercl. Ex. 9 at 1.)

Section 6:1.4 specifies that a blank cell in the Table “indicates that a use type is not permitted in the respective zoning district, unless it is otherwise expressly allowed by other regulations of this ordinance.” (*Id.*) There is a blank cell in the S-1 zoning column across for “Nightclub.” Thus, nightclubs are prohibited in the S-1 zoning district. (*Id.* at 7.)

² One portion of the *Kenwood Enterprises* decision that is not relevant here—which deals with the rule for stating a takings claim—was overruled by *Byrd v. City of Hartsville*, 365 S.C. 650 (2005).

Article 4 of the Zoning Ordinance defines “nightclub” as follows:

Any establishment, whether public or a private club, including cocktail lounges, etc., serving a predominantly adult clientele, and whose primary business is the sale of alcoholic beverages, including beer and wine, for consumption on the premises in conjunction with dancing or live performances. The purchase of food is at the option of the customers and not required by the operator. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic-Beverage Licensing Board.

(Zoning Ordinance Article 4 Excerpts, Ans. and Countercl. Ex. 10 at 1.)

GB operates, and Frontage Road allows, a “nightclub” at 805 Frontage Road, in violation of the Zoning Ordinance. As noted above, law enforcement officers and others have observed dancing and live performances and the sale of alcoholic beverages on several occasions at GB. The Zoning Ordinance prohibits this use of land in the S-1 district.

Zoning Ordinance § 13:3 provides that “[t]he Zoning Administrator or other appropriate county official may also seek injunctive relief or any other appropriate action in courts of competent jurisdiction to enforce the provisions of this Ordinance.” (Zoning Ordinance Article 13 Excerpts, Ans. and Countercl., Ex. 11 at 1.)

IV. Conclusion

Per S.C. Code Ann. § 4-9-30(14) and § 6-29-950, Ordinance No. 2673 § 17 (Injunction), Zoning Ordinance § 13:3, and S.C.R.C.P. 65(a), the County respectfully requests a temporary injunction:

- A. Prohibiting Plaintiffs from operating or allowing a sexually oriented business, as defined in Ordinance No. 2673, at 805 Frontage Road; and
- B. Prohibiting Plaintiffs from operating or allowing a nightclub at 805 Frontage Road.

Respectfully submitted,

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s/ John R. Devlin, Jr.

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Attorneys for Defendants

Dated: March 8, 2018

Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No. 2017-CP-23-03372
	)	
Greenville Bistro, LLC, a South Carolina,	)	
Limited Liability Company, d/b/a Buck's	)	
Racks & Ribs, and Frontage Road Associates,	)	
Inc. a South Carolina Corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Greenville County, a Political Subdivision of	)	
the State of South Carolina, and Will Lewis,	)	
in his Official Capacity as Sheriff of	)	
Greenville County,	)	
	)	
Defendants.	)	

**DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR TEMPORARY INJUNCTION**

At the March 13, 2018 hearing on the County's motion, the Court asked about the nature of the County's appeal of Judge Stilwell's July 17, 2017 order. The County indicated that it had appealed *only* that order's injunctive relief against Ordinance 4869 (numbered paragraph 1 on page 6 of the order), and had not appealed that order's requirement (in numbered paragraph 2 on page 6) that Plaintiffs must comply with all ordinances in effect on February 9, 2017.

The County's notice of appeal (attached) confirms that the County appealed only "that portion of this Court's July 17, 2017 Order for Partial Grant and Partial Denial of Temporary Injunctive Relief that temporarily enjoins the enforcement of Greenville County Ordinance 4869 as to Plaintiffs/Appellants." Plaintiffs did not cross-appeal the portion of the order adverse to them. Thus, Ordinance 2673, the subject matter of the March 13 hearing, is not on appeal.

Respectfully submitted,

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s/ John R. Devlin, Jr.

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Attorneys for Defendants

Dated: March 15, 2018
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No. 2017-CP-23-03372
	)	
Greenville Bistro, LLC, a South Carolina,	)	
Limited Liability Company, d/b/a Buck's	)	
Racks & Ribs, and Frontage Road Associates,	)	
Inc. a South Carolina Corporation,	)	
	)	DEFENDANTS' MOTION TO ALTER OR
Plaintiffs,	)	AMEND THE ORDER DENYING
	)	DEFENDANTS' MOTION FOR
v.	)	TEMPORARY INJUNCTION AND
	)	REQUEST FOR ORAL ARGUMENT
Greenville County, a Political Subdivision of	)	
the State of South Carolina, and Will Lewis,	)	
in his Official Capacity as Sheriff of	)	
Greenville County,	)	
	)	
Defendants.	)	

Pursuant to SCRCP 59(e), Defendants (collectively “the County”) move this Court to amend its May 17, 2018 Order to enjoin Plaintiffs (collectively “GB” or “Greenville Bistro”) from violating the County’s Zoning Ordinance regulations for nightclubs, and from violating the County’s sexually oriented business (“SOB”) regulations unaffected by Ordinance 4869.

Supersedeas bars the Court from adjudicating only a matter that could be affected by the ongoing appeal concerning Ordinance 4869, a recent addition to the SOB regulations. *See* Rules 205, 241(c)(1), SCACR. But the Zoning Ordinance’s regulations for nightclubs are wholly separate and independent from the SOB Code. Under South Carolina law, a local government is entitled to injunctive relief if it shows that it has an ordinance covering the situation, and that the ordinance is being violated. *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282 (2000). Uncontroverted evidence shows that GB is operating a nightclub in an impermissible S-1 district in violation of the Zoning Ordinance, so the County was entitled to relief thereunder.

The Court's May 17 Order also held that the County improperly sought relief under Ordinance 4869, which this Court temporarily enjoined on July 17, 2017. The Court therefore denied the County *all* of its requested relief.

But that was error. The proper course was to simply deny relief under the ordinance that was enjoined and is on appeal (4869), while granting relief under the preexisting SOB location regulations that have been upheld by our Supreme Court. But the Court did not even apply the test for a government seeking an injunction to enforce its laws, as laid out in *Pic-A-Flick Video*.

Ordinance 4869 simply added one way—regularly featuring semi-nudity—for an establishment to qualify as an adult cabaret. So the remaining, independent, ways that an establishment qualifies as an adult cabaret are unaffected by the appeal concerning Ordinance 4869. The location requirements are also unaffected by Ordinance 4869.

Indeed, the Court's holding on the SOB regulations erred in at least three additional ways. First, it never resolved whether GB is an adult cabaret—and uncontroverted evidence shows that it is. Second, the Court's Order is internally inconsistent. The Order says that Ordinance 4869 has not been “rendered unenforceable,” (Order at 9, ¶ 35; *id.* at 10), but that is exactly what the Court's July 17, 2017 injunction did: it rendered Ordinance 4869 unenforceable. And last, the Court erred in its factual finding that Ordinance 4869 “was adopted only a few days after the Plaintiffs began operating the subject establishment.” (Order at 4, ¶ 16.) In fact, Ordinance 4869 was adopted February 21, 2017, and plaintiffs did not obtain their certificate of use and occupancy until more than a month later, on March 27, 2017. (Ans. and Countercl. Ex. 8.)

For these reasons, the Court should amend its Order to grant the County a temporary injunction prohibiting GB from (1) operating a nightclub and (2) operating an adult cabaret, as that term is defined in the portions of Ordinance 2673 that Ordinance 4869 did not amend.

Standard of Review

There are “two basic situations in which a party should consider filing a Rule 59(e) motion.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24 (2004).

A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Id. (emphasis in original).

A motion to alter or amend a judgment is in “the sound discretion of the trial judge, but such discretion is not absolute.” *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61 (1993). A court abuses its discretion when it makes an error of law, *id.*, or makes factual conclusions without evidentiary support. *County of Richland v. Simpkins*, 348 S.C. 664, 668-69 (Ct. App. 2002).

Relevant Regulations

Zoning Ordinance. Zoning Ordinance § 6:1 and Table 6.1 permit nightclubs only in the C-2 zone. (Ans. and Countercl. Ex. 9 at 1, 7.) A “nightclub” is defined as:

Any establishment, whether public or a private club, including cocktail lounges, etc., serving a predominantly adult clientele, and whose primary business is the sale of alcoholic beverages, including beer and wine, for consumption on the premises in conjunction with dancing or live performances. The purchase of food is at the option of the customers and not required by the operator. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic-Beverage Licensing Board.

(Ans. and Countercl. Ex. 10.)

SOB Code. Section 12(b) of the SOB Code prohibits a sexually oriented business from operating within 1,500 feet of, *inter alia*, a residential district, a lot devoted primarily to residential use, a church, a child care facility, or a family oriented recreation facility. (Ans. & Countercl. Ex. 1 at 10-11.)

One kind of sexually oriented business is an adult cabaret. An establishment can qualify as an adult cabaret in a number of ways:

(3) *Adult cabaret* means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

- (a) Persons who appear in a state of nudity, or in a state of semi-nudity; or
- (b) Live performances which are characterized by the exposure of “specified anatomical areas” or by “specified sexual activities”; or
- (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of “specified sexual activities” or “specified anatomical areas.”

Nudity or a *state of nudity* means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.

Specified sexual activities means any of the following:

- (a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- (c) Masturbation, actual or simulated; or
- (d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

(Compl. Ex. G at 2; Ans. and Countercl. Ex. 1 at 3-5.)

Since they were adopted via Ordinance 2673 in 1995 (Ans. and Countercl. Ex. 1), the SOB Code’s definitions remained unaltered until the phrase “or in a state of semi-nudity” in (3)(a) was added by Ordinance 4869 in 2017. (Ans. & Countercl. Ex. 1 at 3; Compl. Ex. G at 2.)

Relevant Facts

More than a month after the County passed Ordinance 4869, Greenville Bistro received a Certificate of Occupancy to operate as a “restaurant” called Buck’s Racks & Ribs at 805 Frontage Road in Greenville County on March 27, 2017. (Compl. Ex. F.) Neither party disputes

that 805 Frontage Road is within 1,500 feet of a church, a residentially-zoned district, and a lot devoted to residential use (Reply to Countercl. at 5 ¶ 110; Def.'s Ans. and Countercl. at 18 ¶ 110), or that it is in an S-1 zoning district (Reply to Countercl. at 5 ¶ 110; Defs.' Ans. and Countercl. at 18 ¶ 110).

Nevertheless, Greenville Bistro began operating a nightclub: it services predominantly adult clientele and it sells alcoholic beverages as a primary business. Greenville Bistro is also operating an "adult cabaret" under both subsections 2(3)(a) and 2(3)(b) of the SOB Code, which define that term. Greenville Bistro features persons appearing in a state of nudity under (a), persons appearing in a state of semi-nudity under (a), and live performances characterized by specified sexual activities under (b). (*See* June 6, 16 Hrg. Tr. & Hrg Exs. 14-18.)

After GB sued the County on May 23, 2017, it moved to enjoin the County from preventing its operation as an adult cabaret, under the theory that GB was a successor in interest to the prior tenant, Platinum Plus, who operated an adult cabaret.

On June 15, 2017, the County filed its own motion for temporary injunction. That motion asked the Court to enjoin Greenville Bistro from (1) continuing to operate as an adult cabaret in violation of the SOB Code's 1,500-foot buffer requirement, and from (2) continuing to operate as a nightclub in an S-1 zone, in violation of the Zoning Ordinance.

On June 16, 2017, the Court held a hearing on GB's motion only. GB did not dispute that the "performances" (e.g. lap dances and stage dances) were live performances characterized by specified sexual activities, nor did it contest numerous affidavits showing that its dancers appeared in a state of semi-nudity. GB instead relied on its assertion that it was a successor to Platinum Plus, and therefore entitled to disregard the SOB Code.

On July 17, the Court partially granted Greenville Bistro's motion. The July 17 order held rejected GB's argument that it was a "successor" to Platinum Plus. (July 17 Order at 2.) Nevertheless, the Court held that since Ordinance 4869 was adopted after a February 10, 2017 order releasing the property to the property owner, GB "had met its burden with respect to the issue of enforcement of Ordinance 4869." (July 17 Order at 5.) The Court specifically enjoined enforcement of Ordinance 4869, but denied GB any further relief and specifically required it to comply with other County laws existing on February 9, 2017:

1. Defendants, Greenville County and Will Lewis, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them are hereby temporarily enjoined from, in any way, enforcing the provisions of Ordinance 4869 as to the Plaintiffs at the subject location.
2. The remaining temporary relief prayed for by Plaintiffs are respectfully denied. **The Plaintiff must comply with any and all applicable laws or ordinances existing at the time of the issuance of the February 9, 2017 Consent Order.**

(July 17 Order at 6 (emphasis added).)

On August 15, 2017, the County appealed *only* "that portion of this Court's July 17, 2017 Order for Partial Grant and Partial Denial of Temporary Injunctive Relief that temporarily enjoins the enforcement of Greenville County Ordinance 4869." (Notice of Appeal at 1.)

While the injunction against that portion of the SOB Code was on appeal, the County continued to pursue its requested injunctive relief against the nightclub zoning regulations and the remainder of the SOB Code—that is, everything in the adult cabaret definition except for the "semi-nudity" prong in 2(3)(a) that was added by Ordinance 4869. The County reiterated this position in its March 8 brief, at the March 13 hearing (Tr. 59:17-60:3), and again in its March 15 supplemental brief.

Uncontroverted evidence at the March 13 hearing showed that GB that is a nightclub operating in a prohibited S-1 zone under the Zoning Ordinance. The evidence also established

that GB is an adult cabaret under subsection 2(3)(a) of Ordinance 2673 because it features persons who appear in a “state of nudity,” as defined in that ordinance. Likewise, GB is an adult cabaret by virtue of featuring live performances characterized by “specified sexual activities,” as defined in subsection 2(3)(b) that same ordinance, Ordinance 2673. It is also undisputed that GB is operating too close to protected land uses under the SOB Code.

Nevertheless, this Court denied the County’s motion for a temporary injunction on May 17, 2018. The denial of injunctive relief was error because the County showed that the Zoning Ordinance prohibits a nightclub in an S-1 district, and that GB is operating a nightclub in an S-1 district. Likewise, the Court erred because the County showed that Ordinance 2673—which was not enjoined and is not on appeal—prohibits GB from operating an adult cabaret in its current location. Under South Carolina law, the County was entitled to injunctive relief enjoining these violations of the County’s ordinances.

Argument

I. The Court erred in failing to resolve the County’s request for relief under the Zoning Ordinance, and in holding that supersedeas bars all relief under the SOB Code.

The Court committed reversible error by denying all of the County’s requested relief under Rule 205, SCACR. The County asked for injunctive relief to enforce two separate sets of regulations, the Zoning Ordinance and the SOB Code. But the Court’s May 17 Order overlooks the Zoning Ordinance. The Court also overlooked that the County sought relief under provisions in the original SOB Code (Ordinance 2673) that were unaffected by the additional prong that Ordinance 4869 added in 2017. Thus, the Court incorrectly assumed that supersedeas blocked all relief requested in the County’s motion—even though the appeal is clearly limited to “that portion of this Court’s July 17, 2017 Order for Partial Grant and Partial Denial of Temporary

Injunctive Relief that temporarily enjoins the enforcement of Greenville County **Ordinance 4869.**” (Notice of Appeal at 1 (bold added).)

The Court correctly observed that supersedeas prevents a trial court from proceeding “with matters that are affected by appeal,” but that it “is specifically allowed to proceed with matters not affected by the appeal.” (Order at 7 (quoting *Tillman v. Oakes*, 398 S.C. 245, 256 (Ct. App. 2012))).) “The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision **on appeal**” Rule 241(c)(1), SCACR (emphasis added). The text of 241(c)(1) makes it clear that supersedeas applies to discrete “matters” within an order, not to whole orders without distinguishing between those matters on appeal those not.

Failure to conduct this analysis is reversible error. In *Tillman v. Oakes*, 398 S.C. 245, 256 (Ct. App. 2012), Tillman (the ex-husband) appealed a trial court’s order that transferred custody of one child, Peter, to Tillman, but left custody of the other child, Jack, with Oakes (the ex-wife). That order also gave Oakes visitation rights to Peter. *Id.* at 248. Oakes appealed the custody order relating to Peter. After appealing and while the appeal was pending, Tillman asked the trial court to suspend Oakes’ visitation rights with Peter. *Id.* at 254. The trial court refused to rule on the petition “stating, ‘this Court is of the opinion that it cannot proceed with this action which involves issues pending on appeal unless the automatic stay is lifted.’” *Id.*

But the Court of Appeals reversed:

In deciding whether it could hear Tillman's petition, the family court addressed the wrong question—whether the order was stayed during appeal. The question the court should have addressed is whether the issue raised in the petition was a matter affected by the appeal. We find that it was not, and that the family court should have ruled on the petition.

The order on appeal in this case changed custody from Oakes to Tillman and established Oakes' visitation rights. Tillman's petition relates to Oakes' visitation rights. It would appear at first, therefore, that the appeal affected Oakes' visitation rights, and the family court did not retain the power to proceed. However, answering the question of whether a matter is “affected by the appeal” requires a closer

examination of the appeal. Oakes challenges only the custody portion of the order in her appeal. In fact, understanding she lost primary custody, Oakes is actually the beneficiary of the visitation provisions in the order. Tillman did not file an appeal. Thus, there is no action the appellate courts could take resolving this appeal that would affect the visitation established in the appealed order, except to reverse the custody determination, in which case Oakes would not need visitation.

Id. at 256.

As in *Tillman*, the Court here erred by holding that supersedeas applied to all of the County's requested relief. (Order at 8 ¶ 32 (“[T]he relief sought by defendants in their Motion for Temporary Injunction would possibly contravene the relief already granted to Plaintiffs on July 17, 2017”).) The County appealed “only the [] portion of the order” relating to Ordinance 4869, so “there is no action the appellate courts could take resolving [that] appeal that would affect the” remaining portions of the motion for injunctive relief. *Tillman*, 398 S.C. at 256.

The Court did not even reach the independent request for an injunction to prevent GB from violating the Zoning Ordinance as an illegally-located nightclub in an S-1 district.

As to the SOB Code, the Court held that Defendants cannot “deviate from their operative Motion and purportedly seek relief under Ordinance 2673, attempting to ignore the adoption of Ordinance 4869.” (Order at 9 ¶ 35.) But this is mistaken on the facts and the law.

In addition to the “semi-nudity” prong added to the adult cabaret definition via Ordinance 4869, the County's motion always sought relief under the “specified sexual activities” prong of the adult cabaret definition established via Ordinance 2673 in 1995. (Defs.' Mot. for Temp. Inj. at 2-3 (explaining that “GB is also an adult cabaret because it regularly features live performances” characterized by “specified sexual activities” including “dancers erotically touching their own, and others, buttocks, breasts, and genital areas” on stage and during “lap dances”).)

After the July 17 order enjoining Ordinance 4869, the County made it clear that it was seeking relief only under those portions of the SOB Code that were adopted via Ordinance 2673, and remained unaffected by Ordinance 4869. (County's Br. Supp. Mot. for Temp. Inj. at 2 .)

Thus, the proper course was to deny relief under Ordinance 4869 (because, as the County recognized, it was enjoined and on appeal), but grant relief under Ordinance 2673 to the extent that the County showed it was being violated—which the County did in spades. The testimony at the hearing established that GB is an adult cabaret because its dancers engage in specified sexual activities as defined in Ordinance 2673. On October 3 and 4, 2017, the investigators observed dancers on stage who simulated intercourse, touched their bare breasts and buttocks, and simulated oral sex with patrons by letting patrons put their face in the dancer's crotch. (*Id.* at 8:8-17, 9:14-24, 14:8-10, 15:23-16:8.) The dancers simulated intercourse during lap dances by grinding their buttocks or "humping against" the investigator's crotch, and dancers also pressed their breasts and buttocks against the investigator's face. (*Id.* at 9:2-9, 9:14-24, 14:2-7, 14:22-15:7, 22:16-23:18.) Undercover officers observed the same activity first-hand on March 7 and 8, 2018. (*See id.* at 33:14-17 (stage dancing); 31:12-16, 32:11-13, 32:18-33:2, 34:11-15, 35:18-23, 36:2-9 (lap dances).)

Ordinance 2673 was a comprehensive SOB Code when it was passed, and is fully capable of being enforced independent of the "semi-nudity" language added by Ordinance 4869. Ordinance 2673 supplies the vast majority of definitions and regulations in the SOB Code. In particular, Ordinance 2673 is the source for SOB Code section 12(b), the location restriction. It is also the source of all of subsection 2(3)(b), which makes an establishment featuring performances with "specified sexual activities" an "adult cabaret." Finally, it is also the source of

subsection 2(3)(a)'s language making an establishment featuring persons in a "state of nudity" an "adult cabaret." (Ans. and Countercl. Ex. 1 at 3, 10.)

The fact that Ordinance 4869 added "or in a state of semi-nudity" to subsection 2(3)(a) as an independent trigger for the "adult cabaret" definition does not diminish the force of these other prongs of that definition, which have existed since Ordinance 2673 passed in 1995—and were not altered by Ordinance 4869.

Thus, independent of Ordinance 4869, an establishment that "regularly features ... [l]ive performances which are characterized by ... 'specified sexual activities'" still qualifies as an adult cabaret. (Ans. and Countercl. Ex. 1 at 3.) Similarly, an establishment that regularly features "[p]ersons who appear in a state of nudity" still qualifies as an adult cabaret independent of Ordinance 4869. (*Id.*) And said establishment must still be at least 1,500 feet from certain specified land uses. (*Id.* at 10, Sec. 12(b).) The ongoing appeal will thus have no effect on the fact that GB qualifies as an adult cabaret both under SOB Code subsection 2(3)(b) and under the "nudity" portion of 2(3)(a); nor will it change the fact that GB is too close to certain land uses.

Put another way, the fact that one part of subsection 2(3)(a) is currently unenforceable due to a temporary injunction does not change the fact that GB still qualifies as an adult cabaret in at least two other ways, and that it is operating unlawfully under location regulations that have been in place and have not been altered since 1995.

Thus, the Court wrongly held that supersedeas bars the injunctive relief the County sought under the Zoning Ordinance and under the SOB Code provisions unaffected by Ordinance 4869.¹

¹ That GB may be operating a restaurant is immaterial. A restaurant can also be an adult cabaret, and become subject to the SOB Code's requirements. The SOB Code even explicitly allows for this. (Ans. and Countercl. Ex. 1 at 3 ("*Adult cabaret* means a nightclub, bar, **restaurant**, or similar commercial establishment which regularly features") (emphasis added).)

Conclusion

For the reasons stated above, the Court should amend its May 17 Order to enjoin GB from:
(1) operating a nightclub in an S-1 district in violation of the Zoning Ordinance, and (2)
operating an adult cabaret, as defined by Ordinance 2673, in violation of the location restrictions
found in section 12(b) of Ordinance 2673.

Respectfully submitted,

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Dated: May 29, 2018

Greenville, South Carolina

Attorneys for Defendants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Court Judge

Civil Action No. 2017-CP-23-03372

Greenville Bistro, LLC, a South Carolina Limited Liability Company,
d/b/a Buck's Racks and Ribs, and Frontage Road Associates, Inc.,
a South Carolina Corporation, ... Respondents,

v.

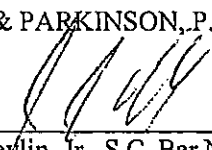
Greenville County, a Political Subdivision of the State of South Carolina,
and Will Lewis, in his Official Capacity as Sheriff of Greenville County, ... Appellants.

NOTICE OF APPEAL

Pursuant to S.C. Code Ann. § 14-8-200(a), Greenville County and Will Lewis, in his official capacity as Sheriff of Greenville County, appeal the Court's May 17, 2018 Order Denying Defendants' Motion for Temporary Injunction and that part of the June 26, 2018 Order denying Defendants' Motion to Alter or Amend. The Orders were issued by the Honorable Perry H. Gravely. Appellants filed a timely motion to alter or amend the May 17, 2018 Order under Rule 59, SCRCP on May 29, 2018, and Appellants received written notice of entry of the order granting in part and denying in part that motion on June 26, 2018. This Notice of Appeal is being served and filed within 30 days thereof.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	2017-CP-23-03372
COUNTY OF GREENVILLE	)	
	)	
GREENVILLE BISTRO, LLC, a	)	
South Carolina Limited	)	
Liability Company, d/b/a/	)	
BUCK'S RACKS AND RIBS, and	)	
FRONTAGE ROAD ASSOCIATES,	)	
INC., a South Carolina	)	
Corporation,	)	
PLAINTIFFS,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
GREENVILLE COUNTY, a	)	
Political Subdivision of the	)	
State of South Carolina and	)	
WILL LEWIS, in His Official	)	
Capacity as Sheriff of	)	
Greenville County,	)	
DEFENDANTS.	)	

June 16, 2017
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, JUDGE

A P P E A R A N C E S:

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Circuit Court Reporter

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EXHIBITS

NO

DESCRIPTION

ID

EVD

There were no exhibits introduced.

P R O C E E D I N G S

(WHEREUPON, proceedings commenced at 10:55 a.m.)

THE COURT: All right, gentlemen. Let us call to bar the case of Greenville Bistro, LLC vs. Greenville County. That is Case Number 2017-CP-23-3372.

This matter is before the Court pursuant to a motion for temporary injunctive relief. I will be happy to hear from you, whoever is the moving party.

MR. LIROT: May it please the Court, Your Honor.

THE COURT: Yes, sir.

MR. LIROT: My name is Luke Lirot. I'm grateful for the privilege of appearing before the Court pro hoc vice, and I'm joined here by my co-counsel, Mr. Bannister, and another Luke. We have at least two Lukes with us in the courtroom today.

The reason that we have filed this motion for temporary injunction is quite simple. And if I may have the privilege of addressing the Court from counsel table so I can review some of the notes ---

THE COURT: Yes, sir. Absolutely.

MR. LIROT: --- and meet your disciplined time frame, I'm happy to do so.

THE COURT: Yes, sir.

MR. LIROT: This case really emanates from some prior

1 cases that resulted in court orders, that being the
2 overarching consideration that there are existing court
3 orders that define, limit, but describe entirely the
4 business model that is acceptable at 805 Frontage Road.
5 That business model interpreted various definitions which
6 were the subject of a complaint for declaratory judgment
7 that was brought back in 2001.

8 In 2002 the Court issued a consent order and ratified
9 the agreement of the parties at that time as the
10 equivalent of a court order. And that's the most
11 important issue that we intend to make today.

12 To cut to the chase and show true discipline, the
13 reason that we're here is that the County feels that they
14 can, through legislative fiat, adopt a mandatory
15 legislation that changes the import, the vitality and the
16 meaning of that court order. And our position is that
17 they cannot do that. There was no effort to seek to
18 change the terms and provisions of that court order, and
19 that court order from 2002 came before the Court on
20 several later occasions and was incorporated and ratified
21 at each of those subsequent occasions.

22 Now, the second time that it came up -- and I've
23 provided the Court with courtesy copies of all the orders.
24 The first order from 2002 is found at Exhibit A, and it's
25 actually an exhibit to the complaint, and I have a copy

1 for my colleagues here.

2 If you look at this particular order, Judge, it
3 defines with great specificity what is allowed and what's
4 not allowed, and basically, it talks about the
5 requirements that a business has to meet so that they're
6 not construed as a sexually oriented business. That's the
7 important issue here. The County has continuously said
8 this order doesn't allow the operation of a sexually
9 oriented business at that location.

10 THE COURT: So am I to understand your assertion is
11 that Greenville Bistro is a successor corporation to
12 Elephant and all of the additional plaintiffs in that
13 case?

14 MR. LIROT: That is correct.

15 THE COURT: Okay.

16 MR. LIROT: That is correct. Not just the
17 plaintiffs, though. The property owner. I think that --
18 and I'll go ahead and cite for the Court the Knuckles
19 case. It's an old case. We researched this, but all of
20 the case law that dealt with these issues pointed back to
21 this case. It's from 1967. It's 250 SC reporter 123.
22 And this dealt with some properties in Myrtle Beach.

23 The proposition that this case stands for is that
24 once you have a nonconforming use, and I think at the last
25 hearing in front of Judge Gravely, the County took the

1 position that every business that has whatever it is, the
2 adult entertainment or the pseudo-adult entertainment,
3 whatever business operates under the provisions of the
4 2002 order, they're all nonconforming uses. And I think
5 that that is consistent with the proper zoning doctrines.
6 We will agree that it's a nonconforming use.

7 It's the order that creates that nonconformity. And
8 based on the Knuckles case, that nonconformity runs with
9 the land. So from our perspective, the landlord in the
10 Knuckles case was the owner of the property that didn't
11 develop it, had acquired some nonconforming vested rights.
12 We would say that the business model that's articulated in
13 the 2002 order creates the same nonconforming vested
14 rights, and that as the owner of the land with a vested
15 right that runs with the land, the landlord can give those
16 rights to a successor lessee through contract.

17 The County's position is that since there's no
18 privity with Elephant, somehow Greenville Bistro is not a
19 successor. That would turn a blind eye to this legal
20 precedent that says the nonconforming use runs with the
21 land. There's been no change in ownership, so certainly
22 the privity between Elephant and the owner is transferable
23 to the owner that leads us to Greenville Bistro. And with
24 the orders that came after that, it would appear that the
25 timing of these events is somewhat problematic.

1 Now, if you look at the other orders, unfortunately,
2 the operation that was the subject of the nuisance
3 abatement action when Elephant, Inc. operated the business
4 resulted in not one but two nuisance abatement orders.
5 The business was ultimately ordered closed, and then in, I
6 want to say, early 2017, a case was brought where the
7 effort was made before the Court to establish the rights
8 in the 2002 order and basically remove the obstacles that
9 were created by the nuisance abatement orders and allow
10 Greenville Bistro to go in and operate. And, candidly,
11 the gist of that order, which I think is Exhibit D to the
12 list I gave you, was that if you can show and the Court
13 has no reason not to believe that there's no privity
14 between Elephant, Inc. and Greenville Bistro, then we will
15 go ahead and allow you to continue in operation there.

16 Now, what happened during that period of time is one
17 of the issues that we think justifies our request for
18 injunctive relief. And I think, as this court well knows,
19 we've briefed it quite extensively. This business
20 presents entertainment that's presumptively protected by
21 the First Amendment in the companion for business of the
22 South Carolina Constitution. That being said, any
23 deprivation of those rights for even a minimal period of
24 time amounts to irreparable harm.

25 So, again, focusing on the four-part test that we

1 need to meet to establish our right to the temporary
2 injunction that we're asking for, we would like to suggest
3 to the Court that the temporary injunction requirement of
4 irreparable harm is met by that issue alone.

5 The likelihood-of-success issue, we think certainly,
6 the County, other than quibbling with us about the concept
7 of successor, has never presented us with any case law
8 that undermines the holding in Knuckles. And, again, I
9 explained that concept to the Court.

10 And the other issues that I think show that if, in
11 fact, someone wants to modify a court order, there are
12 very few options available. You can ask that it be
13 reheard, you can appeal it, you can come back after the
14 order is issued for some type of collateral relief or some
15 kind of modification of the order based on a variety of
16 different legal issues.

17 But in this instance, the County has done nothing to
18 try to change the sanctity or the language of the 2002
19 order. And what's important is that in each of these
20 other orders, the County never made such attempt. They
21 were in court not just in 2002, but at least twice in
22 2015. In the last order that allowed Greenville Bistro to
23 take over the property, there was no effort made by the
24 County to say we don't like the components of this 2002
25 order, we'd like to change it, we'd like to make it more

1 strict, we'd like to modify it in some fashion.

2 So the argument here is that while the County has the
3 right, if not the obligation and responsibility to adopt
4 legislation that it finds to be in the best interest of
5 the public's health, safety and welfare, the County does
6 not have the right to step behind that wall and modify a
7 court order through simply the adoption of legislation.
8 And since this property is the same property that was the
9 beneficiary of the consent order of 2002, the County's
10 actions in trying to enforce their amendatory ordinance
11 and to take different steps to try to make cases and to
12 try to -- I think we've articulated that in numerous --
13 the affidavit of Mr. -- I'm sorry. Mr. Mohny has an
14 affidavit, Mr. Schweitzer has an affidavit, and we've got
15 many affidavits that talk about the conduct of the County
16 both through code enforcement and through law enforcement
17 actions that, candidly, have scared away all the
18 customers, scared away all the performers. Nobody wants
19 to perform in a facility that would be the subject of
20 arrest or the subject of any kind of criminal scenario or
21 anything like that, so the loss of that business goodwill.
22 Even the loss of that income, and the place is presumably
23 protected by the First Amendment, again, buttresses our
24 claim that we're suffering irreparable harm.

25 Now, the other issues that deal with the concept of

1 likelihood of success go with some of the other concepts
2 here. And I think that if the County takes the position
3 that they can modify that court order simply by adopting
4 some amendatory legislation, our position is that you just
5 can't do it. That ordinance might be valid as applied to
6 other businesses and other property owners that were not
7 the beneficiaries of the 2002 order, but as far as the
8 parties and the landowners that were associated to that
9 particular order, that amendatory ordinance would be
10 unconstitutional as applied to them because of a violation
11 of separation of powers.

12 And as far as the balance of the harms -- if you'll
13 excuse me for just a minute.

14 THE COURT: Sure. I won't count that time against
15 your 15 minutes.

16 MR. LIROT: Thank you. It takes me a long time
17 to . . .

18 We've put together what we felt was a strong showing
19 as far as some of the other First Amendment arguments.
20 And, candidly, we had to come here today with witnesses as
21 what we were going to refer to as our alternative
22 argument. We researched this, and much to our surprise,
23 in this county, which is apparently the fourth fastest
24 growing area in the nation, congratulations, this county
25 does not have a single adult business of any type that is

1 in a conforming area. We researched that. And the
2 original ordinance that was the subject of the 2001 case
3 has a number of different provisions, one of those
4 provisions being a zoning setback which requires you to be
5 1,500 feet from a variety of zoning districts, residential
6 zoning districts. It's basically a circle that would
7 insulate other uses from the operation of an adult
8 business.

9 The case law is pretty clear that you cannot zone out
10 these types of businesses because of their constitutional
11 protections. And I would have to frame this in the form
12 of a proffer because we brought Mr. McLaughlin here who
13 has studied this. We filed his affidavit -- I don't know
14 if the Court wants to take that under advisement -- but
15 based on the case law that says that a community, for
16 better or worse, needs to provide adequate alternative
17 avenues of communication for adult-oriented businesses.

18 Now, again, it's kind of an interesting argument
19 because my clients don't want to be an adult-oriented
20 business. They simply want to be the non-adult-oriented
21 business that's described in the 2002 order. And, again,
22 I have to stress the County keeps making the claim that
23 you're trying to exceed that by being something you can't
24 be because you're in the wrong zone and any number of
25 additional arguments. All my clients wants to do is to

1 comply with the dictates of the 2002 order so that they
2 can operate.

3 But in the instances of this particular county, there
4 are only four or five. By geometry, if one locates in one
5 of the spots, it disqualifies one of the other spots so
6 that's why it would be four or five. But for a county of
7 this size and this population, the case law, and it's all
8 in our brief, would require significantly greater numbers
9 of businesses that could open as of right. They wouldn't
10 have to apply for a special exception or a variance. They
11 could open as of right. So from our perspective, the fact
12 that there's not a single location in this county that
13 operates as a conforming use lends credence to our
14 argument that we have a substantial likelihood of success
15 in invalidating the ordinance as it stands.

16 Now, again, that's an alternative argument. My
17 clients have no desire to invalidate the ordinance. They
18 simply want to enjoy the benefits of the 2002 order that
19 was provided. And, candidly, any effort to try to say
20 that they're not a successor, there were opportunities to
21 do that in at least the last case that came up.

22 The only thing that I want to close with is that if
23 you look at the timing of this, it causes us great
24 concern. I'm not going to make an accusation. Obviously,
25 we're early in the case. Discovery may reveal that

1 there's some validity to my concern. But it appears that
2 the County did not undertake to even consider this
3 amendment until after my clients had leased this property.

4 The property was leased, and the -- let me just back
5 up a little bit. Greenville Bistro was created on
6 October 27th, the lease was signed on November 7th, and
7 through the minutes of the ordinances, the original
8 hearings on these didn't occur until after my clients made
9 the application for the liquor license and started to go
10 through the procedures necessary to gain the entitlement
11 to operate this business. After it became clear that
12 there was a desire on a new entity to act as a successor
13 in the operation of a business under the 2002 order,
14 that's when the ordinance started to be considered, and
15 the three readings went through.

16 There were a variety of studies that were considered
17 at those readings, but it's our position now, and, again,
18 as a proffer, that the timing is highly suspect. And
19 anytime that the government acts to try to deter someone's
20 constitutional rights that focuses on them, even if it's a
21 law of general application, if it focuses on them, that
22 comprises an unconstitutional bill of attainder. There
23 was no other reason for them to act the way they did.

24 And, candidly, it would appear that the day the
25 ordinance was signed into law was the day the County sent

1 a letter to my client saying all bets are off, you can't
2 operate, you can't have entertainment. You can only be a
3 restaurant. We had to appear in front of Judge Gravely
4 simply to preserve the fact that we could have
5 entertainment like other restaurants in the area. And
6 every communication that my clients had with the County
7 was clear. We want to operate the same business that was
8 granted the rights given to the predecessor under the 2002
9 order.

10 So there may be some bad faith there, there may not
11 be. We have a lot of discovery to undertake. But based
12 on that alone and the fact that there doesn't appear to be
13 any other explanation for the efforts to adopt this
14 amendment, we're simply taking the position that it looks
15 like they did this just to affect this particular client.

16 And, Judge, if you have any questions, I think I'm
17 close to my time, but I'd be happy to respond to any
18 questions that you may have.

19 THE COURT: You did very well, Thank you.

20 MR. LIROT: Thank you, Judge.

21 THE COURT: Yes, sir.

22 MR. BERGTHOLD: Good morning, Your Honor. May it
23 please the Court. If I could hand up the city -- or the
24 County's exhibits. Can I do that?

25 THE COURT: Yes, sir. Absolutely.

1 MR. BERGTHOLD: Some of these are already in the
2 pleadings, but just for a clear presentation, I want to
3 make sure they were all before you. There's a big stack
4 that's a loose-leaf. I've got a copy for the opposing
5 side. I can tell the Court that, essentially, these are
6 certified copies of ordinances, sworn affidavits that are
7 notarized as well as a series of correspondence between
8 the parties that is also certified.

9 But I think this case is a lot simpler than even the
10 complicated history that Mr. Lirot wants to bring into
11 play. And that is there's two reasons why this business
12 is prohibited at 805 Frontage Road in Greenville. Number
13 one, they're prohibited because it's a sexually oriented
14 business within 1,500 feet of multiple disqualifying land
15 uses: residential districts, residential use properties,
16 a church, a day care center and so on and so forth.

17 Number two, they are a nightclub that is in an S-1
18 zone, and that is separately and independently prohibited
19 by the zoning ordinance, Your Honor.

20 And I want to talk a little bit real quick about the
21 language that triggers the application of this ordinance
22 to these folks.

23 THE COURT: I do want to pose just a comment to
24 y'all.

25 MR. BERGTHOLD: Yes.

1 THE COURT: It's my understanding that we are here on
2 a motion for temporary injunctive relief.

3 MR. BERGTHOLD: Yes.

4 THE COURT: There are certain elements that have to
5 be proven to the Court in order to find temporary
6 injunctive relief. One of those elements is not who's
7 right and who's wrong with respect to the underlying
8 merits of the case. Y'all aren't talking to me a lot
9 about the underlying merits of the case. Very
10 interesting. I'm just not convinced that it's relevant to
11 what I'm here to decide today.

12 With that having been said, you're welcome to
13 proceed, sir.

14 MR. BERGTHOLD: Yes, Your Honor.

15 I wanted to mention specifically the case we cited in
16 our response brief, and that was titled the Peek case
17 versus City of Spartanburg. The burden on the plaintiffs
18 here is to meet three different elements: one is to show
19 irreparable harm if the injunction's not granted; two,
20 that the party is likely to succeed on the merits of the
21 litigation; and, three, that there is no adequate remedy
22 at law. All they've put up is arguments about irreparable
23 harm, and that's basically loss of business income. But
24 essentially, they haven't put on any evidence that would
25 show the likelihood of success on the merits on their

1 claims. And the reason that they won't fail -- or that
2 they will not succeed and they will fail on their claims
3 is because a sexually oriented business has never been
4 allowed at that address.

5 Ever since 1995, the County's ordinances,
6 specifically Ordinance 2673 prohibited sexually oriented
7 businesses at that address. That ordinance was upheld by
8 the Supreme Court of South Carolina in the Harkins vs.
9 Greenville County case. And after it was upheld, the
10 County brought an action for injunction against this
11 property, against the prior tenant at this property. And
12 that was a case called Greenville County vs. Kenwood
13 Enterprises. And Judge Saunders issued a detailed
14 permanent injunction against this business. In fact,
15 here's what Judge Saunders' injunction said, and this is
16 Exhibit 2: In light of my rulings herein, summary
17 judgment is hereby entered in favor of Greenville County.
18 Defendants are hereby enjoined from further operation of
19 their businesses in violation of Ordinance 2673 and are
20 ordered to comply with the ordinance by ceasing the
21 operation of a sexually oriented business at their current
22 locations.

23 Then it says this: Platinum and Heartbreakers were
24 not in business at the time the County adopted the
25 ordinance and are not entitled to any amortization period.

1 All this nonconforming use stuff is irrelevant. This
2 order, particularly, was upheld by the Supreme Court of
3 South Carolina in 2003 in joining the property from
4 operating as a sexually oriented business. They cannot
5 win on the merits.

6 What happened is after that injunction was entered
7 but before the Supreme Court entered its ruling, they came
8 and brought a case, a separate declaratory judgment action
9 about the nature of the injunction and sought to enter
10 into an agreement. But here's what's interesting about
11 the agreement that was memorialized in the consent order
12 of 2002. Of course, this is the separate prior tenant.
13 The agreement or the consent order specifically said there
14 was a prior permanent injunction granted by the Court.
15 This is our Exhibit 2-A, the consent order. And
16 basically, the Court said we're going to have this
17 understanding about nudity.

18 But here's what the 2002 order did not do. It didn't
19 create a covenant that runs with the land. It doesn't say
20 anything about Greenville Bistro. It doesn't prevent
21 future legislation by Greenville County Council. Of
22 course, an order cannot do that. It doesn't affect the
23 zoning claim that we have, separate zoning that prohibits
24 a nightclub in an S-1 district because they're only
25 allowed in a C-2 district.

1 And it doesn't say anything about granting a
2 nonconforming use. And they couldn't grant a
3 nonconforming use because the Supreme Court of South
4 Carolina said Heartbreakers and Platinum Plus, which is
5 this address, were not entitled to any amortization
6 period. The other litigants in that Greenville vs.
7 Kenwood Enterprises case, the Supreme Court said the
8 one-year or two-year amortization that the County gave for
9 nonconforming uses was satisfied. So nobody in Greenville
10 County has a nonconforming use to operate a sexually
11 oriented business at any location. And so that pretty
12 much decimates their ability to proceed on the merits.

13 But here's the other problem with that order for
14 these plaintiffs. It specifically did this. That order
15 said: Plaintiffs and their successors and assigns shall
16 not permit any person to engage in specified sexual
17 activities as that term is defined in Greenville County
18 Ordinance 2673 while in or on the premises owned or
19 operated by the plaintiffs, which is the prior tenant.
20 Well, let's look at what those definitions are.

21 Going back to our Exhibit No. 1, here's what -- the
22 definition that triggers the adult cabaret: if you appear
23 in a state of nudity back then or live performances which
24 are characterized by the exposure of specified anatomical
25 areas or by specified sexual activities.

1 So what is the definition of that term, specified
2 sexual activities? Because that's pretty important. Not
3 only does it exist in their original ordinance independent
4 of the nudity definition, but it's something that the 2002
5 consent order that they're relying on absolutely barred
6 from happening at this location.

7 Here's what that term means. Specified sexual
8 activities means any of the following: the fondling or
9 other erotic touching of human genitals, pubic region,
10 buttocks, anus or female breast; sex acts, normal or
11 perverted, actual or simulated including intercourse, oral
12 copulation or sodomy; C, masturbation, actual or
13 simulated. This is the ordinance that was upheld by the
14 Supreme Court.

15 Well, if you look at our Exhibit 17 -- actually, it's
16 Number 14, 15, 16, 17 and 18 in this document, they are
17 replete with evidence of these types of prohibited
18 activities that not only make you an adult cabaret, but
19 are prohibited by the 2002 consent order which they rely
20 upon.

21 And here's what, for example, the affidavit of Deputy
22 Honeycutt says: On the large stage, I saw a woman
23 dancing. She was exposing her breasts and buttocks, save
24 for pasties covering her nipples and areola.

25 In the next affidavit, which is Number 16,

1 Investigator Hayden went, said: When the dancer and I
2 reached the secluded upper part of the club, this on
3 May 18th, she told me to sit on the couch to begin the
4 dance which lasted about three minutes. She bent over in
5 front of me, exposing the majority of her buttocks. She
6 sat on my lap. She grinded her exposed buttocks against
7 my covered crotch. Throughout the private dance, her
8 buttocks were in constant contact with my body. Several
9 times she leaned back against me, placed her hands inside
10 her own bikini top, rubbed her breasts. She also put her
11 hand inside her bikini bottoms and rubbed her vaginal area
12 a few times during the dance. When the dance was over,
13 she pressed her breast against my face, et cetera, ad
14 nauseam.

15 We have four or five affidavits. In fact, I've got
16 an audio clip that if we had more time I would play, but
17 it is in the record by affidavit. I'm going to submit it
18 on a thumb drive. But it's the affidavit of Wesley Arfin
19 [phonetic] that was two nights ago. And on May 11th,
20 May 18th, May 24th and then June 14th, activities that
21 show that these folks are operating a sexually oriented
22 business, specifically an adult cabaret under the original
23 ordinance and under a provision that has nothing to do
24 with the 2002 consent order but, in fact, is prohibited by
25 the consent order that they were violating on all those

1 dates by engaging in those specified sexual activities.

2 Last night or two nights ago, the dancer said, Yeah
3 but we've got to cover up right now, but in two days -- or
4 tomorrow we're having a hearing, she thought it was
5 yesterday, and after that, we'll be able to go topless.
6 In other words, they're already banking on being able to
7 violate the County's ordinance.

8 Now let's talk about not only that they're a sexually
9 oriented business both under the old ordinance and the new
10 ordinance, but they're also a sexually oriented business
11 that is a nightclub. And the nightclub land use is
12 prohibited by the zoning ordinance at that location, Your
13 Honor. Under Article 6, basically, it says if there's any
14 use that is not listed in the table of uses for a
15 particular zoning district, then that is prohibited at
16 that location. And the only place that nightclubs are
17 allowed are in the C-2 zone. If you go to the S-1 zone,
18 there's a blank there. And Section 6.3 of the zoning
19 ordinance says that means it's prohibited there. So
20 independent of that, it is prohibited.

21 I also want to talk about -- a little bit about the
22 2002 order because they're relying on it. Mr. Lirot
23 basically said the case turns on it. The problem is, they
24 cannot rely on it because here's what the order said. It
25 says plaintiffs, on behalf of themselves and their

1 successors and assigns, agree to fully comply with all of
2 the provisions of Ordinance 2673, including the ban on
3 specified sexual activities, which is up above, which
4 we've documented in spades that they're violating.

5 Plaintiffs agree that if they transfer their interest in
6 the businesses, they will inform their successors and
7 assigns of the agreement set forth in this order and that
8 this order shall be binding upon plaintiff's successors
9 and assigns. The parties also understand that if
10 plaintiffs or any of their successors or assigns engage in
11 any conduct that is prohibited by Ordinance 2673, the
12 County may pursue any remedies provided by law.

13 Number one, they are not a successor or assign as
14 defined in this ordinance because they are not a business
15 transferee of Elephant, Inc., which was the Platinum Plus
16 entity. And we know that because in order to get access
17 to the property, Mr. Mohny submitted an affidavit, which
18 is Exhibit 3 that I'll blow up on the screen, where he
19 says: Greenville Bistro, LLC is completely separate from
20 Elephant, Inc and Ken Gaines.

21 And so if you look at this court's February 10,
22 2017, order, it's predicated on the idea that we cannot
23 apply the ordinance -- or we cannot apply the 2002 consent
24 order to this property because they're totally separate.
25 They had to come in and say we are totally separate from

1 the prior tenant in order to get the property owner's
2 motion for release of the property at 805 Frontage Road
3 granted. Then when they get to court, when they get in
4 there, they do exactly what they said they weren't going
5 to do, which is operate a restaurant. And I'll get to
6 that in a second. But they did exactly what they said
7 they were not going to do and started operating a sexually
8 oriented business. Now they're claiming reliance on this.

9 This is just bad every way but loose. Number one,
10 the 2002 order is a burden on adult use at that site.
11 It's not a benefit. It's something that further people
12 must comply on, but only if there are successors and
13 assigns in the sense of a business transferee, which
14 Mr. Mohny tells us that they are not. That's how they
15 could get access to the property and out from under the
16 restrictive orders of the solicitor.

17 Then they make this claim. And this is -- I don't
18 know. Mr. Lirot and I, we litigate across the country
19 against each other, but he may not have been around when
20 this correspondence was traded. But, Your Honor, this is
21 absurd to argue that the County didn't make it very clear.
22 I've got Exhibit 6 up on the screen, which is a certified
23 copy of the February 24, 2017, letter from Mr. Tollison,
24 the county attorney, to Mr. Mohny. And he says very
25 explicitly: The adult entertainment ordinance includes

1 several provisions that directly impact the 805 Frontage
2 Road property. He gives the specific zoning districts
3 within the 1,500 foot buffer and prohibiting adult use at
4 that location. Then he says in the next paragraph:
5 Additionally, since 805 Frontage Road is zoned S-1, any
6 use of the property must now conform to the regulations
7 governing the S-1 district. Nightclubs are permitted use
8 only in the C-2 zoning district and are not allowed in the
9 S-1 district.

10 And when he said "any nonconforming use," he said you
11 don't have a nonconforming use, but if you did, it expired
12 because the solicitor shut this place for more than six
13 months, and that would cause the expiration. But we know
14 from the Supreme Court of South Carolina's opinion ---

15 MR. LIROT: Under the rule of completeness, I wasn't
16 going to object. I just want to make sure counsel
17 identifies the date of this letter.

18 MR. BERGTHOLD: Yeah. This is February 24th.

19 But let me give you another letter that I think is
20 relevant, and that is the January 13, 2017, letter from
21 Mr. Tollison, not to Mr. Mohny directly but to
22 Mr. Bannister who was representing the property owner at
23 that time. He said to correct some of the misstatements
24 Mr. Bannister had made about the nature of the property,
25 said: In your November 18th letter -- this is Exhibit 4

1 in our binder -- you indicate that Elephant, Inc. and
 2 Gaines no longer are the tenants on the property, the
 3 lease has now ended. As I indicated in our phone
 4 conversation and the November 18th letter, the subject
 5 property has been operating as an adult entertainment
 6 establishment nightclub in contravention of the County's
 7 zoning ordinance. As you are aware, the property is zoned
 8 S-1, which does not allow nightclubs. Further, it should
 9 be noted the property did not meet the setbacks for
 10 sexually oriented businesses per county ordinance in 1999
 11 to 2000, and it's currently ineligible to operate
 12 regulated adult uses under County Ordinance 2673 and 4869,
 13 which was pending at that time. And the County cited the
 14 pending ordinance doctrine recognized time and time again
 15 by the Supreme Court of South Carolina.

16 To summarize this, Your Honor, they're trying to do
 17 an about-face now to get -- to have their cake and eat it,
 18 too. They came in and they said, We are not affiliated
 19 with the prior tenant. We have -- we're totally separate
 20 from them. But once they got in, they started doing
 21 what's been always prohibited at that location. They
 22 started operating an adult cabaret not only because of
 23 nudity and semi-nudity in the current ordinance, but also
 24 because of specified sexual activities that even the 2002
 25 consent order said thou shall not do that at that location

1 because that's unlawful.

2 So all the -- this is a very simple case, and the
3 County's request for its own injunctive relief is
4 straightforward. Under the case law, you just have to
5 show that an ordinance exists that was duly adopted and
6 that this business is in violation of that ordinance.

7 I would ask that the Court admit our Exhibits 1
8 through 23, and then that the Court would grant the County
9 injunctive relief to prohibit the ongoing violation of its
10 sexually oriented business ordinance because this is a
11 sexually oriented business operating within 1,500 feet of
12 numerous sensitive uses. But independently in a much
13 straighter, simpler issue, we would ask the Court would
14 grant us relief because there's simply a nightclub in an
15 S-1 district, but nightclubs are only allowed in the C-2
16 district, and therefore, that use is unlawful
17 independently.

18 As far as Mr. McLaughlin, Exhibits 21 and 22 is a
19 50-page opinion refuting every single thing that
20 Mr. McLaughlin said in the Federal case against Columbia,
21 South Carolina. I just want to throw it out there. I
22 know they haven't levied that charge, and they did that
23 late in the day yesterday, but Mr. McLaughlin went to
24 Columbia and said the 46 sites the City of Columbia
25 identified are not available. And Exhibit 21 or 20, I'm

1 not sure which, Judge Wooten's 50-page published summary
2 judgment order that was affirmed by the Fourth Circuit on
3 January 25th of this year went through every single ground
4 that Mr. McLaughlin gave for disqualifying a site and said
5 that it was legally irrelevant and granted the County
6 summary judgment notwithstanding some 200-page affidavit.

7 So with that, the County rests its position, would
8 ask for the Court to deny the plaintiff's motion. They
9 certainly haven't shown likelihood of success on the
10 merits or irreparable harm other than money damages which
11 they can recover later.

12 Thank you, Your Honor.

13 THE COURT: Hey, question.

14 MR. BERGTHOLD: Yes.

15 THE COURT: Has the County filed a motion for
16 injunctive relief, and is it before the Court today?

17 MR. BERGTHOLD: The County filed a motion for
18 injunctive relief yesterday, and it is essentially the
19 reciprocal because all the issues of why they think the
20 County should be enjoined, i.e., the 2002 order applies
21 and the current ordinance is unconstitutional are the
22 mirror image of what we say: the 2002 order doesn't
23 apply. But even if it did apply, they're still in
24 violation of the zoning ordinance and they're a nightclub
25 in an unpermitted district. So we really see this as just

1 the other side of the same coin.

2 THE COURT: Okay. So I'll pose this question to each
3 of you. I've had the opportunity to review the previous
4 order on the motion for injunctive relief that Judge
5 Gravely has entered. What effect does that order have on
6 this case and the issues propounded by each party?

7 MR. BERGTHOLD: None, Your Honor. That was a TRO. A
8 TRO, under the Rules of Civil Procedure, exists for ten
9 days or maybe a little longer like to get to this hearing.
10 But as of the temporary injunction hearing, the TRO order
11 is of no moment.

12 THE COURT: Okay. All right. Is that your position
13 as well, it's without prejudice?

14 MR. LIROT: Not -- I know it's of a shorter duration.

15 THE COURT: Right.

16 MR. LIROT: But, obviously, it was a hearing based on
17 similar facts. There is a judicial finding that we met.
18 I think there's a statement there that we met the criteria
19 to have the issuance of the TRO. I'd like to think if
20 it's not law of the case, it's certainly illuminating on
21 whatever further proceedings would take place.

22 MR. BERGTHOLD: Your Honor, the rules specifically
23 say that when the hearing comes on for the temporary
24 injunction, that TRO is gone. The judge didn't -- he sort
25 of punted it to this day because he knew something more

1 substantive was coming along.

2 THE COURT: Okay. Good enough.

3 Mr. Lirot, is there anything that you'd like to say
4 in response to the County's argument?

5 MR. LIROT: Well, if I may, I'm just going to address
6 a few of these statements. First of all, I'm going to
7 start from the back and move to the front based on my
8 notes. But Greenville identified 40 or 50 locations --
9 excuse me -- Columbia County identified 40 or 50
10 locations. Greenville hasn't identified any. So if the
11 statements made at the last hearing that all of these
12 existing businesses are nonconforming and that's changed
13 today, I haven't seen any evidence to support that.

14 The other issues that I want to stress is that these
15 letters that were written to the client, not one of those
16 letters mentions the 2002 order. The letters that were
17 sent act as if that order doesn't exist, and I don't think
18 the County can simply ignore that order and say we're
19 going to just apply all of these zoning regulations that
20 were the subject of this prior consent order and act as if
21 it doesn't even exist. I don't think they have the right
22 to do that, and I certainly don't think that undermines
23 our effort to establish a likelihood of success based on
24 the existence of a court order.

25 The other issue that has come out of nowhere is that

1 we're not a business transferee from the plaintiffs in
2 that case, so we get no benefit from that. That would
3 certainly run contrary to the well-settled South Carolina
4 law that says those uses, those vested rights run with the
5 land. And if, in fact -- and there's a big "if" in that
6 sentence. If plaintiff transfers, they've got to notify
7 any successor or assign of the existence of that order.
8 The landlord did exactly that. When our clients came and
9 investigated that property, he told them about that order.
10 They knew about that order. So that component of the
11 order was complied with.

12 The other issues that were brought up deal with
13 issues based on interpretations. Nobody wants to violate
14 the order. Nobody wants to violate the law. All they
15 want to do is operate a business that's in conformity with
16 that order. If there is some confusion or some issue that
17 comes up that they want to enforce the order, first
18 they've got to acknowledge that it applies to this
19 property. So the accusation that we're trying to have our
20 cake and eat it too sounds like it would be much more
21 appropriately leveled on the County, because how can we be
22 violating an order that the County says doesn't even apply
23 to us? That's a real problem, from my perspective.

24 Judge, I'd like to think that in the general concepts
25 of considering the issuance of a temporary injunction, one

1 of the most important criteria is trying to maintain the
2 status quo in light of those other criteria. I think
3 we've established that there's irreparable harm occurring
4 every day that these clients are subjected to the chilling
5 effect of the County's positions and the enforcement
6 mechanisms that I think we've made clear on the record.

7 As far as the substantial likelihood of success,
8 other than say a big "no," the County's offered no legal
9 explanation why that 2002 order doesn't run with the land,
10 doesn't apply to my client.

11 And as far as the other criteria necessary, I'd like
12 to think that we've met that under the general concept of
13 maintaining the last peaceable position between the
14 parties and the maintenance and the status quo. It's
15 necessary that this injunction be considered and entered
16 to avoid irreparable harm. I think that was the focus of
17 a lot of the information and evidence and testimony that
18 we provided to the Court, and I'd like to think that we've
19 carried the day and met those criteria.

20 THE COURT: Okay. And let me make clear, your
21 assertion is that there is no adequate remedy at law
22 against a proscription of the exercise of constitutional
23 rights.

24 MR. LIROT: Yes. I think that was implicit in the
25 other arguments. And I just -- you know, that's a long

1 argument, but I'm sure you're familiar with it. So ---

2 THE COURT: I just want to make sure that that was
3 the -- that's the remedy for which there is no adequate
4 redress.

5 MR. LIROT: You can't get money damages for the
6 chilling effect that's been imposed on this business.

7 THE COURT: Okay. All right. Thank you. I
8 appreciate it.

9 MR. BERGTHOLD: Your Honor?

10 THE COURT: Yeah. Go ahead.

11 MR. BERGTHOLD: I'm sorry. I just wanted to complete
12 the record because I honestly thought that the hearing
13 would be much more than 20 minutes a side, which I
14 understand Your Honor is disciplined, and I like that.
15 But Exhibit 19 is a sworn affidavit from Richard Hanning,
16 the County's GIS guy. There's four attachments. There is
17 a map showing the numerous ways that this property is
18 disqualified. Number two, there is a map showing sites
19 available in the S-1 district and in the county. Number
20 three, the third attachment, which is Exhibit 19-C, is a
21 two-page spreadsheet -- and they have all this -- a
22 two-page spreadsheet showing the 89 separate sites that
23 meet the 1,500 foot buffer requirements in the S-1
24 district where a sexually oriented business could legally
25 operate.

1 And then Exhibit 19-D is this. This is a spreadsheet
2 that shows a number of sites that are available.

3 As far as the constitutional question being an
4 inadequate remedy of law, the Supreme Court of South
5 Carolina in the prior case dealing with this property
6 eradicated that constitutional question because they said
7 the County's ordinance was constitutional. And at that
8 time, they relied upon the County's finding that there
9 were only nine sites in the S-1 district. Now we have 89,
10 80 more sites that meet the distance requirements plus all
11 these in the unzoned county, and there's going to be at
12 least hundreds. And that's what the Supreme Court of
13 South Carolina said. In addition to the S-1, there's
14 hundreds in the unincorporated county, and now we have
15 even more.

16 Thank you.

17 THE COURT: All right. Thank you.

18 I recognize, of course, that I've limited your
19 opportunity to present evidence. Y'all are very well
20 practiced and experienced attorneys in these particular
21 issues. I recognize that. And your issues have focused
22 on the likelihood of success on the merits. Most of
23 everything that each of you talked about was who was right
24 and who was wrong on the merits, both from a legal,
25 factual, constitutional perspective.

1 But there is case law in the State of South Carolina
2 which suggests that it's not incumbent upon the Court to
3 determine who is right and who is wrong. That's not the
4 standard to be applied with the prong for the issuance of
5 temporary injunctive relief to hear all of the facts which
6 bear upon the matter, weigh the evidence and determine
7 from that who has a likelihood of success on the merits.

8 Generally, when the Court looks at the likelihood of
9 success on the merits, they're looking more at is there a
10 judicable cause of action for which a party could
11 potentially prevail. I know that y'all, again, are very
12 practiced in this area, and you have a lot to say about
13 it. But I'm not here today to determine who's right and
14 who's wrong and who's going to win and who's going to
15 lose. All of the witnesses that you would have presented,
16 I suspect, would have gone to the likelihood of success on
17 the merits.

18 I do find -- I do find at this juncture based on a
19 likelihood of success on the merits that there is a
20 judicable cause of action for which the plaintiff could
21 potentially prevail after a full vetting of the evidence
22 in this case. I'm not taking any position as to whether
23 the plaintiff will prevail or not. I'm just saying
24 there's a judicable cause of action that ultimately needs
25 to be determined by a trier of fact and the trier of law.

1 The prongs that I am concerned about are whether
2 there is an adequate remedy at law, and whether
3 irreparable harm will be served upon the parties if I
4 don't issue the order.

5 Now, I'm going to look at that. And when I look at
6 all of these materials that you have given me, including
7 the affidavits that you have given me, including the
8 memorandum of law that you have submitted to the Court,
9 I'm going to be looking specifically at those two prongs
10 in making a determination based on those two prongs.

11 Now, maybe that when I get into it in greater detail,
12 I may go off on another branch of analysis. I haven't
13 read it yet so I don't preclude myself from considering
14 other things. But, generally speaking, that's what I'm
15 looking at. And, generally speaking, the motion for
16 temporary injunctive relief, those are the two prongs that
17 are most difficult to overcome for an advocate who is
18 asserting a right to temporary injunctive relief.

19 Now, from the County, I presume with the reciprocal
20 motion for temporary injunctive relief, if I were to deny
21 the plaintiff's motion for temporary injunctive relief,
22 would it not be moot and unnecessary for me to say I'm
23 issuing temporary injunctive relief to the County to force
24 them to comply with the law?

25 MR. BERGTHOLD: No, Your Honor. It wouldn't be

1 because the standard is different for a governmental
2 entity. The Richland County vs. Simpkins case as well as
3 the Pic-A-Flick vs. Columbia case both say that when a
4 government comes in for a temporary injunction,
5 irreparable harm is presumed because that is a violation
6 of duly enacted law, especially when it goes to the
7 health, safety and welfare. So all the government has to
8 prove for entitlement to injunctive relief is that there's
9 a duly enacted ordinance and someone's violating it.

10 THE COURT: I understand that.

11 MR. BERGTHOLD: The plaintiff has the irreparable
12 harm and inadequate remedy of law burden.

13 THE COURT: I understand. But what I'm saying, this
14 is a practical matter, is they're saying we're asking for
15 temporary injunctive relief to prohibit the County from
16 enforcing the ordinances, right?

17 MR. BERGTHOLD: Right.

18 THE COURT: And I say, no, I'm denying your motion
19 for temporary injunctive relief, the County can enforce
20 their ordinances.

21 MR. BERGTHOLD: Correct.

22 THE COURT: Well, do I really need to enter an order
23 on your temporary injunctive relief?

24 MR. BERGTHOLD: Your Honor, we're entitled to it and
25 we would prefer it because here's the deal. The County

1 has no interest in going out per se and dealing with
2 individual dancers and writing uniform traffic citations
3 for Municipal Court and those types of things. This is a
4 contempt -- or an injunction order is a more adequate
5 remedy because it eliminates multiplicity of actions and
6 enforcement, and it's one thing that makes all the people
7 who are acting in concert with this entity subject to the
8 law and the Court's enforcement of it. So we think it's a
9 better remedy and that the case law says we would get it.

10 But you're right. I would rather, if you would -- to
11 deny their motion for temporary injunctive relief, typical
12 law enforcement mechanisms could be employed.

13 THE COURT: Okay. Well, let me ask you this from the
14 plaintiff.

15 MR. LIROT: Yes, sir.

16 THE COURT: Do you object to my considering the
17 County's motion for temporary injunctive relief today as
18 much as it was served yesterday?

19 MR. LIROT: I would object to that, Judge. And there
20 are different criteria involved in that. If the County
21 wants to pursue that motion and have the Court rule on it,
22 I'd like to have it set for a hearing and go through the
23 process. It might be tedious, but I think it would
24 preserve the due process rights of my clients.

25 And I want to clarify one thing.

1 THE COURT: Sure.

2 MR. LIROT: My clients don't want to have the County
3 not enforce their ordinances. They simply want the
4 enforcement that's provided for in the 2002 court order.
5 And the County is not without the power to enforce that.
6 There is a great deal of power in that order. We're
7 simply asking the County allow it to be enforced in that
8 fashion.

9 MR. BERGTHOLD: That's a contract that's no longer in
10 effect. Essentially, that's what was a contract with
11 somebody else that these guys are totally separate from.

12 THE COURT: I understand. I understand what that
13 dispute is.

14 Okay. All right. Good enough. Well, I'm not going
15 to consider the County's motion for temporary injunctive
16 relief. However, the only reason I brought that up, and
17 that's because, obviously, I haven't had time to respond,
18 and fair is fair. So -- but I just think that perhaps,
19 after there's an issuance of the order on this, on the
20 plaintiff's motion for temporary injunctive relief, it may
21 be entirely accurate. It may be. We'll see the verbiage
22 of the order.

23 Okay. All right. Thank you, gentlemen. I
24 appreciate you being here today, and I appreciate your
25 arguments.

1 MR. LIROT: Thank you for the privilege.

2 MR. BERGTHOLD: Thank you for the opportunity to
3 address the Court.

4 THE COURT: Sure. And I hope y'all have a great day
5 and great weekend.

6 (WHEREUPON, proceedings concluded at 11:40 a.m.)
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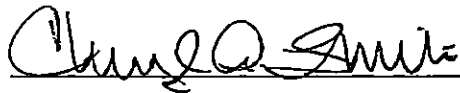
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, CHERYL A. SMITH, Official Court Reporter for the
Thirteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
Common Pleas for Greenville County, South Carolina, on the
16th day of June, 2017.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

October 9, 2017



Cheryl A. Smith, CVR-M
Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

GREENVILLE BISTRO, LLC, et al.,)

PLAINTIFFS,)

2017-CP-23-03372

-VS-)

TRANSCRIPT OF RECORD

GREENVILLE COUNTY, et al.,)

DEFENDANTS.)
_____)

MARCH 13, 2018
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE PERRY H. GRAVELY

APPEARANCES:

ATTORNEYS FOR PLAINTIFFS:

LUKE C. LIROT, ESQ.
LUKE A. BURKE, ESQ.

ATTORNEYS FOR DEFENDANTS:

SCOTT D. BERGTHOLD, ESQ.
JOHN R. DEVLIN, ESQ.

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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1 **THE COURT:** All right. This is Greenville Bistro
2 versus Greenville County, motion for injunction by the
3 County. I'd be glad to hear from you.

4 **MR. BERGTHOLD:** Your Honor, Scott Bergthold on behalf
5 of Greenville County with my co-counsel, John Devlin, also
6 on behalf of the County. If you'd like, I can ---

7 **THE COURT:** I guess go ahead and ...

8 **MR. LIROT:** Good afternoon, Judge. Luke Lirot on
9 behalf of Greenville Bistro, LLC, and Frontage Road
10 Associates, Incorporated. And I'm joined here by Luke
11 Burke, my co-counsel.

12 **THE COURT:** All right. I'll be glad to hear from the
13 County.

14 **MR. BERGTHOLD:** Your Honor, when this case was last
15 before you on June 2nd or June 1st, 2017 you issued a TRO
16 and said there was an issue to be addressed or ---

17 **THE COURT:** I think I kicked the can down the road to
18 Judge Stilwell. That's exactly what I did.

19 **MR. BERGTHOLD:** I think that's a fair summary. And
20 when you did so you said, you know, there's a question about
21 whether this Greenville Bistro is a successor business to
22 the prior tenant there.

23 And Judge Stilwell did definitively answer that
24 question. He said, no, they are not. They've alleged that
25 there's no connection whatsoever. They are not a successor

1 to the business, therefore, they're not entitled to be
2 treated like a successor business.

3 What Judge Stilwell did do in an order dated July 17th,
4 2017 is he temporarily enjoined the County's new ordinance,
5 4869. And he issued a temporary injunction, and that matter
6 is on appeal.

7 The County is not moving for relief under 4869. We're
8 moving for relief under a preexisting Adult Ordinance that
9 has been in place since 1995 under which Greenville County
10 obtained a permanent injunction against the prior tenant
11 from operating a sexually oriented business at that
12 location, 805 Frontage Road, and which was affirmed
13 unanimously by the South Carolina Supreme Court in 2003 in a
14 case called Greenwood County versus Kenwood Enterprises. So
15 there's a prohibition against operating a sexually oriented
16 business as defined in Ordinance 2673, which has been in
17 effect since 1995 at that location.

18 What we're going to prove today, we have some live
19 testimony, a couple of witnesses, we're going to prove that
20 notwithstanding that and notwithstanding the second
21 paragraph of Judge Stilwell's injunction order that says
22 after he enjoins 4869 he says, the remaining temporary
23 relief prayed for by the Plaintiffs are respectively denied.
24 The Plaintiff must comply with any and all applicable laws
25 or ordinances existing at the time of the issuance of the

1 February 9, 2017 order.

2 What we're going to show today through the evidence is
3 that the ordinances that existed as of February 9, 2017 were
4 the longstanding 1995 Adult Entertainment Ordinance as well
5 as the County's Zoning Ordinance. We are entitled to an
6 injunction under both of those laws.

7 First, we're entitled to an injunction under the
8 Ordinance 2673 because we'll show that as defined by that
9 Ordinance that Greenville Bistro is operating an adult
10 cabaret. And, secondly, we -- in violation of the location
11 rules of that Ordinance.

12 And then secondly we'll show through the evidence that
13 we're entitled to an injunction under the Zoning Ordinance,
14 which prohibits a nightclub in the S-1 District. The
15 Greenville County ordinance is very clear that nightclubs
16 are not allowed in the S-1 District, and this business is in
17 the S-1 District. And with that I would call our first
18 witness, who is Steven Smith.

19 THE COURT: All right.

20 Steven Smith, being duly
21 sworn testified as follows;

22 THE CLERK: State your full name for the record and
23 spell your last name.

24 MR. SMITH: Steven A. Smith. And Steven is spelled S-
25 t-e-v-e-n.

1 Direct Examination by Mr. Bergthold:

2 Q. Hello, Mr. Smith. Could you please tell us what your
3 occupation is?

4 A. I'm a private investigator.

5 Q. Okay. And how long have you been a private
6 investigator?

7 A.. Since 2001.

8 Q. And what was your career before that?

9 A. I retired as an assistant director at SLED. I spent
10 thirty years at SLED.

11 Q. Okay. And have you had occasion in the recent months
12 to go to Bucks Racks and Ribs?

13 A. I have.

14 Q. Okay. And when did you first go there?

15 A. October 3rd, 2017.

16 Q. Okay. And tell me what happened when you got there.

17 A. Walked in and there was a male behind the little
18 counter that was not inside the actual room itself. And
19 there was a female there, who said her name was Rachel, and
20 had to pay a five dollar cover charge. And then had to
21 produce a driver's license and scan that -- they scanned my
22 driver's license in before I could enter.

23 Q. Okay. And then when you entered did you -- were you
24 greeted by any dancers?

25 A. There were a number of dancers in there, I'd say five

1 to seven dancers in there.

2 Q. Okay. And what did you observe them doing, let's say,
3 on the stage?

4 A. On the stage they were showing bare breasts and bare
5 buttocks areas. They were pole dancing, gesturing toward
6 the pole. Some people call it twerking, hunching towards
7 it.

8 They were simulating intercourse and putting their
9 hands on their breasts, pulling them up, showing more
10 cleavage, pushing them up, pushing them together, pulling
11 their buttocks cheeks open, not by grabbing the cheeks of
12 their buttocks, but by grabbing the upper rear thighs.

13 There were patrons who went up and the dancer would
14 dance down -- would sort of squat down, put their crotch in
15 the person's face, put their buttocks in the patrons face.

16 Q. And were the buttocks bare at that point?

17 A. They were bare.

18 Q. Okay.

19 A. And the patrons would put money in the band on their
20 panties.

21 Q. Okay. And did you see anybody get a private dance or a
22 lap ---

23 A. I did.

24 Q. --- dance?

25 A. I did. There was a group of about, I'd say, four or

1 five construction-looking-folks that were -- most of them
2 had beards, wearing work clothes, sitting at a table. One
3 girl spent most of the night at the table with them dancing,
4 sitting on their laps, putting her breasts in their face,
5 getting on their -- they had their pants on, but she was
6 putting her vaginal area -- the only thing between them was
7 the man's pants and the bikini-type-panty-front that she was
8 wearing and humping against them, turning around, putting
9 her buttocks in their face.

10 One of them got up when she got on the stage because
11 most of the night she was at the table with them going from
12 person to person. Got up on the stage and she reached down
13 and took his cap off, put it to the side so she could get
14 closer to him. And he'd put his elbows on the stage and she
15 put her vaginal area and her buttocks area, bare buttocks
16 area in his face. And he actually -- and actually touched
17 his face.

18 Q. Okay. And did you see -- during the dances was there
19 grinding?

20 A. Yes. They were grinding ---

21 Q. Describe that. Just tell me what that means.

22 A. Gyration, motioning as if they were having sex, in the
23 face of some of the patrons and on the -- during the pole
24 dance.

25 Q. Okay. And did you -- were you -- there was somebody

1 else that night. Did you travel with a companion?

2 A. I did. Keith Johnson, who also retired from SLED. He
3 and I worked together for years. And Keith was with me.

4 Q. Okay. And did you -- do you know if Mr. Johnson got a
5 private dance that night?

6 A. He did.

7 Q. Okay. And tell me about that.

8 A. On the private dance, they went upstairs. There was
9 nobody else that was up there with them. They went
10 upstairs. And one of the girls that identified herself as
11 Devin, later said her true name was Jessica, did a lap dance
12 for Keith Johnson, who is also a licensed private
13 investigator.

14 And during the time she sat on his lap ---

15 MR. LIROT: Judge, I'm going to object on best
16 evidence. Unless this witness saw this activity, Mr.
17 Johnson would be the witness to testify to the conduct.

18 MR. BERGTHOLD: We can have Mr. Johnson testify.

19 THE COURT: All right.

20 MR. BERGTHOLD: That's fine.

21 Q. Okay. Actually, let me do this.

22 MR. BERGTHOLD: At this time, Your Honor, I would like
23 to show opposing counsel exhibit 24. And if I could
24 approach the witness, Your Honor.

25 (Whereupon Defendant's exhibit 24 was identified for

1 the record)

2 THE COURT: Yeah, that'd be fine.

3 Q. Mr. -- because I want to move this along. Mr. Smith,
4 can you tell me what this is?

5 A. Yes. This is the report, that in conjunction with
6 Keith Johnson, the two of us put together at the conclusion
7 of the two nights, October 3rd and October 4th, 2017.

8 Q. Okay. And Palmetto Investigations is your company?

9 A. That's correct.

10 Q. And do you usually make a contemporary report of your
11 investigations?

12 A. I always do.

13 Q. Okay. And is that a regularly conducted business
14 activity?

15 A. Yes, sir, it is.

16 MR. BERGTHOLD: Your Honor, I'd offer exhibit 24.

17 MR. LIROT: Judge, we're going to object. This was not
18 noticed as an evidentiary hearing, Your Honor. And none of
19 these evidentiary assertions were anywhere included in the
20 motion filed by the County, which actually predates the
21 issuance of the injunction that we received from Judge
22 Stilwell. So I think procedurally this should be barred
23 based on just simple due process concepts.

24 THE COURT: You don't have a Defendant exhibit 24?

25 MR. BERGTHOLD: Your Honor, a motion for injunction is

1 an evidentiary hearing. They presented evidence at the last
2 hearing. We presented evidence at the last motion for
3 temporary injunction hearing, but Judge Stilwell wouldn't
4 hear the County's motion because he was only hearing the ---

5 THE COURT: All right. I mean, I'm going to accept it,
6 and I'll consider it with everything else.

7 MR. BERGTHOLD: Okay.

8 (Whereupon Defendant's exhibit 24 was admitted into
9 evidence)

10 Q. So, Mr. Smith, if you would turn to page -- at the top
11 of page 3, bottom of page 2 and the top of page 3 where you
12 were describing Keith Johnson's private dance. Was that a
13 record -- was that recorded in your report?

14 A. It ---

15 MR. LIROT: Judge, I'm going to ---

16 A. --- was.

17 MR. LIROT: I'm going to object.

18 THE COURT: And I, you know, that's, I mean, he's --
19 you've already said that -- anything Mr. Johnson was going
20 to be put in otherwise based on his objection. I'm going to
21 have to sustain that, if this relates to things with Mr.
22 Johnson, until you've established that.

23 MR. BERGTHOLD: Okay. I'm fine with doing that. I
24 think if it's a business record it would come in even if it
25 reports about somebody else's observations.

1 THE COURT: No, I'm not -- I read business records
2 differently, then. So ---

3 MR. BERGTHOLD: Okay.

4 THE COURT: I mean, that's, you know, it's got hearsay
5 in it that he, you know, said.

6 MR. BERGTHOLD: Yes, sir.

7 THE COURT: Subject to that ---

8 MR. BERGTHOLD: We'll put up -- we'll put on Detective
9 Johnson.

10 Q. Okay. So continue without reference to that. You've
11 described the dances that you saw. Did you return the
12 following night?

13 A. We did.

14 Q. Okay. And tell me what your observations were on
15 October 4th, 2017.

16 A. On October 4th we were there a little bit longer. And
17 on that night there was a -- we paid the cover charge and
18 everything just like we did the night before.

19 And there was a -- there were a couple of different
20 dancers there that night. There was one that either went by
21 Sherry or Cherry who later Devin said was nineteen years old
22 and was from Asheville, North Carolina.

23 MR. LIROT: Objection, hearsay.

24 THE COURT: I'm not sure that's ---

25 Q. Go ahead. Just tell us what you ---

1 A. All right.

2 Q. Let me ask you this to cut to the chase. Was the
3 exposure of the buttocks and the bare breasts, the bare
4 buttocks the same as it was the night before?

5 A. Absolutely.

6 Q. Okay. The lap dances you've already described ---

7 A. Correct.

8 Q. --- on October 3rd, did those same kinds of activities
9 -- did you observe those on October 4th?

10 A. Yes, we did.

11 Q. Okay. And did you also get a lap dance on October
12 4th?

13 A. I did.

14 Q. Tell me about that.

15 A. All right. The only difference that night from where I
16 was sitting from the night before was there was a -- there
17 was a white male that went up to the same room, but this
18 girl, Devin, had already told me that he was not going to
19 interfere with anything, he was just up there. And during
20 the time of the lap dance he was looking out towards the
21 crowd, not back towards the lap dance.

22 And Devin did the same thing, as had been previously
23 described, to me. She sat on my lap. She tried to put her
24 breasts in my face. I wouldn't let her. She pulled her
25 breasts together and manipulated them. She tried to

1 simulate sex in my lap. She turned around and put her bare
2 buttocks in my face.

3 And her panties were pulled so far up into her rear
4 that when she bent all the way down you could almost see her
5 vaginal area because it was more exposed than it was even
6 from the front. And all of that was for the length of one
7 song for twenty dollars.

8 Q. Okay. And during that time when you were up in the VIP
9 Room and down on the main floor did you see dancers exposing
10 their bare breasts?

11 A. I did.

12 Q. And did you see dancers exposing their bare buttocks?

13 A. I did.

14 Q. Okay. And did they have little pasties on their
15 nipples?

16 A. They did.

17 Q. Okay. And then during this dance did you ever have an
18 occasion to touch the bare buttocks?

19 A. I did not.

20 Q. Okay. But she -- when she was grinding on you, was she
21 grinding on your covered crotch with bare buttocks?

22 A. She was.

23 Q. Okay. And let me ask -- so we've covered the nudity.

24 Let me ask you also about the girls on stage that second
25 night.

STEVEN SMITH - CROSS EXAMINATION BY MR. LIROT

16

1 A. Right.

2 Q. Were they erotically touching their breasts?

3 A. They were and their vaginal area.

4 Q. Okay. What about their buttocks?

5 A. They were.

6 Q. Okay. And were they simulating twerking or
7 intercourse-type movements?

8 A. They were.

9 MR. LIROT: Judge, I'm going to object. This is
10 getting a little too leading.

11 Q. Let me ask you this. How would -- you said twerking
12 before. How would you describe that?

13 A. Simulation of sex, intercourse, sexual intercourse.

14 Q. Okay. And -- okay.

15 MR. BERGTHOLD: Your Honor, 24 is in. I have nothing
16 further for this witness. I'll save it for rebuttal.

17 THE COURT: All right. Cross examination.

18 **Cross Examination by Mr. Lirot:**

19 Q. Good afternoon, Mr. Smith.

20 A. How you doing?

21 Q. Now you went in on two days in October of 2017. Prior
22 to that were you given any directions as to what you were to
23 do once inside this establishment?

24 A. I was told to see if it was a restaurant or if it was a
25 sexually oriented business.

1 Q. Did anyone go over the actual ordinances that define
2 sexually oriented business with you?

3 A. They did.

4 Q. And who did that and when?

5 A. Scott Bergthold.

6 Q. And when did that lesson occur?

7 A. I don't remember. I would say just a few days before
8 that.

9 Q. Now do you remember with any specificity what the
10 definitions were of a sexually oriented business in whatever
11 you reviewed?

12 A. It would be a business that was oriented mostly to
13 sexual activity showing bare buttocks and bare breasts, any
14 type of sexual activity.

15 Q. And were you reviewing Ordinance 2673 ---

16 A. I've got a copy of it here if I can look at it. I
17 don't know the numbers.

18 Q. If that refreshes your memory, that would be fine.

19 MR. BERGTHOLD: Your Honor, I'm going to object on this
20 because this is going to legal conclusions. We didn't ask
21 him to make any legal conclusions.

22 THE COURT: I guess he's asking what he looked at prior
23 to going in there. I'll let him go into that a little bit.

24 Q. Mr. Smith, if you could, describe for this record what
25 document you're looking at.

1 A. I'm looking at something that is appendix F to
2 something. It doesn't say what it is. And it's pages 3 of
3 14, 4 of 14 and 5 of 14.

4 MR. LIROT: Judge, for clarity, could we publish this
5 amongst counsel and the Court just to verify what we're
6 looking at?

7 THE COURT: Right. Yeah, look at that and see what
8 y'all -- what he's talking about.

9 (Pause)

10 MR. LIROT: Thank you, Mr. Smith.

11 A. Yes, sir.

12 MR. BERGTHOLD: Your Honor, that's Ordinance 2673.
13 It's an excerpt -- it's attached to the complaint, ---

14 THE COURT: All right.

15 MR. BERGTHOLD: --- I believe.

16 Q. Mr. Smith, who highlighted that document?

17 A. I did.

18 Q. Based on what review?

19 A. In -- just in discussion. I don't remember exactly how
20 I got this, but I went through this and made highlights on
21 what I would be specifically looking for when I went in
22 there. But I did it based on general conversation with the
23 attorney.

24 Q. Now let me ask you a couple of questions. I'm going to
25 refer you to what appears to be subsection (3). Can you

1 find that on that document that you've testified you
2 reviewed in anticipation of your monitoring excursion into
3 the subject business?

4 A. Is that the one that says adult cabaret means a
5 nightclub, et cetera, et cetera?

6 Q. Yes, sir.

7 A. Okay. I've got that.

8 Q. Okay. So let's refer to subsection (a).

9 A. Okay.

10 Q. Persons who appear in a state of nudity.

11 A. Correct.

12 Q. Nudity is defined in subsection (10), which is probably
13 on the next page. And just for the clarity of this record,
14 I'm going to go ahead and just read this. Nudity or a state
15 of nudity means the appearance of a human bare buttock,
16 anus, male genitals, female genitals or female breasts.

17 A. Correct.

18 Q. On the dates of your excursions into this business was
19 anyone nude, without a stitch of clothing on? No bottoms,
20 no tops?

21 MR. BERGTHOLD: Objection. No foundation for the use
22 of the term nudity? He just read the definition, now he's
23 changing it for the question.

24 THE COURT: Well, I think he can answer if he knows.

25 A. I would say they were nude. They may have had

1 something on, but having a string up their buttocks and all
2 of the buttocks cheeks bare, to me is nudity. And for the
3 breasts to have very small percentage, basically their
4 nipples covered, but the full bare breasts showing, to me is
5 nudity.

6 Q. Well, would you agree with me that on both nights you
7 were in this club the breasts were covered as far as the
8 areola and the nipple of the performers?

9 A. The nipple -- I don't know what the areola is, but ...

10 Q. Okay. I believe it's the darker colored portion of the
11 female breast just outside the actual nipple.

12 A. That is possibly true. There was possibly some of it
13 that was showing, but for the most part the nipple and the
14 brown part was covered.

15 Q. Okay. How about any kind of bikini bottoms? I wasn't
16 there with you, so ...

17 A. Right. A bikini bottom -- they had on some bikini
18 panties that were -- that had a string on the side, didn't
19 have cloth. And the rear part was pulled together and
20 pulled so far up in their buttocks that their entire
21 buttocks was shown.

22 And in one particular one, had on a pair of bikinis,
23 dropped the bikinis and had on a super tiny thong in the
24 front with a string that came all the way up in her
25 buttocks. The entire buttocks was shown.

1 Q. So would you agree with me on both nights you were
2 there nobody was completely nude without any kind of
3 clothing, fabric, pasty or that type of similar attire?

4 A. They had something on, but it was not -- left nothing
5 to the imagination.

6 Q. Okay.

7 MR. LIROT: Judge, if I could confer with my co-counsel
8 briefly?

9 THE COURT: Yes.

10 (Pause)

11 MR. LIROT: Judge, that completes our cross examination
12 of this witness.

13 THE COURT: Any redirect?

14 MR. BERGTHOLD: Nothing further from this witness.

15 THE COURT: All right. You may step down.

16 A. Thank you, sir.

17 MR. BERGTHOLD: Your Honor, the County calls Keith
18 Johnson just to finish up with that report.

19 Donald K. Johnson, being
20 duly sworn testified as follows;

21 THE CLERK: State your full name for the record and
22 spell your last name.

23 MR. JOHNSON: Donald K. Johnson, common spelling, J-o-
24 h-n-s-o-n.

25 Direct Examination by Mr. Bergthold:

1 Q. Good afternoon, Mr. Johnson. What's your occupation?

2 A. I'm a private investigator.

3 Q. And how long have you been doing that?

4 A. September of 2016.

5 Q. Okay. Great. And what was your career before that?

6 A. I retired from SLED after thirty-seven years.

7 Q. Okay. Thank you for your service. Quick question, did

8 you have occasion to go to Bucks with Mr. Smith on October

9 3rd and 4th, last year?

10 A. Yes, sir, I did.

11 Q. Okay. And did you see bare buttocks, girls dancing

12 with bare buttocks?

13 A. I did, yes, sir.

14 Q. Okay. Did you see bare breasts?

15 A. I did, sir.

16 Q. Okay. Did you have occasion to see people getting lap

17 dances?

18 A. I did.

19 Q. And did that involve grinding bare buttocks on a

20 patron's covered genital area?

21 A. It did, sir.

22 Q. Did it involve bare breasts being pushed against a

23 patron's face?

24 A. It did, sir.

25 Q. Okay. Did you get a lap dance?

1 A. I did.

2 Q. Okay. Tell me what happened during that.

3 A. We'd gone up into the upstairs in what was referred to
4 as a VIP Room. A lap dance lasted the length of one song,
5 approximately three minutes. It was twenty dollars. The
6 dancer would -- it was Devin. I think her true name, she
7 said, was Jessica.

8 Q. Okay.

9 A. She sat in my lap, ground against my lap, turned
10 around, placed her buttocks in my face, straddled my lap,
11 took her breasts and pressed her breasts up and attempted to
12 put her nipple in my mouth. Standard fair.

13 Q. Was she sitting on your -- when she was sitting on your
14 lap was she moving in a movement that ---

15 A. She was.

16 Q. --- simulated intercourse?

17 A. She did. She gyrated up and down.

18 Q. Okay.

19 MR. BERGTHOLD: Nothing further.

20 THE COURT: Cross examination.

21 **Cross Examination by Mr. Lirot:**

22 Q. Good afternoon, Mr. Johnson.

23 A. Yes, sir.

24 Q. Have you ever been to this facility prior to being
25 hired by the County?

1 A. No, sir.

2 Q. And on the dates in question did you, in fact, notice
3 that the dancers had pasties on or some coverage on their
4 breasts?

5 A. Yes, sir, that's correct.

6 Q. All right. And that would be all the dancers?

7 A. All that I remember.

8 Q. All right. And do you recall that there was bikini
9 bottoms or coverage on their bottom area, if I can refer to
10 it like that?

11 A. Yes, sir. Generally, yes, sir.

12 Q. So rather than being nude, everybody had something on
13 the top and something on the bottom?

14 A. Counselor, I listened to your -- I listened to your
15 cross examination of Mr. Smith. I'm not sure our
16 definitions are the same. What's your definition of nudity?

17 Q. Well, my definition would be consistent with the
18 Ordinance. Nudity means zero, nothing, no covering of any
19 kind.

20 A. Yes, sir. I wouldn't -- I didn't read the Ordinance.
21 I'm not sure. When we say bare breasts, I'm thinking the
22 breast is bare, but the nipple was covered. And when we
23 talk about having the bikini bottom on, while I'm certain it
24 was technically a bikini bottom, the rear of it was pulled
25 up into their buttocks. I would describe that as nude.

1 Q. Okay. Would you agree with me that would be subject to
2 interpretation? Somebody may disagree with you?

3 A. It may well be.

4 Q. Thank you, sir. That's all I have.

5 A. My pleasure.

6 THE COURT: Any redirect?

7 MR. BERGTHOLD: No, none, Your Honor.

8 THE COURT: Thank you. You may step down.

9 MR. BERGTHOLD: Your Honor, the County next calls
10 Shannon Piller.

11 Shannon Piller, being
12 duly sworn testified as follows;

13 THE CLERK: State your full name and spell your last
14 name.

15 MR. PILLER: It's Shannon Piller, P-i-l-l-e-r, like
16 Miller, but with a P.

17 Direct Examination by Mr. Bergthold:

18 Q. Mr. Piller, could you please state your occupation?

19 MR. LIROT: Judge, ---

20 A. I'm an investigator ---

21 MR. LIROT: I apologize for interrupting, but having
22 not anticipated the evidentiary hearing, I would like to, at
23 this point at least, invoke the rule of sequestration; if we
24 may.

25 THE COURT: All right. Any ---

1 MR. BERGTHOLD: Your Honor, I don't have any problem
2 with the rule of sequestration.

3 THE COURT: Okay. Anybody else that's going to be
4 testifying?

5 MR. BERGTHOLD: I think he's our last witness, but out
6 of an abundance of caution I will ask two other gentlemen to
7 exit the room.

8 THE COURT: All right.

9 MR. BERGTHOLD: May I resume, Your Honor?

10 THE COURT: Yes, you may.

11 Q. Mr. Piller, tell us your occupation.

12 A. I'm an investigator with the Greenville County
13 Sheriff's Office.

14 Q. Okay. How long have you been with the GCSO?

15 A. I've been in law enforcement -- it'll be twenty-one
16 years in May.

17 Q. Okay. Tell me about your background and training, sort
18 of a general career experience.

19 A. Well, of course, the South Carolina Criminal Justice
20 Academy. I've gotten numerous tactical-type of schools and
21 investigation schools. I did human trafficking for about
22 four years, training and advanced training in human
23 trafficking. And I've worked vice and narcotics three times
24 now on three separate occasions.

25 Q. Okay. And the unit you're in at the GCSO, is that a

1 vice unit?

2 A. Yes, sir.

3 Q. And have you had occasion to visit Bucks Racks and
4 Ribs?

5 A. I did.

6 Q. Okay. And tell me about the first time you went there.

7 A. The first time was much like the other two gentlemen.
8 Walked in, there was a female sitting behind the desk in the
9 front.

10 Q. I'm sorry. What date was that? My bad.

11 A. That would have been -- I believe it was Wednesday the
12 7th.

13 Q. Of?

14 A. Of this month.

15 Q. So just ---

16 A. Last week.

17 Q. Less than a week ago?

18 A. Yes, sir.

19 Q. Okay. Go ahead.

20 A. We walked in. The cover charge was three dollars per
21 person. So on that particular night I paid the entire nine
22 dollars and left one dollar tip.

23 Walked in, there was hardly anybody in the place at
24 all. I think there may have been one other patron or, I
25 assume, was a patron sitting at the bar. We got a table and

1 almost immediately two of the female employees came and sat
2 with us.

3 Q. And who -- what were their names? Or at least what did
4 they tell you?

5 A. Well, we later, after just talking to them, one was
6 Macey and Alicia were the two young females that sat with
7 us.

8 Q. Okay. And tell me what Macey and Alicia did.

9 A. Well, essentially was small talk in the beginning; age,
10 where they were from, that kind of banter back and forth.
11 We actually ate dinner while we were there. Two of the guys
12 I was with, the other investigators went and got private
13 dances.

14 Q. Okay.

15 A. There was one point during the just kind of initial
16 sitting around and talking, one of the young ladies asked us
17 if we thought her breasts were real or fake, like kind of
18 like a little contest.

19 Q. Okay.

20 A. At one point one of the other investigators I was with
21 reached over and felt her breasts that she didn't pull away
22 from or anything like that in an entire conversation. We
23 all kind of gave our vote. And the bet was if we lost
24 someone had to get a -- pay for a private dance.

25 Q. Okay. And so when the other investigator touched her

1 -- which investigator was that?

2 A. Investigator Belding.

3 Q. Okay. When Investigator Belding touched her breasts,
4 from what you could observe, she allowed it?

5 A. Yes, sir.

6 Q. Okay. And then the contest concluded. Then what --
7 what happened then?

8 A. Well, later or I'd say almost immediately he got -- he
9 went and got another private dance.

10 Q. Okay.

11 A. So essentially, you know, that first night the two
12 other investigators got a private dance. And after -- which
13 was on the main floor.

14 Q. Okay.

15 A. I don't know if it's the same room, if it's been
16 described or not before, but it's the main floor kind of
17 over in the corner. I stayed at the table by myself at that
18 point. I believe it was one song, they came out, and I saw
19 them walk upstairs.

20 They were probably upstairs for a few minutes and a
21 gentleman approached me, who was an employee there at the --
22 at Bucks and said, hey, are you with the other two guys
23 here? And I said, yeah. And he said, they want you to come
24 upstairs. He walked me upstairs to basically the Champagne
25 Room is what they called it.

1 Q. Okay.

2 A. Essentially we were up there for a few minutes. They
3 were trying to talk us into spending a certain amount of
4 money to go to the Champagne Room. They were kind of
5 explaining to us if you get a bottle of champagne for a
6 certain amount, then we get an hour ---

7 MR. LIROT: Objection to hearsay.

8 MR. BERGTHOLD: Your Honor, it's the manager. So it's
9 a statement of a party opponent. He was there. He can
10 cross examine ---

11 THE COURT: All right. I'm going to allow it.

12 A. These were -- the females were trying to talk us into
13 this.

14 Q. And how much was it?

15 A. Eight-fifty was the deal that apparently had been
16 worked out before I got there.

17 Q. Okay.

18 A. When I got there they were trying to get me to --
19 convince me to spend that eight-fifty. We essentially said
20 no, didn't have the money at the time.

21 As we walked back downstairs the two females said they
22 wanted to give me a private dance, both of them at the same
23 time, a double private dance.

24 Q. Okay. And which two females was that?

25 A. The same two, Alicia and Macey.

1 Q. Okay. And did you go along with that?

2 A. I did.

3 Q. Okay. And tell me about the private dance.

4 A. There again, we went into the room on the floor, on the
5 bottom floor. Both of them were there. The song started
6 and Alicia was kind of standing more in front of me. Macey
7 was -- would have been more off to my right.

8 In the beginning of the dance I had my hands on the --
9 on the seat, essentially. These things are almost like
10 little booths with somewhat of -- somewhat high walls on
11 them.

12 Alicia came up and kind of was on me, wasn't really
13 like straddling me at the time, but was kind of dancing on
14 me. At one point did put her breasts in my face, and I
15 don't know what the proper term would be for this, but shook
16 her breasts back and forth across my face.

17 Q. Okay.

18 A. I don't know what the proper term for court would be
19 for that.

20 Q. And when she did that did you feel just skin?

21 A. Yes.

22 Q. Okay. You didn't feel any covering?

23 A. No. No. At that -- when we got into there -- actually
24 after one of the first private dances, Alicia was -- already
25 had like a dress, that she had been wearing, off, exposing

1 her bare breasts and buttocks. Macey was wearing somewhat
2 of a -- I can only describe it as like a negligee type of
3 thing with like thong panties or bikini bottoms on.

4 Q. Okay.

5 A. Macey was off to my right and kind of on my right leg.
6 I had my hands on the chair. And I said, well, how is a man
7 supposed to keep his hands to himself, you know, here and
8 what are the rules? And Alicia got my hands and put them
9 both on her breasts.

10 Q. Okay.

11 A. She continued dancing, and Macey came around kind of to
12 my left. I reached back and put my hand on her rear end,
13 which was bare. And the dance kind of continued like that
14 back and forth. One may get a little more in front of me
15 while one was off to the side.

16 Q. You mentioned that you were hearing -- you heard the
17 other investigators, private investigators talk about what
18 they experienced. Was there some grinding in your private
19 dancing?

20 A. There was. There was -- yeah, there was grinding.
21 Like I said, their breasts were put in my face. One girl
22 was -- had larger breasts than the other. So she was the
23 one primarily doing that. The other one didn't really do
24 that as much.

25 Like the one even made a comment when she was on my

1 leg, I feel like I'm humping your leg. So she was grinding
2 her vaginal area, covered vaginal area on my leg.

3 Q. Okay. And did any of the other dancers put their
4 buttocks -- sit down on your covered crotch area with their
5 buttocks?

6 A. They did the first Wednesday night. She -- Alicia
7 mainly kind of turned around and would gyrate on there. I
8 wouldn't really call that grinding on Wednesday night.

9 Q. Okay. All right. And while you were there did you see
10 dancers with their buttocks exposed?

11 A. I saw a few. There wasn't a whole lot of dancers there
12 on the first night. There was a few up on the stage and,
13 you know, pretty much the same type of clothing, either
14 extremely short or, you know, really close cropped. The
15 ones that were dancing on the stage, I at least saw bare --
16 when they would take their tops off, bare breasts and
17 usually bare rear end from the ones I saw.

18 Q. Yeah. And did they sometimes pull whatever they had
19 on, thong or whatever, into their butt crack?

20 A. You know, I mean, the ones that I saw, the thongs were
21 thongs.

22 Q. Okay.

23 A. So there was really no need to pull them up, they were
24 already in there.

25 Q. Because the -- because the butt cheeks were exposed

1 already?

2 A. The butt cheeks were already exposed. So -- and my
3 definition of a thong is exactly that.

4 Q. Okay. Exposing the butt, bare butt cheeks?

5 A. Yes.

6 Q. Okay. All right. So did the girls on the stage do
7 sexual movements or gyrating on the pole and twerking and
8 things like that?

9 A. On Wednesday, I don't remember much of that on
10 Wednesday.

11 Q. Okay. What about in the private dance you got, was
12 there, ---

13 A. Yes.

14 Q. --- you know, simulating intercourse?

15 A. Yeah, it was definitely simulated sexual movements.

16 Q. Okay. All right. And then so what happened after your
17 private dance? You came down?

18 A. Well, we were -- the private room was on the main
19 floor. We basically had a conversation -- I actually got
20 two songs.

21 Q. Okay.

22 A. So it was two dances by both of them.

23 Q. Okay.

24 A. We actually had a conversation almost immediately after
25 essentially of, well, hey, what would we get for the eight-

1 fifty upstairs?

2 MR. LIROT: Judge, the conversation suggests hearsay.

3 I object.

4 MR. BERGTHOLD: That's fine. I'll move on.

5 Q. Tell me about the next -- did you shortly thereafter
6 leave the establishment?

7 A. Yes.

8 Q. Okay. Did you return on last Thursday, the 8th of
9 March 2018?

10 A. Yes, sir.

11 Q. Okay. And tell me what you observed as far as bare
12 breasts and buttocks on that time.

13 A. More of the same. We walked in, we were greeted by one
14 girl, Alicia, immediately, she gave us all three hugs. We
15 sat down at a table again and Macey came over to us this
16 time. She was there with us alone for about forty-five
17 minutes.

18 I got a dance from another female named Harley. More
19 of the same, kind of grinding. She actually physically did
20 get up on me. She even explained one of the rules to me
21 that she didn't stick to, but she kind of got up on me,
22 grinded on me, straddled on me, there again, took her top
23 off, exposing bare breasts and a bare rear end as well.

24 Q. Okay.

25 A. And then shortly after that dance the five of us went

1 upstairs to the Champagne Room.

2 Q. Okay. And in the Champagne Room was the grinding, and
3 the buttocks, and the breasts and all the activity the same
4 as it was ---

5 A. Yes. It was just a little bit more so upstairs. It
6 was more, I would say, you know, the actual grinding of, on,
7 you know, especially with one of the females, Alicia, turned
8 around a lot with her rear end towards me and would grind on
9 me pretty -- pretty hard ---

10 Q. Okay.

11 A. --- up in the Champagne Room.

12 Q. Okay. And that was on your covered ---

13 A. Covered genital area, yes, sir.

14 Q. Okay. Nothing further.

15 THE COURT: Cross examination.

16 **Cross Examination by Mr. Lirot:**

17 Q. Is it Mr. Tiller or ---

18 A. It's Piller. It's P-i-l-l-e-r. Like Piller -- like
19 Miller, but with a P.

20 Q. Sorry about that.

21 A. No, that's fine.

22 Q. So when you went into the club, can you describe it to
23 the Court? It's a big open room?

24 A. Well, when you first walk in you kind of walk into a --
25 I don't even know what you would call it, but it's a smaller

1 room. It's kind of a C-shaped desk. A young lady was
2 sitting behind the desk. You go through some glass doors,
3 turn left kind of down a hallway with nothing. I'm thinking
4 maybe there was a machine in the corner, and you come out
5 and you make a right.

6 And that's where you enter into a bunch of round
7 tables, two, what I would just call cage-styles where the
8 girls dance in like cages, really small stages, probably
9 just, you know, big enough for someone to stand and kind of
10 move around a little bit, and then one main stage up in the
11 middle of the facility. A bar on the left and a bar up on
12 the far right.

13 Q. Did you see the kitchen?

14 A. No. I'm pretty sure I know where the kitchen is, but I
15 don't remember seeing the kitchen.

16 Q. Did you eat dinner there or ---

17 A. Yes.

18 Q. --- look at a menu?

19 A. We ate dinner and looked at a menu.

20 Q. Okay. So what did you have for dinner?

21 A. Ribs.

22 Q. How were they?

23 A. They were actually pretty good.

24 Q. And so everybody there went in, sat down, ate dinner?

25 A. Yes, sir.

1 Q. All right. And was that true for both visits?

2 A. Yes, sir.

3 Q. And as far as the attire of the performers, you heard
4 the other witnesses testify that subject to their
5 interpretation the nipple and areola of the performers was
6 covered?

7 A. Yes, sir.

8 Q. Would you agree with that?

9 A. Yes, sir. They were covered with the pasties.

10 Q. All right. And their bottoms were covered with at
11 least some fashion of bikini bottom or other attire?

12 A. There was -- they had something on the bottom, but
13 their rear ends were, I would say, not covered. Like I
14 said, there was a thong up the middle.

15 Q. All right. Thank you, sir.

16 A. Yes, sir.

17 THE COURT: Redirect.

18 **Redirect Examination by Mr. Bergthold:**

19 Q. Just one point of clarification, Investigator Piller.
20 When you said that the price quoted for the upstairs room
21 was eight-fifty, I wanted to clarify that was eight hundred
22 and fifty ---

23 A. Eight hundred and fifty dollars, yes, sir.

24 MR. BERGTHOLD: Nothing further, Your Honor.

25 THE COURT: All right. You may step down.

1 MR. BERGTHOLD: Your Honor, the County has no further
2 witnesses.

3 THE COURT: All right. Do y'all expect to put anything
4 up or y'all just want to argue now?

5 MR. BERGTHOLD: I think we're ready to argue, unless
6 they're going to put up witnesses, but ---

7 MR. LIROT: We have no witnesses.

8 THE COURT: All right. Let's argue.

9 MR. BERGTHOLD: Not much, Your Honor. I think it's
10 pretty straightforward. And I'll work off our brief that we
11 submitted last week. And I'll save some time for the
12 rebuttal, and I won't tarry long at the podium because I
13 think the evidence, and the unrefuted evidence is abundantly
14 clear.

15 Under the old Ordinance, 2673, which Judge Stilwell's
16 July 17, 2017 order said they absolutely had to comply with.
17 This business is a sexually oriented business, specifically
18 an adult cabaret by virtue of having bare buttocks and
19 featuring that kind of entertainment as well as female
20 breasts.

21 You know, the pasties issue doesn't avoid it. No one
22 would say that if I took my hand and I stuck my finger the
23 other day and put a band-aid on it, and it covered ten
24 percent of my hand that I wasn't showing you my bare hand.
25 So it's very clear.

1 Nor would someone say that if someone was wearing a
2 condom, but the top part of the condom was cut off, exposing
3 the end of the male organ that they somehow were not
4 exposing their genitalia. So without getting into the
5 absurd, it's clear that ---

6 THE COURT: You just always wanted to use that analogy,
7 didn't you?

8 MR. BERGTHOLD: Yeah, you never know. I've heard ---

9 THE COURT: I'm sorry.

10 MR. BERGTHOLD: --- some pretty bizarre analogies,
11 pretty bizarre analogies. And I don't want to be
12 unnecessarily ---

13 THE COURT: I'm sorry, ---

14 MR. BERGTHOLD: --- explicit, ---

15 THE COURT: --- I just couldn't resist.

16 MR. BERGTHOLD: --- but it's just the common sense
17 test. They're showing their bare buttocks. Investigators
18 had their hands on them. They were feeling with their face
19 bare skin. So that's clearly governed.

20 The Supreme Court of South Carolina has already
21 affirmed in -- it's Greenville County versus Kenwood
22 Enterprises a permanent injunction under these same
23 definitions against operating a sexually oriented business
24 at 805 Frontage Road. And we, therefore, think that the
25 Court should grant one here today as well.

1 They also qualify under the specified sexual activities
2 definition, which is another independent -- all these are in
3 the disjunctive, another independent prong. That includes
4 fondling or other erotic touching of the human genitals,
5 which they did, the pubic region, which they did, the
6 buttocks, which they did, or the female breasts. They did
7 all of that.

8 It also includes under that specified sexual activities
9 definition, this is page 2 of our brief that we -- page 2 --
10 page 3 of our brief that we submitted last week. It also --
11 last Thursday afternoon.

12 It also includes actual or simulated sex acts. That
13 includes intercourse, oral copulation or sodomy. When they
14 are humping these guys with their bare buttocks, they're
15 simulating intercourse or sodomy. And masturbation, actual
16 or simulated, that's also covered within the definition.

17 All of that triggered the definition of adult cabaret.
18 They're operating that at a business location that is
19 prohibited and has been for twenty-three years under an
20 ordinance upheld by the South Carolina Supreme Court.

21 They're also operating a nightclub. A nightclub is a
22 place where they have alcohol and live entertainment or
23 dancing. Under section 6:1 of the Zoning Ordinance in
24 Greenville County a nightclub is prohibited in the S-1
25 District. But even if they could be a nightclub that was a

1 sexually oriented business, they'd have to be 1500 feet away
2 from churches, schools, residential neighborhoods.

3 And exhibit 19 that was entered at the last hearing, we
4 both entered exhibits, I treat those as already in the
5 record being received by Judge Stilwell, but the Hannon
6 affidavit, which is the zoning guide for the County, I
7 shouldn't say zoning guide, it's not the zoning
8 administrator, it's the GIS technician, said that that
9 property, 805 Frontage Road, is within 1500 feet of a
10 church, a lot devoted primarily for residential use, a
11 nursing care facility and a licensed daycare facility.

12 So they're operating an illegal business in an unlawful
13 location under old ordinances that Judge -- that existed on
14 February 9th, 2017. And Judge Stilwell said they had to
15 follow, and they're just not doing it.

16 Under South Carolina law it's not like when a plaintiff
17 comes to seek a temporary injunction. All the stuff about
18 irreparable harm is not applicable.

19 All the County has to show under the Supreme Court's
20 decision, the County of Richland versus Simpkins, and the
21 City of Columbia versus Pic-A-Flick Video case is that
22 there's an ordinance governing the situation and that
23 there's a violation of the ordinance. We've clearly shown
24 both of those things.

25 And for that we would respectfully ask that the Court

1 enter a temporary injunction prohibiting Greenville Bistro
2 from operating a sexually oriented business as defined in
3 Ordinance 2673 at 805 Frontage Road.

4 And we would also separately request injunctive relief
5 against operation of a nightclub in the S-1 District in
6 violation of section 6:1 of the Zoning Ordinance. And on
7 that, if the Court allows, we would send a proposed order.

8 I will remain available and reserve the last few
9 minutes of ---

10 THE COURT: Let me ask you some questions ---

11 MR. BERGTHOLD: Sure.

12 THE COURT: Remind me how Ordinance 4869, what it did
13 to 2673.

14 MR. BERGTHOLD: All it did was added a definition of
15 semi-nudity. And so it took a definition of semi-nudity and
16 said here's an updated definition of semi-nudity, which was
17 not part of the adult cabaret definition previously under
18 2673 ---

19 THE COURT: So it just had -- was it just a one
20 sentence ordinance?

21 MR. BERGTHOLD: Yeah, basically added that one word and
22 updated that definition and incorporated the semi-nudity
23 into the adult cabaret definition.

24 THE COURT: Do you have a copy of 4869?

25 MR. BERGTHOLD: I'm sure I do. This was exhibit 4A ---

1 **THE COURT:** If you can reference what you've got, I
2 mean, I've got the file.

3 **MR. BERGTHOLD:** Okay. It's exhibit 4A. It was just a
4 two-page thing.

5 **THE COURT:** 4A of?

6 **MR. BERGTHOLD:** Of the -- exhibit 4A entered at the
7 June 16, 2017 hearing in front of Judge Stilwell.

8 **THE COURT:** But would it be on the ...

9 **MR. BERGTHOLD:** I don't think it would have been
10 electronically docketed. It was handed up in the notebook.
11 And we do have, Your Honor, a Judge's copy. And actually we
12 had an extra one made for you today. So ---

13 **THE COURT:** And it doesn't have pictures in it, does
14 it?

15 **MR. BERGTHOLD:** No, it doesn't. Nothing explicit. Not
16 that I remember. I don't think this normally ---

17 **THE COURT:** No, no. It's 4 -- what did you ---

18 **MR. BERGTHOLD:** Exhibit 4A. So there's exhibit 4. And
19 then there's a separator page that's -- that should be
20 yellow. And you see that adds on the second page, the
21 definition of semi-nudity to adult cabaret.

22 **THE COURT:** All right. Now, also it sounds like you're
23 kind of basing some of your motion on injunction on the
24 order of Judge Stilwell based on some of the language he put
25 in there, but the motion itself was -- it hadn't been filed

1 since this order, has it?

2 **MR. BERGTHOLD:** No. What happened was when we filed
3 the motion on June the 14th, 2015 Judge Stilwell held a
4 hearing the following day. And we asked for our motion to
5 be considered at that time. Mr. Lirot and the Plaintiffs
6 objected. And Judge Stilwell said, I'm not going to
7 consider the County's motion at this time.

8 So what we did was we proceeded with the Plaintiff's
9 motion for temporary injunction, which resulted in the July
10 17, 2017 order that basically said you're not a successor
11 business. I will grant an injunction against 4869, the new
12 Ordinance, but all other ordinances that were in effect as
13 of February 9, 2017, which was Ordinance 2673 as well as the
14 Zoning Ordinance, have to be followed by this business.

15 Now, if you look at the order, you know, it says
16 Plaintiff must comply with any and all applicable laws. In
17 a normal circumstance I would be coming in here on a motion
18 for contempt because they're violating what Judge Stilwell's
19 order said they had to comply with, but technically he
20 declined to hear our motion for temporary injunction that
21 day and instead said that would have to be heard at a later
22 date, which is now.

23 **THE COURT:** All right.

24 **MR. BERGTHOLD:** And so our brief last Thursday made it
25 clear, I think, at footnote 1 on page 2, it says the County

1 does not seek relief under Ordinance 4869, which was
2 temporarily enjoined and is on appeal.

3 THE COURT: All right. And the other question I have
4 is you mentioned zoning. I know that zoning in the previous
5 hearing in front of me, the arguments regarding zoning were
6 discussed because I remember that being the -- I'm not sure
7 in what nature, but I remember the discussion about zoning.

8 MR. BERGTHOLD: Um-hum (affirmative).

9 THE COURT: Was that not brought up at that point as
10 well?

11 MR. BERGTHOLD: I think it was at that point. And I
12 think, if I remember your order the following day, June 2,
13 2017 correctly was there was an issue that had to be
14 adjudicated at the temporary injunction hearing about
15 whether this was a successor business because I think that
16 would at least be an issue that they would try to argue
17 about grandfathering or something.

18 But it's clear since 1995 before Platinum or any of
19 these people came into town Ordinance 2673 prohibited them
20 from operating a sexually oriented business at that
21 location. And that's why they were enjoined in the Kenwood
22 Enterprises case in 2001. And that injunction was affirmed
23 as was the constitutionality of Ordinance 2673 in 2003.

24 So I think what Your Honor was probably questioning
25 about is like, okay, a new tenant, what's the relationship?

1 Well, Judge Stilwell's order of July 17th answered that by
2 saying there's no relation, not a successor business,
3 separate entity.

4 So as of that date all the prior orders that dealt with
5 -- those died. Those are dead. Those -- this is a brand
6 new, I mean, they went to the court to get -- actually,
7 Judge Simmons released the property on Greenville Bistro and
8 Frontage Road Associates' representation to the court back
9 in February of 2017 that the new tenant had no relation, no
10 connection whatsoever to the old tenant.

11 So all that was done away with. And then these guys
12 were allowed to come in. They got a certificate of
13 occupancy to do a restaurant and instead they opened a strip
14 club. Thanks.

15 THE COURT: All right. Thank you. All right. Be glad
16 to hear from the Plaintiff.

17 MR. LIROT: May it please the Court? Judge, I've got a
18 notebook with a couple of the pleadings that I'm going to
19 refer to, if I could pass that up.

20 THE COURT: All right.

21 MR. LIROT: Well, Judge, I'm going to cut to the chase.
22 I think what our colleagues are trying to accomplish here is
23 to close the doors on these ---

24 MR. BERGTHOLD: Excuse me, Your Honor. I don't mean to
25 interrupt, but did you give us a copy of that notebook that

1 you're referring to?

2 MR. LIROT: I did.

3 MR. BERGTHOLD: Do you have an extra one?

4 (Pause)

5 MR. BERGTHOLD: Okay. Got it now.

6 MR. LIROT: Got it?

7 MR. BERGTHOLD: Yeah. Thanks.

8 MR. LIROT: I passed over the case law. I had a couple
9 of supplemental authorities I was going to point out to the
10 Court.

11 MR. BERGTHOLD: Yeah.

12 MR. LIROT: But candidly, Judge, what's happening here
13 is that the County's trying to close a business which they
14 were unsuccessful in trying to close the last time we were
15 in front of Judge Stilwell. And they're trying to pick
16 their pieces out of a motion that was filed even before
17 Judge Stilwell issued his order.

18 And tab number 2 is the actual motion for temporary
19 injunction that was filed. And as you can see from the
20 motion on page 2 the references to Ordinance number 2673
21 amended by Ordinance 48 number 69. So the original motion
22 dealt with the ordinances as amended. And the changes to
23 all the different definitions there, which, admittedly, were
24 found to be subject to the injunction issue by the other
25 court.

1 There is a body of law here, Judge, that would indicate
2 that the County is seeking this Court to do two things that,
3 I think, are procedurally barred. One is they're trying to
4 get you to reverse, if not directly, then certainly
5 constructively, the decision of a prior court. And I have
6 some cases that deal with that, Judge.

7 If you look in the notebook, I've got three cases that
8 we copied out today. The first one there is Dukes versus
9 Dukes, 236 S.C. 69 from 1960. And on page 2 they posed the
10 question this way. This is on the right hand column, second
11 full paragraph. It just says can one circuit -- can one
12 circuit judge grant an order of reference the motion for
13 which made on the same state of facts has been refused by
14 another circuit judge? The query was answered in the
15 negative.

16 And then the rationale behind that is on the very last
17 page in the left hand column. And it just says that it's
18 well settled that one circuit judge cannot set aside or
19 modify the orders of another, except in cases when the right
20 to do so has been reserved to the succeeding judge, or when
21 it's allowed by rule of court or statute.

22 We quote further from the opinion in the Gorgion (ph.)
23 Company case, the opinion of the present Chief Justice in
24 the case of Middleton versus Denmark, citation omitted, it's
25 equally clear as to what effect from the early case of

1 Durant versus Staggers (ph.), which is as follows; a
2 succeeding judge will not rescind an order made by a
3 preceding judge, but where a party thinks himself aggrieved,
4 by such order, the proper manner to procure redress is by
5 appeal, et cetera.

6 Well, the one thing that the County seems to have
7 glossed over here is that the sequence of events based on
8 the fact that their motion was filed in June, we had our
9 hearing the day after. The motion's filed June 15th, 2017,
10 then we have our hearing in front of Judge Stilwell on June
11 16th, the order comes out on June, excuse me, July 17th of
12 2017 and then the County files its appeal on August 16th,
13 2017. And basically what you're being asked to do is to
14 overrule the merits of Judge Stilwell's order allowing this
15 business to continue to operate.

16 Now, the County would have you believe that they can
17 pick and choose whatever ordinances are at issue. I can
18 assure you and the record will support this that these exact
19 zoning issues came up extensively, not only in the hearing
20 before you, but certainly in the hearing in front of Judge
21 Stilwell.

22 And the County's answer and affirmative defenses deal
23 with two issues. They want the Court to declare that this
24 is a sexually oriented business and, therefore, in violation
25 of both ordinances, and they want it to be declared as a

1 nightclub and, therefore, in violation of the other zoning
2 issues. All of those matters came up before Judge Stilwell.
3 And those matters are all currently on appeal.

4 In our brief we reference the Appellate Procedure
5 Rules. And, Judge, if I can refer you to tab 1, we identify
6 on page 5 the old rules, which I'll certainly submit the
7 business would appear to be in compliance with. Nobody
8 there is nude. I think we heard the testimony of everybody
9 there. And clearly the business operates as a restaurant.

10 But that being said, in order to grant the County the
11 relief that it seeks, they would be violating Rule of
12 Appellate Procedure 2.05. And what that stands for, Judge,
13 is the proposition that, and I'll just quote it, it says
14 upon the service of a notice of appeal the Appellate Court
15 shall have exclusive jurisdiction over the appeal, the lower
16 court or administrative tribunal shall have jurisdiction to
17 entertain petitions for writs of supersedeas as provided by
18 241.

19 And then I bolded this. And this is on page 9 of our
20 response. It says nothing in these rules shall prohibit the
21 lower court commission or tribunal from proceeding with
22 matters not affected by the appeal. Now the reason I bring
23 that up is, again, to grant the County's motion would
24 ultimately be closing this business, which would clearly
25 impact the matter on appeal, which was an injunction issued

1 against the County to allow the continued operation of the
2 business.

3 And in that particular rule, 241, of the appellate
4 rules, it talks about how to do this. And we've included
5 that in the section tab number 4. There's a way for the
6 County to seek the relief it wants, but this isn't how to do
7 it. In order to try to take advantage of the exception,
8 which is at subsection (8) on page 1, it basically says, the
9 general rule is that after service of a notice of appeal in
10 a civil matter acts to automatically stay matters decided in
11 the order, judgment, decree or decision on appeal.

12 Well, again, the decision on appeal here was that an
13 injunction was issued to allow this business to continue to
14 operate. And the County is trying to parse this out in a
15 way that would clearly violate the other injunction,
16 constructively reverse it and essentially absolutely,
17 unequivocally have an impact on the exact matters on appeal.
18 Is this business a sexually oriented business or is it a
19 nightclub that's operating in violation of the Zoning
20 Ordinance? Those are the issues on appeal.

21 Now, the County has taken some rather esoteric steps to
22 talk about various constitutional issues in their appeal,
23 but that's the gist of what is on the table here. Can this
24 business continue to operate?

25 What is it they're asking for? They're asking you to

1 essentially issue an order that would nullify, eviscerate,
2 if not directly reverse the order that's already been issued
3 in this case. And as I said, under 241, if they're not
4 happy about that, they have a whole series of procedures
5 that they can utilize.

6 If they don't like it they can -- in subsection (d) on
7 page 2 of Rule 241 it says procedure for obtaining a lift or
8 stay of the supersedeas. If the County is unhappy with the
9 prior entry of that injunction, they could have availed
10 themselves of this procedure. They chose not to do that.

11 They chose not to file anything that really changed the
12 waterfront from what they filed before the injunction was
13 ever issued. So from a procedural standpoint, that would be
14 their remedy. They're pursuing the wrong remedy in the
15 wrong fashion and basically asking you to, at the very
16 least, constructively reverse Judge Stilwell's grant of an
17 injunction.

18 And again, I'm going to suggest that it's impossible to
19 isolate out the arguments that the County's making from
20 those arguments that are already included in the pending
21 appeal. The appeal's briefed up. The reply brief was
22 filed, I think, a little over a week or so ago. So it's
23 poised in the Appellate Court. There will be a
24 determination at some point on those very issues.

25 But to try to suggest that you can surgically remove

1 this argument simply at the behest of the County and render
2 moot the entirety of the pending appeal, I think, would be
3 inconsistent with both the procedures and the rationale
4 underlying these rules in the Rules of Appellate Procedure.

5 So as far as we're concerned, Judge, the conduct
6 issues, while they're entertaining, the one thing that we
7 think was missing from any of that, we didn't hear a single
8 witness say that this conduct was countenanced, was adhered
9 to or was in some way allowed by anybody in the club or
10 associated with the management of the club. In fact, I
11 think some testimony from Agent Piller was that someone says
12 here's how I'm going to break the rules of the club, which
13 suggests to me that there were some modicum of different
14 procedures and regulations that govern the club and prevent
15 this kind of activity.

16 But from our perspective, Judge, the ---

17 THE COURT: That's a stretch on that argument.

18 MR. LIROT: Pardon me?

19 THE COURT: I said that's a little bit of a stretch on
20 that argument, but ---

21 MR. LIROT: Well, I understand that, but ---

22 THE COURT: --- I'll take it.

23 MR. LIROT: --- these ordinances are to be strictly
24 construed. And if it requires nudity to vitiate or violate
25 certain aspects of the ordinance, I think that that's an

1 issue that everybody testified that there's to some degree,
2 you know, whatever is subject to their interpretation, I
3 think, needs to be construed in favor of the Plaintiffs for
4 that matter.

5 But, Judge, our argument is simple. To grant the
6 relief that the County is seeking would basically reverse
7 the prior injunction and would clearly impact the matters
8 that are pending on appeal. So I think from a procedural
9 standpoint the motion should be denied. And I'm happy to
10 answer any questions that you might have.

11 THE COURT: All right.

12 MR. BERGTHOLD: Your Honor, the County didn't put
13 together all this testimony and document the violations of
14 ongoing law to be entertaining. This is a serious matter.
15 And this County has adopted a Zoning Ordinance and a
16 Sexually Oriented Business Ordinance that has been upheld by
17 the Supreme Court of South Carolina and specifically an
18 injunction against operating a sexually oriented business at
19 805 Frontage Road.

20 So there's no way to interpret what Judge Stilwell's
21 order did as protecting them to do something which is
22 illegal under a law upheld by the South Carolina Supreme
23 Court. And we know that because on page, I guess it was
24 page 6 of the order, Judge Stilwell in paragraph 1 enjoined
25 4869.

1 As I mentioned before, all that did, Your Honor, was
2 add the definition of semi-nudity. You don't have anybody
3 in any of the testimony relying on that definition today.
4 What you have is paragraph 2 of his order that says all
5 remaining leave for the remaining temporary relief prayed
6 for by Plaintiffs are respectively denied.

7 The Plaintiffs weren't seeking relief under the Zoning
8 Ordinance. That's not a matter that we're debating about on
9 appeal, section 6:1 of the Zoning Ordinance prohibiting a
10 nightclub in the S-1 District. That's not a portion of the
11 appeal.

12 But the most important thing is the second sentence of
13 paragraph 2 of Judge Stilwell's operative order. The
14 Plaintiff must comply with any and all applicable laws or
15 ordinances existing at the time of the issuance of the
16 February 9th, 2017 order. In other words, the order that
17 released the property to Frontage Road Associates to open up
18 for this new tenant that said they had nothing to do with
19 the prior business.

20 **THE COURT:** Well, looking at your motion for summary, I
21 mean, motion for temporary injunction, which was filed on
22 June the 15th, 2017.

23 **MR. BERGTHOLD:** That's right.

24 **THE COURT:** And that's the one that we're going on
25 today.

1 MR. BERGTHOLD: Well, Your Honor, ---

2 THE COURT: And it's, I mean, half of it talks about
3 injunction based on Ordinance number 4869. So, I mean, how
4 can you now separate those if that's what your injunction
5 ---

6 MR. BERGTHOLD: Well, because we filed the motion at a
7 time when -- before -- thinking it would be heard the
8 following day, but Mr. Lirot objected. That's why those
9 issues weren't taken up that day.

10 And so now all we're seeking is relief. And our brief
11 made this clear last week, all we're seeking is relief not
12 under 4869. In other words, that definition of semi-nudity
13 is not part of what we're seeking here. We're seeking
14 relief under Ordinance 2673, which is one of the ordinances
15 existing on February 9, 2017.

16 That's what -- in other words, ---

17 THE COURT: Well, did you file an amended motion?

18 MR. BERGTHOLD: Your Honor, we amended by virtue of
19 clarifying in our brief that we weren't seeking what Judge
20 Stilwell had enjoined. I mean, it was clear that we weren't
21 going to seek what Judge Stilwell had enjoined, and we made
22 that clear in our briefing.

23 But this isn't even asking for something -- he's saying
24 that this would upend the appellate matter or somehow
25 interfere or constructively overrule what Judge Stilwell

1 ordered, but that's absurd because Judge Stilwell ordered
2 them to comply with all the ordinances existing at the time
3 of February 9, 2017 consent order, which was Ordinance 2673.

4 THE COURT: If I grant this, then why do you go forward
5 on your appeal? I mean, y'all are the ones that appealed
6 the order.

7 MR. BERGTHOLD: Right.

8 THE COURT: There's no reason to go forward on the
9 appeal at that point.

10 MR. BERGTHOLD: Well, Your Honor, there may -- it may
11 be something that we get relief here, but whenever a county
12 has a law that's duly adopted by the legislative body that's
13 enjoined without, we think, any cause, I mean, the same
14 language of semi-nudity was upheld by the Federal Court in
15 Florence against Horry County's Ordinance and all over the
16 country. So the County did not want to be enjoined even in
17 that one word amendment to Ordinance 4869.

18 But here's what they came in on. They -- their
19 complaint challenges the whole Sexually Oriented Business
20 Ordinance, which is 2673 as amended by 4869. And basically
21 what Judge Stilwell's order says, I'm going to enjoin the
22 ordinance that wasn't in existence when you came into town
23 because that was passed after you got here, you know, I'm
24 basically going to see how to address that. But everything
25 that was in existence on February 9th, 2017, which was the

1 preexisting adult establishment ordinance or Sexually
2 Oriented Business Ordinance, his order explicitly says you
3 have to comply with it.

4 The only reason we're back here is because he
5 technically wasn't hearing our motion for temporary
6 injunction that day. But if we can prove, which we did
7 through unrefuted evidence, that they are operating a
8 sexually oriented business as defined in Ordinance 2673,
9 which was existing on February 7th, then we're entitled to
10 an injunction.

11 To read his order any other way would say that he
12 somehow authorized them to do something in violation of law.
13 And I think Judge Simmons would also be aghast to think that
14 they're coming in here now trying to say that anything that
15 was in effect on February 9th, 2017 they don't have to
16 comply with.

17 So the only question -- because it's clear that he
18 refused -- he denied -- paragraph 2 says the remaining
19 temporary relief prayed for by the Plaintiffs, including the
20 challenge to Ordinance 2673, is respectfully denied. So he
21 denied -- he said I'm -- blocked the new ordinance, but the
22 preexisting ordinance, you've got to comply with.

23 And so here we are with the County seeking relief under
24 the preexisting ordinance. Their argument is -- they don't
25 have an argument. They don't have an evidentiary argument.

1 Bare buttocks, simulated sex acts, simulated masturbation,
2 all that stuff, pure, straight-up Ordinance 2673, adult
3 cabaret activities.

4 And, in fact, they rely on this inapposite rule, Rule
5 241 and the rule on supersedeas does not apply here. In
6 fact, I just actually got an order last Thursday from the
7 Circuit Court in Columbia. And if I could hand that up,
8 Your Honor.

9 This is a case whereby the Richland County Common Pleas
10 Court heard a challenge -- a motion by the City of Columbia
11 against an adult bookstore that had pending matters in the
12 court. And they challenged some decisions of the zoning
13 authority. Those decisions went up on appeal. The County
14 in its counter or the City in its counterclaim sought an
15 injunction under their ordinances.

16 And at page 3 of the order, footnote 2, where she
17 explains, you know, this is the hearing on the City's motion
18 for an injunction as part of the counterclaim. Footnote 2,
19 because the Circuit Court specifically excluded injunctive
20 relief from its decision, this court rejects plaintiff's
21 argument that it lacks jurisdiction to hear this matter.
22 Because no ruling was made on this issue, it is not the
23 subject of the pending appeal, rather, this is a matter not
24 affected by the appeal.

25 The same is true here. Judge Stilwell's order says

1 that they have to comply with the ordinances existing on
2 February 9, 2017. And the only question is did Ordinance
3 2673 exist on February 9, 2017? It did.

4 THE COURT: And that order's under appeal.

5 MR. BERGTHOLD: No, that one is not. Only the new one.
6 The new ordinance is under appeal ---

7 THE COURT: No, no, the new -- his order is under
8 appeal.

9 MR. BERGTHOLD: Yes, but the County didn't cross move.
10 All they sought on appeal was they appealed the injunction
11 against 4869. There was no appeal ---

12 THE COURT: --- appealed that order. That order is
13 under appeal.

14 MR. BERGTHOLD: The order enjoining 4869 is under
15 appeal. But what's -- and the rule is that normally once a
16 notice of appeal is taken ---

17 THE COURT: I'm familiar with the rules.

18 MR. BERGTHOLD: It would act as supersedeas. But there
19 is not, Your Honor, supersedeas. One of the specific
20 exceptions under 241 sub (b)(8) that doesn't -- where a
21 notice of appeal does not act as supersedeas is an appeal
22 from an order granting an injunction or a temporary
23 restraining order. So that order is not stayed. There is
24 no supersedeas. And we're relying on it.

25 We're challenging paragraph 1, but today we're not

1 trying to upend the order, we're actually enforcing the
2 order where the judge says -- Judge Stilwell says the
3 Plaintiffs have to comply with the preexisting ordinances.
4 So we're here under the preexisting ordinances seeking
5 relief.

6 Judge Stilwell certainly didn't say you can go in there
7 and operate a sexually oriented business in violation of the
8 previous ordinance that's been in place for twenty years.
9 And so they have essentially no argument here that they're
10 complying with that because they're operating a sexually
11 oriented business, specifically an adult cabaret at 805
12 Frontage Road, which has violated the ordinance since 1995.

13 THE COURT: All right. Any additional comments?

14 MR. BERGTHOLD: Let me ---

15 THE COURT: I'll let him, and then since you're the
16 moving party, I'll give you one more shot ---

17 MR. BERGTHOLD: All right.

18 MR. LIROT: Judge, I just want to address the new
19 matter brought up. And, candidly, I just -- I couldn't be
20 more in disagreement with Mr. Bergthold's assessment of the
21 Rules of Appellate Procedure.

22 Once the appeal is filed there's an automatic stay.
23 There's a presumption that everything is stayed. And he
24 suggested to this Court that that subsection (8) said that
25 injunctions are an exception to that rule.

1 They're only an exception if the County pursues the
2 appropriate remedy under the petition for the supersedeas.
3 So it's not an automatic stay that they get. Everything is
4 stayed, all these matters are interrelated. They would have
5 to have brought the particular pleading that's directed in
6 those rules if they wanted to obtain this type of relief.

7 So at this point, there's no question that what they're
8 asking for directly impacts the matters on appeal. And I
9 don't think that they can, by argument, simply pick and
10 choose what is or is not stayed.

11 If they feel that some component of that order needs to
12 be reviewed or there needs to be a supersedeas on the
13 continued operation of this business, they need to file the
14 specific pleading that's authorized by those rules. They
15 can't just file seriatim motions for temporary injunction.
16 That's not what the rule allows for and that exception
17 doesn't permit them to do that.

18 So had they pursued the right remedy, my argument would
19 be a lot different. But they have simply not pursued the
20 right remedy and, therefore, the relief they're requesting
21 should be denied.

22 And I just wanted to add for this one case that Mr.
23 Bergthold handed up. And I'm looking at footnote 2 that he
24 drew your attention to. It says, because the Circuit Court
25 specifically excluded injunctive relief from its decision,

1 et cetera, well, our decision asked for injunctive relief.
2 We got injunctive relief. So I would respectfully submit
3 that this really is not applicable to the facts that are
4 before this Court today. Thank you, Judge.

5 THE COURT: All right. Final word.

6 MR. BERGTHOLD: Yes. Let me take issue with that last
7 issue.

8 THE COURT: I don't believe y'all could agree that we
9 were supposed to move the clocks up or back on ---

10 MR. BERGTHOLD: Your Honor, ---

11 THE COURT: --- Saturday night, but ...

12 MR. BERGTHOLD: Yeah, yeah, yeah, right. Probably not.
13 Probably not.

14 Your Honor, in that case there was a BZA decision that
15 was appealed to the Circuit Court. And then there was a
16 counterclaim by the City for an injunction against the adult
17 establishment. The BZA appeal went up on -- the judge ruled
18 on the BZA, he affirmed the BZA decision, it went up to the
19 Court of Appeals. And in that case there was no initial
20 motion for injunction by the adult store. But that doesn't
21 matter.

22 In this case they sought injunctive relief against
23 Ordinance 2673 and 4869. They didn't get it. They lost on
24 2673. They got it on the second, on the latter, 4869.

25 So Judge Stilwell said you have to comply with the

1 ordinances that existed in February of 2017, which certainly
2 included that 1995 Ordinance that we're relying on here
3 today, certainly included the Zoning Ordinance. Those have
4 been in existence for years. And that's what we were
5 relying on. And those were not a part -- he didn't enjoin
6 those.

7 And then when he said -- Mr. Lirot's comments about
8 Rule 221, I think he's just confused. (A) is the general
9 rule. (B) is exceptions to the general rule. In other
10 words, the general rule is that a notice of appeal triggers
11 an automatic stay. (B) is the exceptions to the general
12 rule. (A) is an appeal from an order granting an injunction
13 or temporary restraining order.

14 That's the whole point. We don't need a stay from
15 Judge Stilwell's order as it concerns Ordinance 2673 because
16 Judge Stilwell told them they had to comply with that
17 Ordinance and they'd better comply with that Ordinance
18 because that existed on February 7th -- February 9th, 2017.

19 So they've got no argument on the evidence. Their only
20 theory is, even though Judge Stilwell said that they had to
21 comply with Ordinance 2673, and that order is not stayed
22 because it's under (b)(a), certainly not stayed by a notice
23 of appeal, then they have to comply with it. And they've
24 got no argument to show how they're not operating a sexually
25 oriented business in an unprohibited location.

1 THE COURT: All right.

2 MR. BERGTHOLD: Thank you.

3 THE COURT: And thank both of you for your argument.

4 And I think we've got plenty to consider and read. And I'll
5 let y'all know.

6 MR. LIROT: Thank you very much, Judge.

7 MR. BERGTHOLD: Do you want proposed orders, Your
8 Honor?

9 THE COURT: Let me -- I will let you know, how about
10 that?

11 MR. BERGTHOLD: Okay.

12 MR. LIROT: Thank you, Judge.

13 THE COURT: I tell you what, let me -- no, that may be
14 a good -- something else to read. How about both of you
15 send me a proposed order.

16 MR. BERGTHOLD: We have something coming up in two
17 weeks. Can we -- can we say twenty days?

18 MR. LIROT: I could use a little more time. I have a
19 federal trial coming up, too. Do you think thirty days
20 would be acceptable?

21 THE COURT: I'm good with thirty days.

22 MR. LIROT: All right. Thank you, Judge.

23 THE COURT: All right. Thank y'all.

24 (Hearing Ended at 3:18 pm)

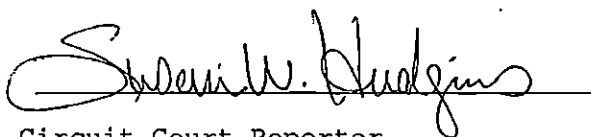
25 (End of Requested Transcript of Record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 13th day of March 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 24, 2018


Circuit Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

01-CP-23-1793

Elephant, Inc., d/b/a Platinum Plus,
Kenwood Enterprises, Inc. and Ken
Wood, and Nepals, Inc.,

2002 JAN 24 P 4:27

Plaintiffs,

FILED-CLERK OF COURT
GREENVILLE CO. SC
PAUL B. WICKENBACH

vs.

ORDER

Greenville County,

Defendant.

This is an action for declaratory relief in which the Plaintiffs seek a declaration and determination by this Court of the meaning of the terms "nudity" and "semi-nude" as defined in Greenville County Ordinance 2673. Plaintiffs allege that there currently exists a controversy between them and Greenville County as to whether Plaintiffs' businesses constitute a "sexually oriented business" as that term is defined in Ordinance 2673. They further allege that they face prosecution and the possibility of civil and criminal contempt if they are determined to be operating a sexually oriented business in violation of the permanent injunctive relief previously granted the County prohibiting Plaintiffs from operating their businesses in violation of Ordinance 2673. They have therefore asked the Court to inquire into the matter and issue a declaratory judgment interpreting and defining certain provisions of the Ordinance set forth in their complaint.

The parties have now advised the Court that they have reached an agreement pursuant to which this action has been resolved. Pursuant to this agreement, this action will be dismissed without prejudice. The parties have asked the Court to enter this consent order memorializing

1
JK [Signature]

EXHIBIT A

their agreement and the terms and conditions pursuant to which this action is being dismissed.

Plaintiffs have agreed that neither they, (and to the extent that they can control them), nor any of their successors or assigns will engage in activities that if conducted, would constitute their business as a "sexually oriented business" as that term is defined in Greenville County Ordinance 2673. Pursuant to Greenville County Ordinance 2673, a "sexually oriented business," as that term is currently defined in the Ordinance, must be located either in an S-1 zone or in one of the unzoned areas of the County. Sexually oriented businesses are also prohibited from locating within 1,500 feet of certain designated uses set forth in Section 12(b) of the Ordinance. At their present locations, Plaintiff's businesses are in violation of the locational requirements set forth in Section 12 of Ordinance 2673 if their businesses are found to be "sexually oriented businesses".

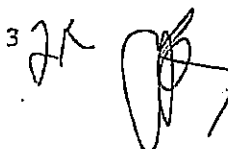
In accordance with the agreement reached by the parties, Plaintiffs agree on behalf of themselves and their successors and assigns to the following:

1. Plaintiffs and their successors and assigns shall not permit any person at any time to appear in a "state of nudity" while in or on the premises of Plaintiffs' businesses. "State of nudity" is currently defined in Greenville County Ordinance 2673 as "the appearance of a human bare buttock, anus, male genitals, female genitals, or female breasts." County agrees that under the definition currently set forth in Ordinance 2673, a person at Plaintiffs' businesses would be considered to be in a "state of nudity" when any one or more of the following occur:
 - a. A female breast is shown with anything less than a completely opaque covering of the entire areola. As an illustration, a "pastie" or other covering which is both completely opaque and completely covering the areola, would be sufficient minimum coverage to avoid the "state of nudity" as currently defined in Ordinance 2673; or

2 AK 

- b. A human buttock is exposed with anything less than a completely opaque covering of the genitalia and anus and a completely opaque covering over the buttocks with a minimum width of two (2) or more inches, at the sacrum. As an illustration, completely opaque "thongs", bikini bottoms, and "T-bar" forms of apparel that both completely cover the genitalia and anus and cover two (2) or more inches, at the sacrum, would be sufficient minimum coverage to avoid the "state of nudity" as currently defined in Ordinance 2673; or
 - c. Male or female genitals are exposed with anything less than a completely opaque covering.
- 2. Plaintiffs and their successors and assigns shall not permit any person to engage in "specified sexual activities", as that term is defined in Greenville County Ordinance 2673, while in or on the premises owned and/or operated by Plaintiffs.
 - 3. Plaintiffs and their successors and assigns shall not permit any person to at any time display or expose "specified anatomical areas", as that term is defined in Greenville County Ordinance 2673, while in or on the premises owned and/or operated by Plaintiffs.

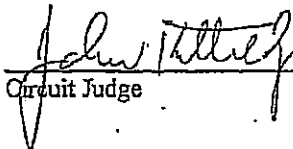
The parties agree that nothing in this Order shall be deemed to permit the Plaintiffs or any of their successors or assigns to violate any other provisions of Ordinance 2673 and Plaintiffs, on behalf of themselves and their successors and assigns agree to fully comply with all other provisions of Ordinance 2673. Plaintiffs agree that if they transfer their interest in their businesses, they will inform their successors and assigns of the agreements set forth in this order and this order shall be binding upon Plaintiff's successors and assigns. The parties also understand and agree that if Plaintiffs or any of their successors or assigns engage in any conduct that is prohibited by Ordinance 2673, the County may pursue any remedies provided by law and that nothing set forth in this order shall be deemed a waiver by County of its right to pursue any

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remedies provided by law. The parties further understand and agree that violations of the agreements set forth in this order shall be punishable as contempt of Court and/or the County may pursue any other relief provided by law.

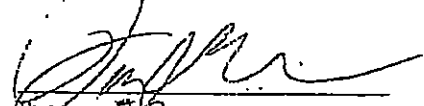
Based upon the foregoing, it is ORDERED that this action is dismissed without prejudice in accordance with the terms and provisions set forth hereinabove.

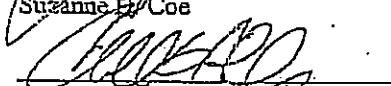
IT IS SO ORDERED.

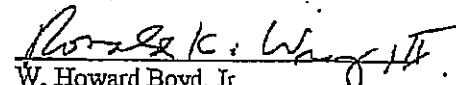

Circuit Judge

Dated this 24 day of
January, 2002, at Greenville, SC

WE SO MOVE AND CONSENT:


Suzanne E. Coe


Randall S. Hiller
Attorneys for Plaintiffs


W. Howard Boyd, Jr.
Ronald K. Wray, II
Attorneys for the Defendant

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

State of South Carolina on the relation of
William Walter Wilkins, III, Solicitor of
the Thirteenth Judicial Circuit,

Civil Action No. 2015-CP-23-02597

Petitioner,

vs.

Elephant, Inc., Frontage Road
Associates, Inc., Gregory Kenwood
Gaines, Micah Nicole Dobbins, Brittany
Caroline Neal, Jordyn Nicole Sierra,
Stephanie Renee Turner, Ashley Renee
Walker, and Alicia Diane Howard,

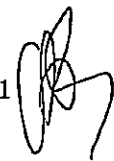
Respondents.

CONSENT ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2015 JUN 4 PM 9 22

WHEREAS, pursuant to S.C. Code §15-43-10 *et seq.* ("Nuisance Statute"), Petitioner, the State of South Carolina, on the relation of William Walter Wilkins, III, Solicitor of the Thirteenth Judicial Circuit ("Solicitor"), filed a Verified Petition in the above-captioned case on April 17, 2015 against Respondents Elephant, Inc. ("EI") and Frontage Road Associates, Inc. ("FRAI");

WHEREAS, the Solicitor filed an Amended Petition on May 15, 2015 naming all other individual Respondents appearing in the above-captioned matter, including Gregory Kenwood Gaines ("Gaines"), Micah Nicole Dobbins ("Dobbins"), Brittany Caroline Neal ("Neal"), Jordyn Nicole Sierra ("Sierra"), Stephanie Renee Turner ("Turner"), Ashley Renee Walker ("Walker"), and Alicia Diane Howard ("Howard");

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* copy to Atty Davis @counter to serve

EXHIBIT B

WHEREAS, the relief sought by the Solicitor against Respondents appears in the Prayer for Relief on pages 17 and 18 of the Amended Petition, which is incorporated herein by reference;

WHEREAS, according to the Solicitor's Amended Petition, Respondents fell within a class of entities or individuals who engaged in one or more of the following: established, continued, used, owned, occupied, leased, or re-leased the property and building, or parts thereof, located at 805 Frontage Road in Greenville, South Carolina 29615 ("Subject Property");

WHEREAS, the Solicitor's Amended Petition further alleged a public nuisance existed at the Subject Property within the meaning of the Nuisance Statute, as reportedly witnessed by undercover Deputy Sheriffs employed by the Greenville County Sheriff's Office ("GCSO");

WHEREAS, upon filing of the Verified Petition, the Solicitor moved the Court for a temporary injunction pursuant to S.C. Code §15-43-30 *et seq.* and the Court granted such temporary relief on May 6, 2015 pending a trial on the merits;

WHEREAS, pursuant to the terms and conditions set out below, the Solicitor and the undersigned Respondents have agreed to settle this matter;

WHEREAS, the Solicitor and the Undersigned Respondents further intend that the terms and conditions of their agreement, as set out below, shall be incorporated into and made an Order of this Court requiring compliance with the same by operation of judicial decree.

NOW, THEREFORE, for and in consideration of the terms and conditions hereinafter expressed, for which the adequacy of such consideration is acknowledged by all Parties, the Solicitor and the Undersigned Respondents hereby agree and stipulate to the following terms and conditions:

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I. Solicitor's Evidence:

Respondents, EI and Gaines, both deny a nuisance existed at the Subject Property within the meaning of the Nuisance Statute. However, EI and Gaines do acknowledge and stipulate that the Solicitor possesses and could present sufficient evidence to the Greenville County Court of Common Pleas of such nature that a presiding judge could find that Platinum Plus Greenville constituted a public nuisance within the meaning of the Nuisance Statute.

II. Business Shutdown:

EI and Gaines stipulate and agree that Platinum Plus Greenville shall remain closed for a period of six (6) calendar months with such closure ending on November 8, 2015 at 12:00 PM. During such period, the Subject Property and the Building thereupon shall remain closed in the same manner and under the same conditions as contemplated by and provided for in the Order of Judge Charles Simmons (dated May 6, 2015) granting the Solicitor's Motion for a Temporary Injunction, a copy of which is attached hereto as Exhibit A and incorporated herein by reference.

Notwithstanding any other term or condition contained herein, from time to time, EI may be permitted limited access to the Subject Property but only in the following instances and, only then, under the stipulated conditions below:

A. Purposes For Which EI May Have Limited Access:

EI shall have access to the Subject Property in the following instances:

- 1) when public health, safety, and welfare so requires (*e.g.*, removal of perishable food, testing of fire alarms, pest control, necessary maintenance, *etc.*);
- 2) for purposes of E.I. pursuing actions required by or in furtherance of this Order (*e.g.*, installation of video equipment, renovation, *etc.*);
- 3) such other facts and circumstances as identified by EI that the Solicitor, in his sole discretion, determines would be in the furtherance of the public interest.



B. Conditions Governing Limited Access:

EI shall be granted limited access to the Subject Property under the following terms and conditions:

- 1) EI must send, and the Solicitor must receive, a written request identifying the date and time when access is required, the estimated duration of the requested access, the purpose of the requested access (as limited above), and the name and contact information of all individuals or companies for whom access is requested. To ensure the Subject Property remains appropriately safeguarded and secure, only those individuals or companies pre-identified in writing shall be granted access.
- 2) The Solicitor retains the sole discretion to determine whether the request identifies a legitimate and permissible purpose for which to allow EI to gain limited access. Notwithstanding the same, the Solicitor will not arbitrarily and capriciously deny limited access to the Subject Property in response to a legitimate request made in good faith that falls under one of the three categories set forth above.
- 3) All written requests sent to the Solicitor seeking limited access shall be sent to:

Assistant Solicitor Andrew Culbreath
305 E. North Street
Greenville, SC 29601

With copy to:

Lane W. Davis
Nelson Mullins Riley & Scarborough, LLP
104 South Main Street
Greenville, SC 29601
- 4) If EI's request is approved, the Solicitor shall make arrangements for a Deputy Sheriff of the Greenville County Sheriff's Office (GCSO) or his Designee to meet the person(s) pre-identified in EI's request and grant them access to the Building on the Subject Property. During all limited time periods when EI's designee shall be inside the Building at the Subject Property, the Deputy or his Designee may remain with such designee, unless the Solicitor has previously excused such pre-condition in writing.

- 5) The Solicitor possesses the authority to make the conditions governing limited access to the Subject Property less burdensome, if in his discretion the facts and circumstances so warrant or if an emergent situation arises.
- 6) EI shall bear all expenses, if any, associated with obtaining limited access to the Subject Property.

III. Payment From EI & Gaines:

Within thirty (30) days of the final execution and filing of this Consent Order, EI and Gaines shall pay and deliver the following funds to:

- A. The Solicitor (care of Andrew Culbreath at the address above) in the amount of fifty-thousand dollars and no cents (\$50,000.00) made payable to the County of Greenville to defray the costs and legal expense of bringing this lawsuit;
- B. SWITCH 4216 ("Switch") of Greenville, South Carolina in the amount of ten thousand dollars (\$10,000.00) to help the non-profit's mission to end human trafficking in Upstate South Carolina and to help the recovery of women forced into prostitution. The funds shall be delivered to Andrew Culbreath, at the address identified above, for purposes of prompt delivery to Rebecca (Becky) Hayes, SWITCH's CEO.

IV. Incorporation of 2003 Consent Order Herein:

In 2003, EI and Gaines among others entered into a Consent Order ("2003 Order") with Greenville County. EI and Gaines hereby acknowledge and stipulate that the 2003 Order remains and will continue to remain in full force and effect thereby mandating EI's and Gaines' continued compliance with the same. The 2003 Order is attached hereto as Exhibit B. The terms of the 2003 Order are likewise incorporated by reference into and reaffirmed by this Consent Order thereby mandating full compliance with the same under this Consent Order as well.

V. Mandatory Enhanced Monitoring of the Subject Property:

EI and Gaines consent to and shall provide to the Solicitor and the GCSO enhanced monitoring rights of the business operations at the Subject Property to ensure full compliance with this Consent Order as follows:

A. Surveillance Footage. EI, at its expense, shall ensure video surveillance equipment exists sufficient to capture reviewable video footage ("Video Footage") of all places where Dancers interact with customers inside the Subject Property. This is to include but is not limited to the Champagne Room, the Couch Room, and all parts of the main floor. The following terms and conditions shall apply to such Video Footage and the maintenance thereof:

1. EI, at its expense, shall ensure all such video surveillance equipment is maintained in good working order at all times. In the event the video surveillance equipment is rendered inoperable for any reason, EI or its designee shall, upon discovery, report, as soon as practicable, any such malfunction in writing to Assistant Solicitor Andrew Culbreath, at the address set out above, or to the Solicitor himself and thereafter take immediate measures to restore the equipment in good working order.
2. Failure to self-report malfunctioning equipment shall be deemed a violation of this Order.
3. EI shall maintain video footage captured from the video surveillance equipment for a period of not less than the prior thirty (30) days.
4. EI or its designee agrees to furnish the Solicitor and GCSO, at any time, immediate and full access to any and all such video surveillance footage upon request. Such video footage shall be provided by EI in an unedited, unaltered format.

B. Independent Monitoring:

EI and Gaines agree to enhanced monitoring of the business at the Subject Property by an independent monitoring company for a period of one calendar year beginning on November 8, 2015 and ending on November 8, 2016, under the following terms and conditions:

1. An independent monitor ("Monitor") shall be selected by the Solicitor.
2. The Monitor will visit the Subject Property no more than twenty (20) hours per month. No later than two weeks after each visit, the Monitor will provide the Solicitor with a report detailing: the days and times of his or her visit, a description of the areas he or she visited while on the Subject Property, and instances of non-compliance with this Consent Order, if any. If there are any instances of non-compliance then the Solicitor shall forward such reports to EI, which will include the date and time when the Monitor visited the Subject Property, the incident of non-compliance observed, and where such non-compliance occurred at the premises.

3. Within thirty (30) days from the final execution and filing of this Consent Order, EI and Gaines shall pay the sum of sixty-five hundred dollars and no cents (\$6,500.00) into an escrow account designated by the Greenville County Sheriff's Office to pay all costs and fees arising out of the work completed by the Monitor. Neither EI nor Gaines will be responsible for paying or supervising the Monitor. The Monitor is not an employee or independent contractor of EI or Gaines and neither EI nor Gaines is responsible for his or her actions.
4. EI and Gaines shall provide access to the Subject Property at any time to the Monitor.

VI. Respondent Frontage Road and Associates, Inc. (FRAI):

The Solicitor agrees to dismiss the claims against FRAI with prejudice under the following conditions:

- A. FRAI stipulates and agrees the Subject Property shall remain vacant until November 8, 2015 at 12:00 PM;
- B. To the extent FRAI seeks limited access to the Subject Property between now and November 8, 2015, the terms and conditions set forth in Paragraphs II (A) & (B) shall also apply to FRAI;
- C. FRAI stipulates and agrees that it shall take no action to frustrate any term or condition of this Consent Order as related to itself or any other Party;
- D. FRAI hereby acknowledges and stipulates that the Nuisance Statute applies to owners of real property in South Carolina to ensure a public nuisance (as defined by S.C. Code §15-43-10 *et seq.*) is not occurring on their property, regardless of whether the property is rented or in another party's possession.

VII. Respondents Dobbins, Neal, Sierra, Turner, Walker, and Howard:

At the time of the execution of this Order, Respondents Dobbins, Neal, Sierra, Turner, Walker, and Howard ("Remaining Respondents") had not yet been served with the Summons and the Amended Petition in this matter. Pursuant to Rule 41(a)(1)(A), and by operation of this Consent Order, the Solicitor hereby dismisses the Remaining Respondents with prejudice.

Notwithstanding any other term or condition herein, nothing in this Consent Order shall be construed to impair or impact the Solicitor's ability to pursue criminal charges arising out of

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or relating to the underlying allegations against any party hereto or any third-party. In that regard, the Solicitor's rights on behalf of both his office and the State of South Carolina are hereby expressly preserved.

VIII. Sanctions for Violation of this Order:

Willful violations of the terms and conditions set forth in this Consent Order shall be punishable as contempt of Court.

IX. Jurisdiction, Dismissal, Continuing Enforcement Jurisdiction & Miscellaneous Matters:

The Solicitor and the Undersigned Respondents further agree to following terms and conditions:

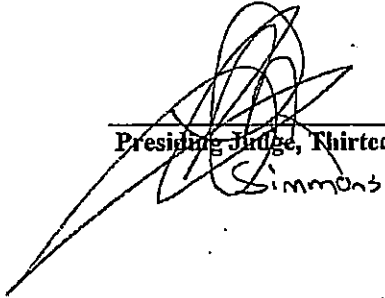
- A. All undersigned signatories have had the benefit of the advice of counsel and knowingly and voluntarily agree to be bound by the terms of this Consent Order.
- B. All undersigned signatories hereto stipulate and agree that the Greenville County Court of Common Pleas possesses personal jurisdiction over them as well as subject matter jurisdiction to hear this matter and enter this Consent Order.
- C. All undersigned signatories hereto represent and warrant they possess sufficient authority to execute this Consent Order on behalf of themselves or on behalf of the entity for which they execute this document.
- D. All undersigned signatories further stipulate to this Court's continuing personal jurisdiction over them for purposes of enforcing the terms of this Consent Order.
- E. Notwithstanding any other term and condition of this Order, the Greenville County Court of Common Pleas shall perpetually retain continuing jurisdiction to enforce the terms and conditions of this Consent Order.
- F. This Consent Order shall be binding upon all undersigned parties, their assigns, heirs, and successors in interest and all such other parties who may occupy the Subject Property for purposes of operating a business for entertainment purposes.



- G. The recitals to this Consent Order are intended to be incorporated as a material part of this Order and the agreement of the undersigned parties.
- H. Subject to the terms and conditions of this Consent Order, the Solicitor dismisses all Respondents from the above-captioned matter with prejudice and all civil causes of action, remedies, and claims that have been or could have been asserted, by any undersigned party in the above-captioned case, are deemed adjudicated and deemed *res judicata* without further recourse.

IT IS SO ORDERED.

6/3/2015
Date


Presiding Judge, Thirteenth Circuit
Simmons

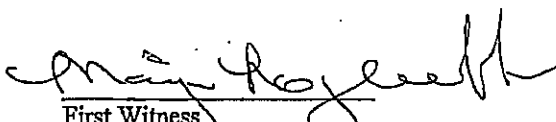
WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF
THIS ORDER:



William Walter Wilkins, III

Solicitor of the Thirteenth Judicial Circuit
On behalf of the State of South Carolina

6/1/2015
Date



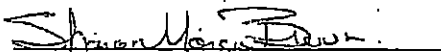
First Witness



Second Witness

SWORN TO before me this

1 day of June, 2015.



Notary Public for South Carolina

My Commission Expires Dec 10, 2020
(SEAL)

Approval and consent of counsel of record:



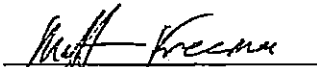
Lane W. Davis
Special Prosecutor, Thirteenth Judicial Circuit
Nelson Mullins Riley & Scarborough, LLP
SC Bar #68796

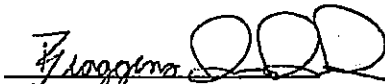


WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF
THIS ORDER:


Gregory Kenwood Gaines
In his Individual Capacity

5-30-15
Date

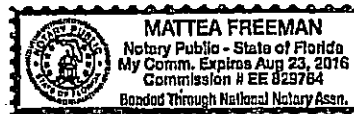

Witness


Witness

SWORN TO before me this

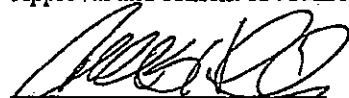
30th day of May, 2015.


Notary Public for Orlando, FL



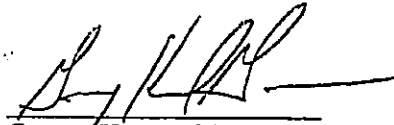
My Commission Expires: Aug 23rd 2016
(SEAL)

Approval and consent of counsel of record:

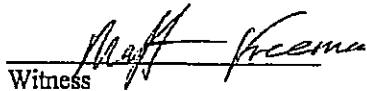

Randall S. Hiller
Randall S. Hiller, P.A.
SC Bar #2513

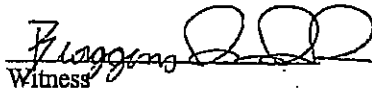


WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF
THIS ORDER:


Gregory Kenwood ("Ken Wood") Gaines
On behalf of Elephant, Inc.
As Its Sole Shareholder and Chief Executive Officer
and Authorized Signatory

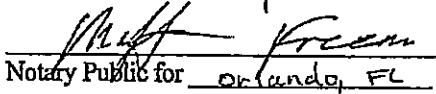
5-30-15
Date

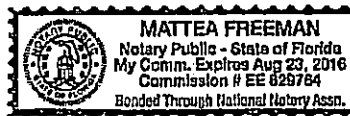

Witness


Witness

SWORN TO before me this

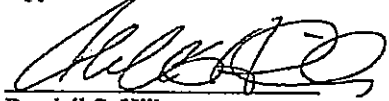
30th day of May, 2015.


Notary Public for Orlando, FL



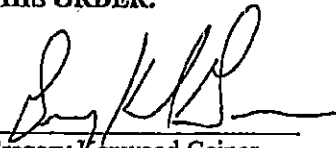
My Commission Expires: Aug 23rd 2016
(SEAL)

Approval and consent of counsel of record:

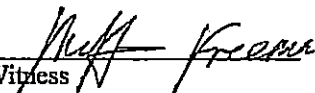

Randall S. Hiller
Randall S. Hiller, P.A.
SC Bar #2513

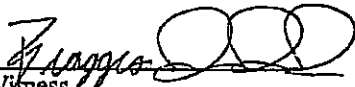


WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF
THIS ORDER:


Gregory Kenwood Gaines
In his Individual Capacity

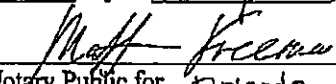
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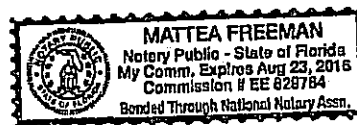

Witness


Witness

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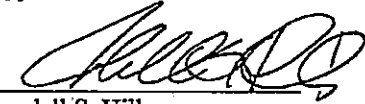
30th day of May, 2015.


Notary Public for Orlando, FL



My Commission Expires: Aug 23rd 2016
(SEAL)

Approval and consent of counsel of record:

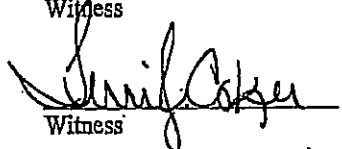

Randall S. Hiller
Randall S. Hiller, P.A.
SC Bar #2513

WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF
THIS ORDER:


Thomas Schweitzer
On behalf of Frontage Road & Associates, Inc.
As its President and Authorized Signatory

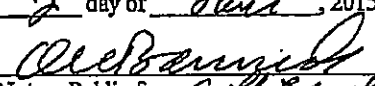
June 2, 2015
Date


Witness


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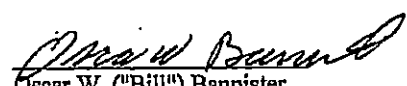
SWORN TO before me this

2 day of June, 2015.


Notary Public for South Carolina

My Commission Expires: April 21, 2024
(SEAL)

Approval and consent of counsel of record:


Oscar W. ("Bill") Bannister

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
State of South Carolina on the relation of	)	C.A. No. 2015-CP-23-02597
William Walter Wilkins, III, Solicitor of	)	
The Thirteenth Judicial Circuit,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	<u>ORDER</u>
Elephant, Inc., Gregory Kenwood	)	
Gaines,	)	
	)	
Defendants.	)	

This matter comes before the Court pursuant to a Verified Petition ("Petition") filed by the Thirteenth Circuit Solicitor ("Solicitor") on April 27, 2016. The Solicitor's Petition seeks contempt findings against Defendants. Elephant, Inc. (treated interchangeably as "EI" or "Platinum Plus") and Gregory Kenwood Gaines ("Gaines") (Solicitor, EI, and Gaines treated collectively as "Parties"). The Petition alleges that EI and Gaines willfully violated a Consent Order executed by the Parties and thereafter entered by the Court on June 3, 2015 ("2015 Order"). The Court held a hearing on the Petition on June 14, 2016 ("Contempt Hearing").¹ All Parties appeared and were represented by counsel.

The 2015 Order

The 2015 Order arises out of an underlying civil action initiated by the Solicitor on April 17, 2015, pursuant to S.C. Code §15-43-10 *et seq.* ("Nuisance Action"). The Nuisance Action sought to abate a public nuisance allegedly existing at Platinum Plus's primary place of business located at 805 Frontage Road in Greenville, South Carolina ("Subject Property"). Following a

¹ The presiding administrative judge issued an Order to Show Cause on April 29, 2016 referring the proceedings to the undersigned and commanding Gaines and EI to appear on May 18, 2016. Thereafter, Defendants, through their attorney of record at that time, requested a continuance, which the Court granted, postponing the hearing date until June 14, 2016.

hearing, Platinum Plus was closed by the Court pursuant to an Order filed May 6, 2015. Pending a trial on the merits, the Parties thereafter negotiated, by and through their attorneys, a settlement of the Nuisance Action. See, 2015 Order. For purposes of assuring compliance, the Parties: incorporated their agreement into a consent order (*i.e.*, the 2015 Order), stipulated to the Court's continued jurisdiction to enforce the consent order, and subjected themselves to the Court's contempt power if they failed to comply with the order's terms. (*See* 2015 Order at 2, 8-9.)

As an initial matter, the Court finds the 2015 Order constitutes a valid and binding judgment of this Court. The Solicitor executed the 2015 Order on behalf of the State. (2015 Order, p. 10.) Conversely, as its sole shareholder, chief executive officer, and authorized signatory, Gaines executed the 2015 Order on behalf of EI. (*Id.* at 12.) Gaines also separately executed the 2015 Order in his individual capacity. (*Id.* at 13.)² Accordingly, the Court finds an identity of Parties exist as between the Consent Order and the Parties to the instant Contempt Hearing.

The 2015 Order set forth negotiated terms and conditions that Platinum Plus expressly agreed to honor (*i.e.*, not violate) if allowed to re-open. The 2015 Order also expressly incorporated and reaffirmed the terms and conditions of a prior Consent Order between the parties from 2002 ("2002 Order"). (*See* 2015 Order, p. 5 ("The terms of the [2002] Order are likewise incorporated by reference into and reaffirmed by this Consent Order thereby mandating full compliance with the same under this Consent Order as well.")). Platinum Plus also executed the 2002 Order by consent, and that action involved substantially the same issues as those presently before the Court. The 2002 Order, as did the 2015 Order, clearly defined what could or

²The 2015 Order reflects all signatories "had the benefit of the advice of counsel and knowingly and voluntarily agree[d] to be bound by the terms of [the 2015 Order]." (*Id.* at 9, ¶A.)

could not occur at the Subject Property and established defined affirmative duties and obligations Platinum Plus agreed to undertake.

For example, in the 2002 Order (and again by incorporation into the 2015 Order), Platinum Plus agreed not to allow any person at the Subject Property to: appear in a "state of nudity,"³ engage in specified sexual activities,⁴ or expose certain anatomical areas.⁵ (2002 Order at 2-3.) The 2002 Order's terms define, at length, what conduct is prohibited and even include examples of minimum compliance.⁶ Accordingly, the Court finds the negotiated terms of both the 2015 Order and the incorporated 2002 Order were sufficiently clear, subject to the below as relates to Gaines individually, to allow Defendants to understand with reasonable certainty what could and could not be done and what obligations Platinum Plus undertook as conditions precedent to its resuming business operations at the Subject Property.

Platinum Plus's Willful Violations of the 2015 Order

After carefully reviewing and considering all of the evidence of record, the Court finds that Platinum Plus had actual knowledge of terms and conditions of both Orders and the Solicitor has proved Platinum Plus willfully violated the 2015 Order beyond a reasonable doubt.

³The 2002 Order defined state of nudity as: "A female breast...shown with anything less than a complete opaque covering of the entire areola;" "A human buttock...exposed with anything less than a complete opaque covering of the genitals and anus and a complete opaque covering over the buttocks with a minimum width of two (2) or more inches at the sacrum;" and the exposure of "male or female genitals...with anything less than a completely opaque covering." (2002 Order at 2-3.)

⁴Prohibited sexual acts included: "the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;" "Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;" "Masturbation, actual or simulated." (*Id.* at 3; GCO §2.5-72.)

⁵"Specified anatomical areas" include "[m]ale genitals in the state of sexual arousal or the vulva or more intimate parts of the female genitals." (*Id.*)

⁶ Moreover, such prohibitions have been binding on Platinum Plus for over fourteen years, and twice knowingly and voluntarily agreed upon following advice from counsel.

Evidence illustrative of the Court's finding in this regard includes but is not limited to the following:

- Evidence overwhelmingly established Platinum Plus willfully and repeatedly violated the 2015 Order within only seven (7) days of re-opening. (Hr'g Tr. 31:18-24, pp. 32-39.)
- Evidence established the Solicitor furnished notice to Platinum Plus of its non-compliance with the 2015 Order in January and February of 2016. (Verif. Petit., Ex. E.)
- Evidence established serial and persistent violations continued to occur even after the Solicitor furnished notice to Platinum Plus of its non-compliance. (See Hr'g Tr. 59:18-23, 64-65, 68, 72-75, 77, 84, 96, 97.)
- Evidence established serial and patent violations of the 2015 Order, which in and of itself, confirmed Platinum Plus's willful non-compliance. Evidence established at least thirteen (13) separate violations of the "state of nudity" prohibition incorporated into the 2015 Order from the 2002 Order. (See, e.g., Hr'g Tr. at 32, 37, 64, 65, 72, 73, 74, 77, 97.) And, evidence established at least fifteen (15) separate violations of the "specified sexual activities" prohibition incorporated into the 2015 Order from the 2002 Order. (See Hr'g Tr. at 32, 34, 35, 36, 64, 65, 68, 72, 73, 74, 77, 84, 96.)⁷
- Evidence established Platinum Plus's management and employees turned an institutional blind eye to violative conduct that occurred in their presence. (See, e.g., Hr'g Tr. at 35-36, 72-75, 96-97.)
- Evidence established Platinum Plus allowed dancers to wear patently violative clothing without taking corrective measures. (See Hr'g Tr. at 63-64, 72, 74, 77.)
- Evidence established that as late as March of 2016 Platinum Plus did not inform prospective dancers of what clothing and conduct proved off-limits under the Court Order. (See Hr'g Tr. at 108:23-24, 114:4-18.)
- Evidence established Platinum Plus continued to supply prospective dancers with an Entertainment Agreement, the terms of which failed to comply with the 2015 Order. (See State Ex. 7; Hr'g Tr. at 106-107.)
- Evidence established Platinum Plus violated Paragraph V(A)(4) of the 2015 Order by failing to provide the Solicitor video footage as requested. (See Hr'g Tr. at 40:17-41:18.)

⁷ Of note, these numbers largely reflect only what the two Independent Monitors observed on the three (3) randomly chosen nights when the State audited Platinum Plus's compliance efforts. The Order of May 6, 2015 also noted a myriad of violations.

- Evidence established the video cameras installed by Platinum Plus did not capture reviewable video footage in "all places where Dancers" interacted with customers as required by Paragraph V(A) of the 2015 Order. (*See* Hr'g Tr. at 26, 37-38; Verif. Petit., Ex. E at 1.)
- Video footage from Platinum Plus's surveillance cameras that was presented in Court during the hearing on June 14, 2016, clearly established the blatant and repeated violations of the Consent Orders (independent of the Monitors testimony) and substantially corroborated the testimony given by the State's witnesses. (*See* State Ex. 1-4.)⁸

The Court finds Platinum Plus (Elephant, Inc.) is, therefore, found in criminal contempt of the 2015 Order. The evidence overwhelmingly established Platinum Plus clearly, repeatedly, willfully and beyond a reasonable doubt violated the 2015 Order. *See State v. Passmore*, 611 S.E.2d 273, 275 (Ct. App. 2005) (Willful disobedience determined through "subjective, not objective" evaluation of "all the acts, words, and circumstances surrounding" Defendants' disobedience.)⁹ Alternatively, the Court also finds the evidence clearly and convincingly established Platinum Plus as being in civil contempt based upon clear and repeated violation of the Orders.

⁸The Court's citation to the Record in this Order is intended as merely illustrative, not exhaustive. Ample evidence supports the Court's conclusions throughout the decision beyond what is cited. Defendants have also raised a wide array of legal arguments in this case. After careful review and consideration, the Court addresses those it deems material herein. To the extent an argument has not been deemed worthy of discussion by the Court, it should be deemed as having been fully reviewed and rejected by the Court as without legal basis under the facts of the case *sub judice*.

⁹ Defendants assert Platinum Plus's dancers constitute independent contractors, over which they have no duty or control. The Court finds it need not reach such issues. Under the 2015 Order, Platinum Plus, in fact, assumed, and the Court correspondingly imposed, a positive obligation to ensure the dancers' compliance with the Order's terms while present at the Subject Property. As noted above, the evidence of record established willful violations of the 2015 Order's terms and conditions. However, if the dancers' status somehow mattered, the Court finds recent authority addressing the issue belies Defendants' attempted classification of the dancers as independent contractors. *See, e.g., Lewis v. L.B. Dynasty*, 411 S.C. 637, 639-640 (2015); *McFeeley v. Jackson St. Entm't, LLC*, 2016 U.S. App. LEXIS 10352 (4th Cir. 2016). This is particularly true where, as here, Platinum Plus voluntarily assumed the obligation to oversee and control both the dancers' manner of dress and conduct.

In regards to the finding of civil contempt, Defendants argue that the Solicitor alleged and proceeded solely on the basis of criminal contempt and that the defense was premised on this. However, in light of the Consent Orders, the pleadings and the evidence submitted at the hearing, the Court finds that the Solicitor has sufficiently alleged and proven a basis for either criminal and/or civil contempt.

Notwithstanding the above, as to Gaines, the Court finds the level and manner of his obligations and duties under the Consent Orders, as well as any determination of guilt or violation, less clear. The Court acknowledges Paragraph IX(A) of the 2015 Order states: "All undersigned signatories have had the benefit of the advice of counsel and knowingly and voluntarily agree to be bound by the terms of this Consent Order." (2015 Order, p. 8, ¶IX(A).) Gaines also signed the Consent Order individually and in his capacity as "sole shareholder and Chief Executive Officer" of Elephant, Inc. (*Id.* at 11 & 12.) And Paragraphs I, II, III, IV, and V of the 2015 Order all apply equally to both "EI and Gaines." (2015 Order.) The Court is likewise reluctant to excuse a party's voluntary failure to perform obligations imposed by a court order.

Even in light of this, the Court questions whether the Orders established in sufficiently definite terms the duties and obligations Gaines was personally undertaking or that the evidence establishes Gaines personally willfully violated the Consent Order beyond either a reasonable doubt or clear and convincing standard.¹⁰ As such, the Court declines to sanction Gaines for contempt of court. However, going forward, the Court hereby provides Gaines with clear and unequivocal notice that, as Elephant, Inc.'s sole shareholder and Chief Executive Officer, as a named tenant of the Subject Property, and as a signatory to the Consent Order in dual capacity,

¹⁰ One may not be held in contempt for violating a court order which fails to tell him in definite terms what he must do or not do. See, *Spartanburg Buddhist Center of SC v. Ork*, Op. #5427, SC Ct App. filed 7/13/2016.

the Court concludes he does possess an affirmative duty to ensure Platinum Plus adheres to 2015 Order's terms and conditions. Such affirmative duty requires Gaines to avail himself of and learn all such facts as are necessary to ensure Platinum Plus's compliance with the Order. Moving forward, Gaines may not assert ignorance of such facts to avoid the responsibilities undertaken under the 2015 Order. Having now been expressly afforded such notice, further violations of the 2015 Order by Platinum Plus may likely result in Gaines personally being subject to contempt of court sanctions.

Defendants' Objections

Defendants raised a series of arguments disputing the validity of the instant contempt proceedings. Before imposing contempt sanctions in this matter, the Court will endeavor to address Defendants' arguments.

Although Defendants question the undersigned's jurisdiction to hear the instant proceedings, the Court finds jurisdiction exists. (Hr'g Tr. at 10.) A standing order of the South Carolina Supreme Court confirms the Court's jurisdiction to hear the matter at bar. (*See* Court Ex. 1; *see also* S.C. Code §14-11-130.) Moreover, and independent of the standing order, the presiding administrative judge issued an Order referring the current proceedings to the undersigned. (*See* Order dated April 29, 2016.) And last, the Parties consented to the Court's continued personal and subject matter jurisdiction to enforce the 2015 Order's terms and conditions. (*See e.g.*, 2015 Order, p. 8, ¶IX(B), (D), and (E).) The Court, therefore, has jurisdiction.

Next, despite their arguments to the contrary, the Court finds Defendants had adequate time to retain new counsel and prepare for the June 14th, 2016 contempt hearing ("Contempt Hearing"). During a May 6, 2016 conference call with the Court, Defendants then counsel requested a continuance of the upcoming May 18, 2016 hearing that had been set by the

presiding administrative judge, citing a likelihood Defendants may retain new counsel. Over the Solicitor's objection, the Court postponed the hearing until June 14, 2016 but expressly stated no further continuances would follow. (Hr'g Tr. at 5:22-6:2.) Accordingly, the Court finds Defendants had sufficient time to hire counsel and prepare.¹¹

According to Defendants' next assertion, the Solicitor violated their Due Process and Sixth Amendment rights by serving "a person he knew was not acting as defendants' counsel." (Def. Closing, p. 5.) But, contrary to Defendants' argument, Attorney Randall Hiller ("Hiller"), one of Defendants' then lawyers of record, personally accepted service of: the Petition, the verification, the Order to Show Cause, and a subpoena for Gaines. (See Solicitor Closing, Ex. B.)¹² In so doing, Hiller acknowledged in writing his acceptance of service on behalf of both EI and Gaines and certified his authority to do so. (Compare *Id.* with Rule 4(j), SCRCP.)¹³ Accordingly, the Court rejects Defendants' service of process arguments.

Defendants further suggest the Solicitor violated their Sixth Amendment rights by subpoenaing Hiller as a potential witness during the June 14th hearing. Defendants claim Hiller's receipt of a subpoena left them "with time so short" and ensured "Defendants could not consult with him." (Def. Closing, p. 6.) As per their reasoning, the short timetable, in turn, deprived

¹¹ Notably, Defendants failed to submit any evidence demonstrating good and sufficient cause existed to warrant a continuance and justify a further delay. (See *also infra*.)

¹² In making the instant argument, Defendants appear to misquote the Solicitor. The record reflects the Solicitor stated: "Mr. Hiller made it very clear at the outset that he was not an attorney of record on this particular aspect of the case." (Hr'g Tr. at 14:21-24.)

¹³ At the time of Hiller's acceptance of service, the Solicitor had communicated with Hiller, as counsel for Defendants, for over a year. Hiller had not moved to withdraw as counsel of record. And, pursuant to the 2015 Consent Order, Defendants stipulated to the Court's personal jurisdiction over them; Defendants also clearly received notice of the Verified Petition. (See Hr'g Tr. at 5; 2015 Order, p. 8, ¶IX(B), (D), & (E).) Furthermore, Defendants submitted no evidence suggesting Hiller lacked the authority to accept service.

Defendants of their true choice of counsel, who lacked adequate time to gain *pro hac* admission. (See Hr'g Tr. at 8.)

The Court rejects all of Defendants' arguments in this regard. As noted, as of May 6, 2016 (*i.e.*, before Hiller received the subpoena), Defendants argued they needed a continuance because they would likely hire new counsel of record (*i.e.*, to replace Hiller) "on this particular aspect of the case." (*Id.* at 14:21-15:1-12.) The Court granted Defendants the requested continuance based upon their representations. (*Id.*) Thus, Defendants' claims they were caught short on time proves inconsistent with their own, prior representations to the Court.¹⁴

Contrary to Defendants' suggestions, the Court also finds Rule 3.7, RPC, Rule 407, SCACR ("Rule 3.7") would not have impaired Hiller's ability to help Defendants prepare for the Contempt Hearing, as it only restricts a lawyer's ability to advocate in court proceedings where he also may testify. *See S.C. Bar Ethics Adv. Op.* #90-27. In addition, Defendants could have, but did not, file a motion to quash Hiller's subpoena.¹⁵

In an interrelated argument, Defendants claim the Court deprived them of counsel of their choosing by requiring adherence to the South Carolina Supreme Court's *pro hac vice* requirements. (*See* Rule 405, SCACR.) To the contrary, a trial court does not abridge Sixth Amendment protections by requiring litigants to abide by state *pro hac* mandates. *See, e.g., United States v. Menner*, 374 F.App'x. 446, 447 (4th Cir. 2010) (unpublished), *cert denied*, 131

¹⁴ The Court notes the factual inconsistencies underpinning Defendants' arguments. On one hand, Defendants assert Hiller could not accept service as of May 14, 2016 because he was not their attorney. On the other hand, Defendants assert they were caught short preparing for the hearing because Hiller, their attorney, received a subpoena just prior to the hearing causing them to scramble for new counsel.

¹⁵ Nor did the Parties ask the Court to determine whether, under the facts and circumstances presented, Rule 3.7 even disqualified Hiller.

S.Ct. 191, 178 L.Ed.2d 114 (2010). If, as here, Defendants wish to proceed with out-of-state counsel, they must complete the requisite steps to secure the privilege (not right) of such counsel's lawful appearance. This is particularly true where, as here, the Court previously granted Defendants additional (and ample) time to retain new counsel and forewarned it would grant no further continuances. (Hr'g Tr. at 5:22-6:2.)

A defendant's right to counsel "is only a qualified one" and "the opportunity guaranteed is only a 'fair' one." *Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 612-16 (4th Cir. 1986). "[A] defendant has no constitutional right to dictate the time" of his trial by "showing up" and objecting that his "then retained" counsel is not "counsel of his choice." *Id.* (internal citation omitted). Under the facts at bar, then, the Court finds Defendants had a "fair" opportunity to retain counsel of their choosing.¹⁶

Also without merit, Defendants next contend the Solicitor violated their Fifth Amendment rights against self-incrimination by arguing they should be found guilty because they did not testify. (Def. Reply pp. 4, 6, 8-10.) The Court finds that the Solicitor did not make such an argument. Indeed, the passage Defendants rely upon does not even mention their failure to testify but instead points out Defendants "offered no proof--of anything." (Solicitor's Closing, p. 9.)¹⁷ Statements concerning a defendant's failure to introduce any evidence do not implicate

¹⁶ Furthermore, no evidence of record substantiated good cause to support a continuance. No evidence demonstrated why Defendants could not retain counsel during the time granted by the Court—or—that they did not actually do so. No evidence demonstrated the actual engagement date of counsel or when Defendants first contacted counsel. No evidence showed how Defendants incurred prejudice of any kind. No evidence reflected how Defendants did not receive a "fair" opportunity to retain counsel of their choosing.

¹⁷ The Solicitor's Closing made the following statement: "Once the Solicitor made out a *prima facie* case for contempt, the burden shifted to Defendants to establish their defense or inability to comply with the Order. But, here, Defendants did neither. They offered no proof—of anything. They advanced no defense. Nor did they claim they could not comply." (Solicitor's Closing, p. 9.) Moreover, under South Carolina law, the Solicitor's Closing correctly stated the burden

the Fifth Amendment. *See, e.g., Newell v. Slayton*, 468 F.2d 888, 1972 U.S. App. LEXIS 7284 (4th Cir. Va. 1972).¹⁸ Moreover, the Court heard the instant matter as a non-jury proceeding. Thus, here, the risk of jury confusion does not exist, since the Court can discern, and has adequately discerned, the difference between Defendants not testifying and their failure to offer any evidence by way of a defense.

The Court likewise finds no Due Process violations arose out of the Solicitor's redaction of the affiant's names in the affidavits supporting the Verified Petition.¹⁹ The Solicitor redacted the affiants' names before filing their affidavits in the public record because they also worked as undercover narcotics agents. (Hr'g Tr. at 58:14-15 & 86:3-8.) However, in the Verified Petition, the Solicitor offered to provide the affiants' names to Defendants if deemed necessary to the proceedings. (Hr'g Tr. at 12-13.)

The Solicitor's redactions did not violate Defendants' Due Process rights. South Carolina law allows the Solicitor to protect the names of confidential informants. *See State v. Humphries*, 354 S.C. 87, 90 (2003). The testimony of the affiants at the hearing tracked their affidavits and defense counsel vigorously cross-examined both at length. Additionally, in the five weeks prior to the hearing, Defendants never asked the Solicitor for the affiants' names, nor did they file a

shifted to Defendants once the petitioner established a *prima facie* case of contempt. *Widman v. Widman*, 557 S.E.2d 693, 705 (Ct. App. 2001); *Henderson v. Henderson*, 298 S.C. 190, 379 S.E.2d 125, 1989 S.C. LEXIS 79 (1989).

¹⁸ *See also United States v. Spriggs*, 452 Fed.Appx. 271, 272-73, 2011 WL 5252647 (4th Cir. 2011); *United States v. Jenkins*, 544 F.2d 180, 180-81 (4th Cir. 1976); *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006); *United States v. Pena*, 2000 U.S. App. LEXIS 8244 (4th Cir. Va. Apr. 27, 2000); *United States v. Francis*, 82 F.3d 77, 78 (4th Cir. 1996); *United States v. Percy*, 765 F.2d 1199, 1204-05 (4th Cir. 1985).

¹⁹ Contrary to Defendants' arguments, *see* Hr'g Tr. at 11, the Court finds the Solicitor did verify the Petition. A copy of the verification exists in the Court's record and the acceptance of service document executed by the Defendants' attorney confirms their receipt of the same. (*See* Solicitor Closing, Ex. B.) An additional copy was supplied to defense counsel during the hearing. (*See* Hr'g Tr. at 12.)

motion seeking the same. Such a request is required under the common law of South Carolina before Defendants can raise it in a proceeding. *State v. Batson*, 261 S.C. 128, 136 (1973). Last, no evidence of record substantiates any prejudice resulted from Defendants' knowing the substance of affiants' testimony in advance but not their names.

The Court similarly rejects Defendants' claimed entitlement to a jury trial, which they assert as constitutionally guaranteed because Gaines faced incarceration of more than six months. (Def. Closing, pp. 1-2.) As indicated herein, the Court has not imposed incarceration as a penalty. Nor did the Solicitor seek incarceration exceeding six months. (Hr'g Tr. at 16:15-17:7; Solicitor's Closing, p. 40.) Accordingly, the Court finds the instant proceedings do not implicate Defendants' jury trial rights due to incarceration exceeding six months as Defendants contend. *See Curlee v. Howle*, 277 S.C. 377, 385, 287 S.E.2d 915, 919 (1982).²⁰

Defendants appear to characterize the 2015 Order as merely a "civil settlement agreement," for which the Court's contempt powers only half-operate. (*See, e.g.*, Def. Closing, pp. 3 & 14.) However, the Solicitor and Defendants did not execute a mere civil settlement agreement. The Parties negotiated and executed a consent order stating "willful violations" of its "terms and conditions...shall be punishable as contempt of Court." (2015 Order, p. 8, §§VIII & IX(A).) The 2015 Order is a valid and binding judgment²¹ of this Court and supported by its full contempt powers to ensure compliance. *See, e.g., Checker Yellow Cab Co. v. Checker Cab &*

²⁰ *See also Frank v. United States*, 395 U.S. 147, 150 (1969); *Int'l Union v. Bagwell*, 512 U.S. 821, 827 (1994).

²¹ *See also Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004); *Local No. 93, Int'l. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 519, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986); *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002); *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983); *United States v. Kellum*, 523 F.2d 1284, 1287 (5th Cir. 1975); 46 Am.Jur.2d §186.

Parcel Service, Inc., 287 S.C. 608, 610 (Ct. App. 1986); *Rawcliffe Resorts, Inc. v. Matt Becker & Assocs.*, 2016 S.C. App. Unpub. LEXIS 122 (Ct. App. 2016).

Finally, Defendants' arguments under the 2015 Order lack merit. For example, Defendants complain they were entitled to notice of their violations and an accompanying right to cure the same.²² (Def. Reply, p. 11.) The Court rejects this argument. The 2015 Order only entitled Defendants to copies of the Independent Monitor reports detailing "instances of non-compliance." (2015 Order, p. 6, ¶V(B)(2).) The Order does not otherwise require notification of any kind. By way of defense, Defendants offered no evidence that the Solicitor failed to supply the Monitors' reports. Even so, the Court specifically inquired and the Solicitor confirmed the reports were, in fact, provided, which otherwise proves consistent with the evidence of record.²³ (Hr'g Tr. at 88:5-15.)

Nowhere does the 2015 Order's terms confer upon Defendants a right to cure. Of note, the 2015 Order substantially incorporates state law, local ordinance, and a 2002 Order of this Court. The Solicitor did not, and could not, grant Defendants the ability to violate but then cure their violations of state law, local ordinances, and a Court Order. The Court rejects Defendants' arguments in this regard.

Sanctions for Contempt

For the reasons set forth above, the Court imposes the following:

A. Criminal Contempt Sanctions:

²² Defendants also complain about how the Independent Monitors investigated Defendants' non-compliance when the 2015 Order imposes no such limitations.

²³ The Court does not mean to suggest the Solicitor shouldered a burden to prove the State's compliance with the Order. If Defendants wished to raise such issues as a defense, they had the opportunity to present such evidence but elected not to do so.

1. **Monetary Sanction.** As a sanction for Platinum Plus's criminal contempt, the Court imposes a one hundred thousand dollar (\$100,000.00) sanction against Platinum Plus.
 - a. In imposing this sanction, the Court is cognizant that in the 2015 Order, the parties agreed to Defendants making monetary payments in an aggregate sum of sixty-six thousand dollars (\$66,000.00). A portion was paid to the Solicitors' Office for attorney fees and costs and a portion was to be paid to a local non-profit organization.
 - b. Despite the imposition of such voluntary payments, the evidence of record demonstrated Platinum Plus resumed blatant and repeated conduct at the Subject Property in clear and repeated violation of the 2015 Order within only one week of re-opening. As a result, the Court finds an enhancement of what Platinum Plus should be sanctioned under this Order is appropriate to uphold the integrity of the Court's Order and to promote proper deterrence against a repeat in such conduct in the future.²⁴
 - c. In the present contempt action, the Solicitor does not seek attorney fees or costs. As such, the Court finds that the monetary sanction should inure to the benefit of the citizens of Greenville County since the Nuisance Statute this action is founded upon ultimately inures to the benefit of the public. Therefore, the Court finds that Platinum Plus shall pay the one hundred thousand dollars (\$100,000.00) in certified funds to the Clerk of Court within 30 days of this Order and that the monies shall be used by the Greenville County Sheriff's Office (the only local law enforcement agency with county-wide jurisdiction) in procuring body cameras for its uniform patrol officers. This will provide a benefit to the citizens of Greenville County, while also protecting our committed and dedicated law enforcement officers.
2. **Injunction Against Business Operations.** As a further sanction for Platinum Plus's criminal contempt, the Court enjoins Platinum Plus, as operated by Elephant, Inc., from continuing its business operations for a period of one-hundred and eighty (180) consecutive days ("Injunction Period"). This is the closure period sought by the State.
 - a. Platinum Plus, by and through Elephant, Inc., shall have fourteen (14) days following the issuance of this Order and its receipt by defense counsel to wind-down ("Wind-down Period") and cease Platinum Plus's operations, as operated by Elephant, Inc., at 805 Frontage Road in Greenville, South Carolina 29615 ("Subject Property").
 - b. Absent further Court Order, Platinum Plus shall remain closed and shall not resume operations at the Subject Property or any other location during the Injunction Period.

²⁴ Pursuant to an affidavit by Gaines dated 4/24/15, Platinum Plus served over 100,000 patrons annually, employed 53 full-time employees and, in 2014, "purchased more than \$3,000,000.00 in goods and services from the local economy." Clearly, Platinum Plus generates substantial sums of revenue and has the ability to pay the sanction.

- c. By five p.m. on the day after the Wind-Down Period expires ("Closure Date"), the Greenville County Sheriff's Office ("GCSO") shall post a laminated notice (size to be 11 x 14 inches) on all exterior doors of the Subject Property in substantially the same form as Attachment A.
 - d. By five p.m. on the Closure Date, GCSO shall take reasonable measures to secure all exterior doors of the Subject Property and limit ingress and egress to the Subject Property's parking lot. Beginning at nine a.m. on the Closure Date, Platinum Plus shall provide GCSO access to the Subject Property to commence implementing the directives of this Order.
 - e. Beginning on the Closure Date and continuing for the duration of the Injunction Period, no individual (except for routine/emergency maintenance) shall gain access to the Subject Property without written approval of the Solicitor's Office or written permission of the Court outlining the terms and conditions of the same.
 - f. Individuals found guilty of violating this Order shall be subject to the Court's contempt powers and subject to monetary fines, imprisonment, or both.
3. **Extension of Mandatory Monitoring.** As a sanction for Platinum Plus's criminal contempt, the Court extends the mandatory enhanced monitoring provisions set forth in the 2015 Order ("Extended Monitoring Period").
- a. After expiration of the Injunction Period, the Extended Monitoring Period shall commence upon the date when Platinum Plus re-opens to the public, if in fact it does, and shall continue for a period of twelve (12) months.
 - b. The terms and conditions applicable to the Extended Monitoring Period shall be the same as those set forth in Paragraph V(A) & (B) on pages 6 & 7 of the 2015 Order.
 - c. At least 30 days prior to any planned re-opening by Platinum Plus, and consistent with Paragraph V(B)(3), Platinum Plus shall pay the sum of six thousand five hundred (\$6500.00) into an escrow account designated by the GCSO to pay all costs and fees arising out of the work done by the Independent Monitors during this Extended Monitoring Period. The Court finds this to be an appropriate amount in that this is the same amount and term the parties agreed to in the 2015 Order.

B. Civil Contempt Sanctions:

- 1. The Court incorporates herein by reference Paragraph 2 (Injunction Against Business Operations) and Paragraph 3 (Extension of Enhanced Monitoring), above.

2. The Court alternatively re-imposes the sanctions set forth in Paragraphs 2 & 3 *verbatim* as appropriate sanctions for Platinum Plus's civil contempt.
 - a. In light of the fact that the State is a party to this action, the Court finds such sanctions serve the remedial purpose of delivering to the Solicitor the benefits contemplated by the 2015 Order, namely, upholding the integrity of this Court's Order, the abatement of the public nuisance at the Subject Property and compliance with state law, local ordinance, and prior order of this Court.
 - b. Platinum Plus's non-compliance with the 2015 Order deprived the State of such benefits.
 - c. The Court finds imposition of such sanctions, in this case, restores to the State, in remedial fashion, the agreed upon reciprocal benefits set forth in the 2015 Order, which Defendants failed to deliver and/or comply with.

C. Notice to Defendants Concerning Future Violations:

1. The Court provides notice to both Defendants that any future willful violations of the 2015 Order or interrelated Orders shall result in additional sanctions for contempt.
2. Such sanctions may include additional monetary sanctions, imprisonment, and a substantial likelihood that Platinum Plus will be permanently shut-down.

IT IS SO ORDERED.

JUDGE'S SIGNATURE PAGE TO FOLLOW

ATTACHMENT A

PURSUANT TO COURT ORDER, THIS BUSINESS IS CLOSED UNTIL FURTHER ORDER. SEE, 2015-23-02597.

VIOLATION OF THIS ORDER MAY RESULT IN CONTEMPT OF COURT, INCLUDING MONETARY FINES, JAIL, OR BOTH.

A COPY OF THE COURT ORDER MAY BE OBTAINED FROM THE GREENVILLE COUNTY CLERK OF COURT, 305 EAST NORTH STREET GREENVILLE, SC 29601.



Greenville Common Pleas

Case Caption: South Carolina State Of vs. Elephant Inc , defendant, et al
Case Number: 2015CP2302597
Type: Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2016-07-27 08:44:57 page 18 of 18

ELECTRONICALLY FILED - 2016 Jul 27 10:24 AM - GREENVILLE - COMMON PLEAS - CASE#2015CP2302597
ELECTRONICALLY FILED - 2017 May 23 5:01 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303372

**AMENDMENT TO
LEASE AGREEMENT**

AMENDMENT TO LEASE AGREEMENT dated as of December 6, 2016 between FRONTAGE ROAD ASSOCIATES, INC. ("Landlord") and GREENVILLE BISTRO, LLC ("Tenant").

RECITALS:

RECITAL A. Landlord and Tenant entered into a Lease Agreement ("Lease") for the property commonly known as 805 Frontage Road, Greenville, South Carolina ("Leased Premises").

RECITAL B. The Commencement of Rental and Other Charges under the Lease is December 1, 2016.

RECITAL C. Landlord and Tenant have agreed to change the Commencement of Rental and Other Charges as hereinafter set forth in this Amendment.

NOW, THEREFORE, the parties hereto agree as follows:

1. All capitalized terms not defined in this Amendment shall have the same meanings as defined in the Lease, unless the context or use clearly indicates or requires a different meaning or intent.

2. The Commencement of Rental and Other Charges shall be the earlier of (i) the date Tenant opens for business, or (ii) 30 days after Tenant obtains a Temporary Liquor License to serve beer, wine, and liquor at the Leased Premises.

3. After Tenant has access to the Leased Premises, Tenant shall diligently apply for a Temporary Liquor License to sell beer, wine, and liquor at the Leased Premises and provide to the appropriate regulatory authorities all information and documents necessary to obtain a Temporary Liquor License at the Leased Premises. As soon as access to the Leased Premises is available, Tenant shall be provided access to the Leased Premises for the purposes of preparing the Leased Premises to open for business, including making improvements to the Leased Premises, inspections by regulatory authorities, and any other reasonable purpose necessary or desirable in connection with Tenant opening Tenant's business at the Leased Premises.

4. Except as specifically provided in this Amendment, the terms and conditions of the Lease shall remain in full force and effect.

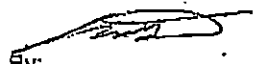
[REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties have caused this Amendment to be executed as of the day and year first above written.

EXHIBIT D

LANDLORD:

FRONTAGE ROAD ASSOCIATES, INC.

 PB 6

By:
Thomas Schweitzer
Its President

TENANT:

GREENVILLE BISTRO, LLC

By:
Jason C. Mohnay
Its Manager



ELECTRONICALLY FILED - 2017 May 23 5:01 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303372



Codes Enforcement Office

(864) 467-7090

www.greenvillecounty.org

May 15, 2017

FRONTAGE ROAD ASSOCIATES INC
VISION HOMES INC
103 BARFIELD DR
EASLEY, SC 29642

Re:	CASE NO:	17-90001976
	TAX MAP NO:	0543.01-01-001.01
	LOCATION OF PROPERTY:	805 FRONTAGE RD
	CORRECTION BEFORE:	IMMEDIATELY

OFFICIAL NOTICE

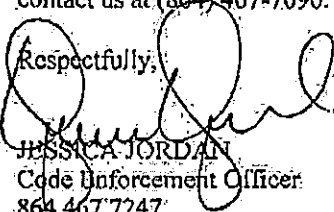
An inspection of the above-referenced property conducted on MAY 12, 2017 revealed that you are in violation of The Code of the County of Greenville South Carolina. Please see the following page for details concerning your violation(s).

You are hereby ordered to correct this violation by the above-stated CORRECTION BEFORE DATE. Failure to comply with this order will leave us no alternative but to proceed with further legal actions available under Greenville County Ordinances and/or Codes.

You have the right to appeal this order to the Greenville County Board of Zoning Appeals. The written appeal must be filed with the Secretary of the Zoning Board within 30 days after the notice or order is served. There is a filing fee due when the appeal is submitted.

Your cooperation in this matter is appreciated and if you have any questions please contact us at (864) 467-7090.

Respectfully,


JESSICA JORDAN
Code Enforcement Officer
(864) 467-7247

County Square | 301 University Ridge | Suite 4100 | Greenville, SC 29601 | Fax (864) 467-7164

EXHIBIT E

ELECTRONICALLY FILED - 2017 May 23 5:01 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303372

05/13/2017 22:01 8542951377

VISION HOMES
VIOLATION DETAIL

PAGE 02/02
PAGE 1

CASE NUMBER 17-90001976
PROPERTY ADDRESS 805 FRONTAGE RD

VIOLATION: PERMITTED USES QUANTITY: 1
DESCRIPTION: ZONING ORD SECTION 6:1 DATE: 5/12/17
LOCATION:

NARRATIVE :

THE CERTIFICATE OF OCCUPANCY ISSUED IS FOR A RESTAUNT AND DOES NOT HAVE LIVE ENTERTAINMENT. ALL PATRONS/PERSONELL MUST BE PROPERLY CLOTHED. NO SWIMSUITS ETC. THE USE OF THE STRUCTURE IS FOR A RESTAUNT ONLY. CEASE ALL USE FOR LIVE ENTERTAINMENT.

ORDINANCE DESCRIPTION :

6:1 PERMITTED USES, SPECIAL EXCEPTIONS AND CONDITIONAL USES
Principle uses shall be allowed within the base zoning districts of this ordinance in accordance with Table 6:1.

CAS.
PRO

CORRECTIVE ACTION REQUIRED :

Correct the violation(s) by ceasing to use the property for any use not specifically allowed in this district.

OFF

OFF
OFF

OFF

ELECTRONICALLY FILED - 2017 May 23 5:01 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303372

TO: [illegible]
FROM: [illegible]
SUBJECT: [illegible]

OFFICIAL NOTICE

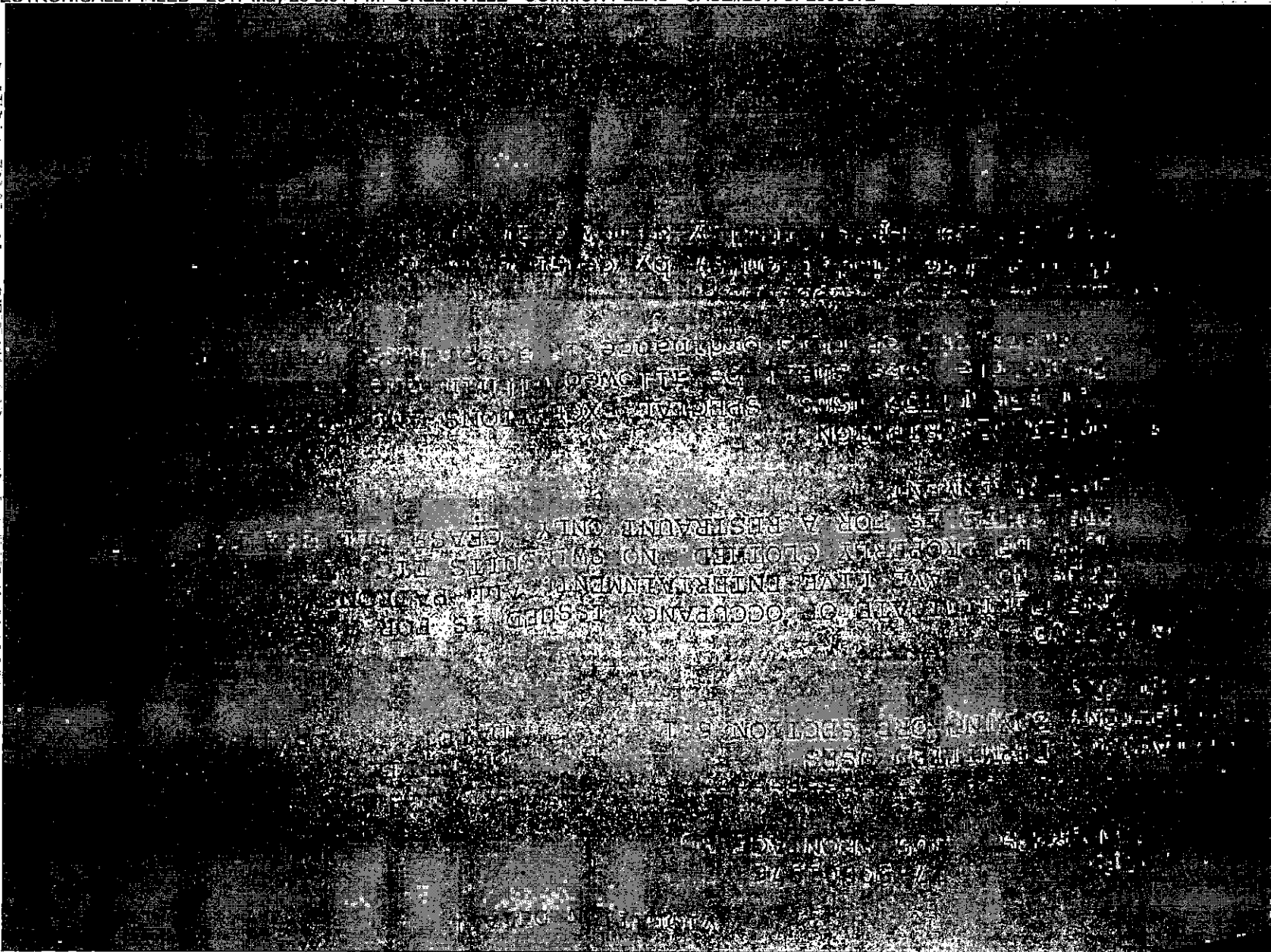
An inspection of the above-referenced property conducted on MAY 12, 2017 revealed a violation of the Code of the County of Greenville South Carolina. Please see the following page for details concerning your violation(s).

You are hereby ordered to correct this violation by the above-stated CORRECTION DATE. Failure to comply with this order will leave us no alternative but to pursue other legal actions available under Greenville County Ordinances and Code.

You may appeal this order to the Greenville County Board of Zoning Appeals. An appeal must be filed with the Secretary of the Zoning Board within 10 days of the date this order is served. There is a filing fee due when the appeal is filed.

Your cooperation in this matter is appreciated and if you have any questions please call (864) 477-2000.

RECEIVED
MAY 23 5:01 PM
GREENVILLE
COMMUNITY DEVELOPMENT
LEASING
2017 05 23 05:01 PM



COUNTY OF GREENVILLE
BUILDING SAFETY DIVISION
301 UNIVERSITY RIDGE STE 4100
GREENVILLE SC 29601

ELECTRONICALLY FILED - 2017 May 23 5:01 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303872

CERTIFICATE OF USE AND OCCUPANCY

PERMANENT

Issue Date 3/27/17
Parcel Number 0543.01-01-001.01
Property Address 805 FRONTAGE RD.
GREENVILLE SC 29615
Subdivision Name
Legal Description LOT 1.1 FRONTAGE RD
Property Zoning S1 - SERVICE DISTRICT
Construction type IBC TYPE V-B
Flood Zone OUTSIDE FLWAY & FLPLAIN
Edition of code INTERNATIONAL CODES 2015
Occupancy type RESTAURANT
Occupancy load 609.00
Interior Sprinklers YES
Tenant Number/Name GREENVILLE BISTRO, LLC
Application Descr Restaurant
Contractor:
Owner:
FRONTAGE ROAD ASSOCIATES INC
VISION HOMES INC
103 BARFIELD DR
EASLEY SC 29642

Application number 17-00001651.001.001
Description of Work CHANGE OF TENANT/NO PLAN REVIEW
Approved
Herb Yingling / Building Official
Rick Merck / Deputy Building Official
Approved
Zoning Administrator
Krisopher Kurjaka

The described portion of the structure has been inspected for compliance with the requirements of this code for the occupancy and division of occupancy and the use for which the proposed occupancy is classified.

THIS CERTIFICATE VOID UNLESS OFFICIAL SEAL AFFIXED
AND SIGNED BY BUILDING OFFICIAL

EXHIBIT F

No. 4869

AN ORDINANCE

AN ORDINANCE TO AMEND ORDINANCE NO. 2673, CONCERNING ADULT ENTERTAINMENT REGULATIONS TO MODIFY CERTAIN DEFINITIONS.

BE IT ORDAINED by the Greenville County Council:

Section 1. Findings.

The Greenville County Council finds the following:

- 1) County Council hereby reaffirms its findings set forth in County Ordinance No. 2673, where it was stated that:

"It is the purpose of this article to regulate sexually oriented businesses to promote the health, safety, morals and general welfare of the citizens of the county, and to establish reasonable and uniform regulations to prevent the continued deleterious location and concentration of sexually oriented businesses within the county. The provisions of this article have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent or effect of this article to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent of this article to condone or legitimize the distribution of obscene material."

- 2) County Council further finds that that:

A. The South Carolina Supreme Court has recognized the regulatory provisions of Greenville County's Adult Entertainment Ordinance as constitutional and as a proper exercise of the County's police powers in the cases of *Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000) and *Greenville County v. Kenwood Enterprises*, 353 S.C. 157, 577 S.E.2d 428 (2003).

B. Adult entertainment establishments, as commercial uses, continue to be associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation all of which increase demands on law enforcement resources and are detrimental to the community.

C. Adult entertainment establishments should continue to be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other adult entertainment establishments, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of adult entertainment establishments in one area.

D. Each of the foregoing negative secondary effects constitutes a harm which the County continues to have a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the county's rationale for this article, exists independent of any comparative analysis between sexually-oriented and non-sexually-oriented businesses. Additionally, the county's interest in regulating adult entertainment establishments extends to preventing future secondary effects of either current or future adult entertainment establishments that may locate in the county. The County finds that law enforcement records associated with adult entertainment establishments are reasonably believed to be relevant to said secondary effects.

Section 2. Amend "Section 2 Definitions" of Ordinance No. 2673 at Subsections (3)(a) and (12) to be revised as follows.

A. The definitions appearing in Sections 2(3)(a) "*Adult cabaret*" and 2(13) "*Semi-nude*" of Ordinance No. 2673 are amended to read as follows:

"(3) *Adult cabaret* means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(a) Persons who appear in a state of nudity, or in a state of semi-nudity; or"

"(13) *Semi-nude* or a *state of semi-nudity* means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part."

B. The previous definitions for "*Adult cabaret*" and "*Semi-nude*" appearing in Section 2 of Ordinance No. 2673 are hereby replaced.

Section 3. Severability. Severability is intended throughout and within the provisions of this Ordinance. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, then that decision shall not affect the validity of the remaining portions of this Ordinance.

Section 4. Repeal. All ordinances or parts of ordinances in conflict with this Ordinance, or inconsistent with its provisions, are hereby repealed or superseded to the extent necessary to give this Ordinance full force and effect.

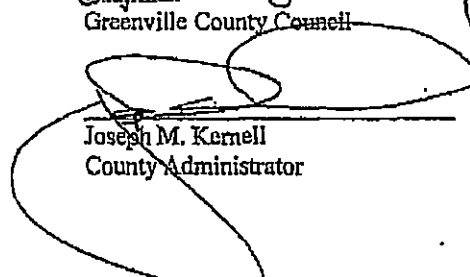
Section 5. Effective Date. This Ordinance is effective upon adoption and is subject to the pending ordinance doctrine and is enforceable upon its introduction and notice of Public Hearing.

DONE IN REGULAR MEETING THIS 21 DAY OF February, 2017.

ATTEST:


Theresa B. Kizer, c.c.c.
Clerk to Council


Chairman
Greenville County Council


Joseph M. Kernell
County Administrator

Form E-432
(Rev. 01-2014)

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA
VERSUS

DRIVER NAME: Raul MIDDLE NAME: ATEL LAST NAME: Kabala

STREET: 516 E. Ave. J CITY: Grand Prairie TX ZIP CODE: 75050

PLATE: TX 13584777 CLASS: C YES/NO

FACE: W SEX: M BIRTH DATE: 11/28/85 HEIGHT: 5'11" WEIGHT: 210 HAIR: BROWN EYES: BROWN

VEHICLE: 2011 MAKE OF VEH: SAAB YEAR: 2011 MAKE OF VEH: SAAB YEAR: 2011 MAKE OF VEH: SAAB YEAR: 2011

VEHICLE CURRENT REGISTRATION: SAAB LAST NAME: ATEL

CITY: Grand Prairie STATE: TX ZIP CODE: 75050

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAMES OF TRIAL COURT: Summary STREET: 2801 Wade Hampton Blvd CITY: Taylor STATE: SC ZIP CODE: 29687

DATE OF TRIAL: 6/12/17 TIME OF TRIAL: 1400 CITY: Taylor STATE: SC ZIP CODE: 29687

VIOLATION: CO 4869 Adult Entertainment Reg VIOLATION: CO 4869 Adult Entertainment Reg VIOLATION: CO 4869 Adult Entertainment Reg

DATE OF VIOLATION: 5/11/17 TIME OF VIOLATION: 1935 CITY: Greenville STATE: SC ZIP CODE: 29603

VIOLATION LOCATION: 805 Frontage Rd CITY: Greenville STATE: SC ZIP CODE: 29603

NAME AND NUMBER OF ARRESTING OFFICER: B. Hunnicutt #1336 DATE OF ARREST: 5/11/17 BOND AMOUNT REQUESTED: 2246-3392

PRESENT THIS SUMMONS TO THE TRIAL COURT SHOWN ABOVE

BE SURE YOU UNDERSTAND FROM THE ARRESTING OFFICER THE EXACT TIME AND BEFORE WHOM YOU ARE TO APPEAR. IF THIS TICKET IS WRITTEN FOR A TRAFFIC VIOLATION AND YOU FORFEIT BAIL, PLEAD GUILTY OR HOLD CONTENDERS, OR ARE CONVICTED AFTER A TRIAL, THIS VIOLATION WILL BE PLACED AGAINST YOUR DRIVING RECORD, OR FORWARDED TO YOUR HOME STATE. POINTS FOR OUT OF STATE VIOLATOR WILL BE ASSESSED BY YOUR HOME STATE LICENSING AUTHORITY AND MAY DIFFER FROM STATE TO STATE. FAILURE TO COMPLY WITH THE TERMS OF THIS SUMMONS MAY RESULT IN THE SUSPENSION OF YOUR DRIVER'S LICENSE BY YOUR HOME STATE. YOU ARE REQUIRED BY LAW TO APPEAR IN COURT FOR CERTAIN OFFENSES.

SEE IMPORTANT INFORMATION ON THE REVERSE SIDE OF THIS TICKET.

VIOLATOR'S COPY: 5102P0052785

Form E-432
(Rev. 01-2014)

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA
VERSUS

DRIVER NAME: Brooke MIDDLE NAME: Mirah LAST NAME: Dunon

STREET: 6918 Mazy Lane CITY: Rowlett TX ZIP CODE: 75081

PLATE: TX 41543499 CLASS: D YES/NO

FACE: W SEX: F BIRTH DATE: 04/15/193 HEIGHT: 5'02 WEIGHT: 130 HAIR: BLK EYES: BLU

VEHICLE: 2011 MAKE OF VEH: SAAB YEAR: 2011 MAKE OF VEH: SAAB YEAR: 2011 MAKE OF VEH: SAAB YEAR: 2011

VEHICLE CURRENT REGISTRATION: SAAB LAST NAME: Dunon

CITY: Rowlett STATE: TX ZIP CODE: 75081

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAMES OF TRIAL COURT: Summary STREET: 2801 Wade Hampton Blvd CITY: Taylor STATE: SC ZIP CODE: 29687

DATE OF TRIAL: 6/12/17 TIME OF TRIAL: 1400 CITY: Taylor STATE: SC ZIP CODE: 29687

VIOLATION: CO 4869 Adult Entertainment Reg VIOLATION: CO 4869 Adult Entertainment Reg VIOLATION: CO 4869 Adult Entertainment Reg

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NAME AND NUMBER OF ARRESTING OFFICER: B. Hunnicutt #1336 DATE OF ARREST: 5/11/17 BOND AMOUNT REQUESTED: 2246-3392

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SEE IMPORTANT INFORMATION ON THE REVERSE SIDE OF THIS TICKET.

VIOLATOR'S COPY: 5102P0052784

EXHIBIT H

AN ORDINANCE

Exhibit 1

No. 2673

AN ORDINANCE TO PROVIDE FOR THE LOCATION OF SEXUALLY ORIENTED BUSINESSES WITHIN THE UNINCORPORATED AREAS OF GREENVILLE COUNTY, TO PROVIDE FOR BUSINESS PERMITS, TO ESTABLISH FEES FOR THE PERMITS, AND TO PROVIDE FOR PENALTIES FOR VIOLATIONS OF THE ORDINANCE.

WHEREAS, Greenville County Council is aware that many citizens in Greenville County are concerned about the deleterious effects of certain so-called "adult" entertainment establishments in their communities.

WHEREAS, Greenville County Council has considered summaries of the following studies and cases:

1. Land Use Study: Garden Grove, CA, dated September 12, 1991
2. Land Use Study: Tucson, AZ, dated May 1, 1990
3. Land Use Study: Seattle, WA, dated March 24, 1989
4. Land Use Study: Austin, TX, dated May 19, 1986
5. Land Use Study: Oklahoma City, OK, dated March 3, 1986
6. Land Use Study: Indianapolis, IN, dated February 1984
7. Land Use Study: Houston, TX, dated November 3, 1983
8. Land Use Study: Beaumont, TX, dated September 14, 1982
9. Land Use Study: Minneapolis, MN, dated October 1980
10. Land Use Study: Phoenix, AZ, dated May 25, 1979
11. Land Use Study: Whittier, CA, dated January 9, 1978
12. Land Use Study: Amarillo, TX, dated September 12, 1977
13. Land Use Study: Cleveland, OH, dated August 24, 1977
14. Land Use Study: City of Los Angeles, CA, dated June 1977
15. 7250 Corporation v. Board of County Commissioners for Adams County, 799 P.2d 917 (Colo. 1990).
16. City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986)

County Council also considered more complete reports from the Oklahoma City and Austin, Texas studies. The unmistakable conclusions to be drawn from these reports and cases are that in areas surrounding adult-oriented entertainment establishments crime increases, property values decrease, and the quality of life for residents declines. Specifically, the studies indicate that sex related crimes and property crimes increase dramatically in the vicinity of sexually oriented businesses, one study showing that sex related crimes increased 1,000%. Residents living near sexually oriented businesses complain of increased traffic, noise, litter and fear of assault or property crimes. Property values decline even as far away as three blocks from the establishment.

WHEREAS, Greenville County Council, in order to protect the quality of life and property values of the residents of Greenville County, and at the same time preserve the First Amendment rights of those who would wish to express themselves through adult-oriented entertainment

ELECTRONICALLY FILED - 2017 Jun 14 10:33 AM - GREENVILLE - COMMON PLEAS - CASE#2017COP2303372

establishments, deems it necessary to amend the zoning ordinance.

NOW, THEREFORE, pursuant to the authority granted by the Constitution and the General Assembly of the State of South Carolina,

BE IT ORDAINED BY THE GREENVILLE COUNTY COUNCIL:

Section 1. Purpose and Intent

It is the purpose of this ordinance to regulate sexually oriented businesses to promote the health, safety, morals and general welfare of the citizens of the county, and to establish reasonable and uniform regulations to prevent the continued deleterious location and concentration of sexually oriented businesses within the county. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials including sexually oriented materials. Similarly, it is not the intent or effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent of this ordinance to condone or legitimize the distribution of obscene material.

Section 2. Definitions

(1) *Adult arcade* means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image producing devices are maintained to show images to five (5) or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(2) *Adult bookstore* or *adult video store* means a commercial establishment that as one of its principle business purposes offers for sale or rental of any one or more of the following:

- (a) Books, magazines, periodicals or other printed matter, or photographs, films, motion picture, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or
- (b) Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

A commercial establishment may have other business purposes that do not involve the offering for sale or rental of material depicting or describing "specified sexual activities" or "specified anatomical areas" and still be categorized as an adult bookstore or adult video store. Such other business

purposes will not serve to exempt such commercial establishment from being categorized as an adult bookstore or adult video store so long as one of its principle business purposes is the offering for sale or rental of the specified materials which depict or describe "specified sexual activities" or "specified anatomical areas."

(3) *Adult cabaret* means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

- (a) Persons who appear in a state of nudity; or
- (b) Live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
- (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(4) *Adult motel* means a hotel, motel or similar commercial establishment which:

- (a) Offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or
- (b) Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or
- (c) Allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten (10) hours.

(5) *Adult motion picture theater* means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) *Adult theater* means a theater, concert hall, auditorium, or similar commercial establishment that regularly features persons who appear in a state of nudity or live performances that are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) *Establishment* means and includes any of the following:

- (a) The opening or commencement of any sexually oriented business as a new business;
- (b) The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;
- (c) The addition of any sexually oriented business to any other existing sexually oriented business; or
- (d) The relocation of any sexually oriented business.

(8) *Permittee* means a person in whose name a permit to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a permit.

(9) *Nude model studio* means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured; photographed, or similarly depicted by other persons who pay money or any form of consideration.

(10) *Nudity* or a *state of nudity* means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.

(11) *Person* means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(12) *Semi-nude* means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

(13) *Sexual encounter center* means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration

- (a) Physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
- (b) Activities between persons of the opposite sex or persons of the same sex or both when one or more of the persons is in a state of nudity or semi-nude.

(14) *Sexually oriented business* means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, nude model studio, or sexual encounter center.

(15) *Specified anatomical areas* means the male genitals in a state of sexual arousal or the vulva or more intimate parts of the female genitals.

(16) *Specified sexual activities* means any of the following:

- (a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- (c) Masturbation, actual or simulated; or
- (d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

(17) *Substantial enlargement* of a sexually oriented business means the increase in floor areas occupied by the business by more than twenty-five (25%) percent, as the floor areas exist on the effective date of this ordinance.

(18) *Transfer of ownership or control* of a sexually oriented business means any of the following:

- (a) The sale, lease, or sublease of the business;
- (b) The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or other similar means; or
- (c) The establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

Section 3. Classification

The following are classified as sexually oriented businesses:

- (1) Adult arcades;
- (2) Adult bookstores or adult video stores;
- (3) Adult cabarets;
- (4) Adult motels;
- (5) Adult motion picture theaters;

- (6) Adult theaters;
- (7) Nude model studios; and
- (8) Sexual encounter centers.

~~Section 4. Permit required~~

~~(a) A person commits a misdemeanor if he operates a sexually oriented business without a valid permit issued by the county for the particular type of business.~~

~~(b) An application for a permit must be made on a form provided by the Greenville County zoning department. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six (6) inches.~~

~~(c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official. The health department, fire department, and building official shall complete their inspections and certify same to the zoning administrator within twenty-one (21) days of receipt of the application by the zoning administrator.~~

~~(d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a permit as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a ten (10) percent or greater interest in the business must sign the application for a permit as an applicant. If a corporation is listed as owner of a sexually oriented business or as the entity which wishes to operate such a business, each individual having a ten (10) percent or greater interest in the corporation must sign the application for a permit as an applicant.~~

~~(e) The fact that a person possesses other types of state or county permits and/or licenses does not exempt him from the requirement of obtaining a sexually oriented business permit.~~

~~Section 5. Issuance of permit~~

~~(a) The Greenville County zoning administrator shall approve the issuance of a permit to an applicant within thirty (30) days after receipt of an application unless he finds one or more of the following to be true:~~

- ~~(1) An applicant is under eighteen (18) years of age.~~
- ~~(2) An applicant or an applicant's spouse is overdue in his payment to the county of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.~~
- ~~(3) An applicant has failed to provide information reasonably necessary for issuance of the permit or has falsely answered a question or request for information on the applicant form.~~
- ~~(4) An applicant is residing with a person who has been denied a permit by the county to operate a sexually oriented business within the preceding twelve (12) months, or residing with a person whose permit to operate a sexually oriented business has been revoked within the preceding twelve (12) months.~~
- ~~(5) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.~~
- ~~(6) The permit fee required by this ordinance has not been paid.~~
- ~~(7) An applicant of the proposed establishment is in violation of or is not in compliance with any of the provisions of this ordinance.~~

~~(b) The permit, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The permit shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.~~

~~Section 6. Fees~~

~~The annual fee for a sexually oriented business permit is five hundred dollars (\$500.00). This fee is in addition to any other fees which may be due in connection with the operation of a business within the unincorporated areas of the county.~~

Section 7. Inspections

(a) An applicant or permittee shall permit representatives of the sheriff's office, health department, fire department, zoning department, or other county departments or agencies to inspect the premises of a sexually oriented business for the purpose of ensuring compliance with the law at any time it is occupied or open for business.

~~(b) A person who operates a sexually oriented business or his agent or employee commits a misdemeanor if he refuses to permit such lawful inspection of the premises any time it is occupied or open for business.~~

~~Section 8. Expiration of permit~~

~~(a) Each sexually oriented business permit shall expire one year from the date of issuance and may be renewed only by making application as provided in section 4. Application for renewal should be made at least thirty (30) days before the expiration date, and when made less than thirty (30) days before the expiration date, the expiration of the permit will not be affected.~~

~~(b) When the Greenville County zoning administrator denies renewal of a permit, the applicant shall not be issued a permit for one year from the date of denial. If, subsequent to denial, the Greenville County zoning administrator finds that the basis for denial of the renewal permit has been corrected or abated, the applicant may be granted a permit if at least ninety (90) days have elapsed since the date denial became final.~~

~~Section 9. Suspension~~

~~The Greenville County zoning administrator shall suspend a permit for a period not to exceed thirty (30) days if the zoning administrator determines that a permittee or an employee of a permittee has:~~

- ~~(1) Violated or is not in compliance with any section of this ordinance;~~
- ~~(2) Engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;~~
- ~~(3) Refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;~~
- ~~(4) Knowingly permitted gambling by any person on the sexually oriented business premises.~~

~~Such determination may be based upon information obtained independently by the zoning department, a conviction under section 17 of this ordinance, a separate criminal conviction that would constitute a violation of this ordinance, or other information from law enforcement, the health department, the fire department, or other official charged with enforcing the law.~~

~~Section 10. Revocation~~

~~(a) The Greenville County zoning administrator shall revoke a permit if a cause of suspension in section 9 occurs and the permit has been suspended within the preceding twelve (12) months.~~

~~(b) The Greenville County zoning administrator shall revoke a permit if the zoning administrator determines that:~~

~~(1) A permittee gave false or misleading information in the material submitted to the zoning department during the application process;~~

~~(2) A permittee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;~~

~~(3) A permittee or an employee has knowingly allowed prostitution on the premises;~~

~~(4) A permittee or an employee knowingly operated the sexually oriented business during a period of time when the permittee's permit was suspended;~~

~~(5) A permittee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or other sexual conduct to occur in or on the permitted premises;~~

~~(6) A permittee is delinquent in payment to the county or state for any taxes or fees past due.~~

~~Such determination may be based upon information obtained independently by the zoning department, a conviction under section 17 of this ordinance, a separate criminal conviction that would constitute a violation of this ordinance, or other information from law enforcement, the health department, the fire department, or other official charged with enforcing the law.~~

~~(c) When the Greenville County zoning administrator revokes a permit, the revocation shall continue for one year, and the permittee shall not be issued a sexually oriented business permit for one year from the date revocation became effective. If, subsequent to revocation, the Greenville County zoning administrator finds that the basis for the revocation has been corrected or abated, the applicant may be granted a permit if at least ninety (90) days have elapsed since the date the revocation became effective.~~

~~Section 11. Transfer of permit~~

~~A permittee shall not transfer his permit to another, nor shall a permittee operate a sexually oriented business under the authority of a permit at any place other than the address designated in the application.~~

Section 12. Location of sexually oriented businesses

(a) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business outside of a designated S-1 district. All sexually oriented businesses shall be located within a S-1 district.

(b) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within one thousand five hundred (1,500) feet of:

- (1) A church;
- (2) A public or private elementary or secondary school;
- (3) A boundary of a residential district;
- (4) A public park adjacent to any residential district;
- (5) The property line of a lot devoted primarily to residential use;
- (6) A continuous care retirement center or nursing care facility;
- (7) A family oriented recreation facility including but not limited to a roller skating rink, an ice skating rink or a public swimming pool;
- (8) A day nursery or licensed child care facility;
- (9) A public library.

(c) A person commits a misdemeanor if he causes or permits the operation, establishment, substantial enlargement or transfer of ownership or control of a sexually oriented business within one thousand five hundred (1,500) feet of another sexually oriented business.

(d) A person commits a misdemeanor if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor areas of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(e) For the purpose of this ordinance, measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of any land use listed in subsection (c) above.

(f) For purposes of subsection (d) of this section, the distance between any two (2) sexually

oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(g) Any sexually oriented business lawfully operating on the effective date of this ordinance that is in violation of subsection (a) through (f) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed one (1) year, unless sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two (2) or more sexually oriented businesses are within one thousand five hundred (1,500) feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(h) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business permit, of a land use designed in subsection (c) above within one thousand five hundred (1,500) feet of the sexually oriented business. This provision applies only to the renewal of a valid permit, and does not apply when the application for a permit is submitted after a permit has expired or has been revoked.

(i) With the exception of subsection (a) above, the provisions of this ordinance shall apply to those areas of the county that are not zoned.

Section 13. Operating hours for sexually oriented businesses

No sexually oriented business shall open to do business before 10:00 a.m. Monday through Saturday or remain open after 12:00 midnight Monday through Saturday. No sexually oriented business shall open for business on a Sunday. This subsection shall not apply to an adult motel, nor to a business whose hours of operation are regulated by state law.

Section 14. Additional regulations for adult motels

(a) It may be inferred from evidence that a sleeping room in a hotel, motel, or a similar commercial establishment has been rented and vacated two (2) or more times in a period of time less than ten (10) hours that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits a misdemeanor if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business permit, he rents or subrents a sleeping room to a person and, within ten (10) hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

Section 15. Regulations pertaining to exhibition of sexually explicit films or videos

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than one hundred fifty (150) square feet of floor space, a film, video cassette, or other video reproduction which depicts "specified sexual activities" or "specified anatomical areas," shall comply with the following requirements:

- (1) Upon application for a sexually oriented permit, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed thirty-two (32) square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions of all areas of the interior of the premises to an accuracy of plus or minus six (6) inches. The Greenville County zoning administrator may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.
- (2) The application shall be sworn to be true and correct by the applicant.
- (3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the zoning administrator or his designee.
- (4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.
- (5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's

station.

- (6) It shall be the duty of the owners and operators, and of any agents and employees present in the premises to ensure that the view area specified in subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to subsection (1) of this section.
- (7) No viewing room may be occupied by more than one person at a time.
- (8) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to an illumination of not less than one footcandle as measured at the floor level.
- (9) It shall be the duty of the owners and operators and of any agents and employees present in the premises to ensure that the illumination described above is maintained at all times that any patron is present in the premises.

(b) A person having a duty under subsection (1) through (9) of subsection (a) above commits a misdemeanor if he knowingly fails to fulfill that duty.

Section 16. Exemptions

It is a defense to prosecution under section 4 and section 12 that a person appearing in a state of nudity did so in a modeling class operated

- (1) By a proprietary school, licensed by the state of South Carolina; a college, junior college, or university supported entirely or partly by taxation;
- (2) By a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or
- (3) In a structure:
 - (a) Which has no sign visible from the exterior of the structure and no other advertising that indicated a nude person is available for viewing and
 - (b) Where, in order to participate in a class a student must enroll at least three (3) days in advance of the class and

(c) Where no more than one nude model is on the premises at any one time.

Section 17. Injunction and Penalty

A person who operates or causes to be operated a sexually oriented business without a valid permit or in violation of section 12 of this ordinance is subject to a suit for injunction as well as prosecution for criminal violations. Such violations shall be punishable by a fine not to exceed five hundred dollars (\$500.00) or imprisonment not to exceed thirty (30) days. Each day a violation continues shall constitute a separate offense.

Section 18. Separability and Validity

Should any paragraph, clause, phrase, or provision of this ordinance be adjudged invalid or held unconstitutional by a court of competent jurisdiction, such declaration shall not affect the validity of the ordinance as a whole or any part or provision thereof, other than the part so decided to be invalid or unconstitutional.

Section 19. Effective Date

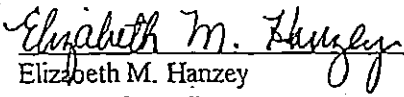
This ordinance shall take effect upon the date of its adoption.

DONE IN REGULAR MEETING THIS 7th DAY OF February, 1995.



Chairman,
Greenville County Council

ATTEST:



Elizabeth M. Hanzey
Clerk to Council



Gerald Seals
County Administrator

J Burress @ Greenville County - ORG

State of Michigan)
 County of Hillsdale)

Exhibit 3

AFFIDAVIT

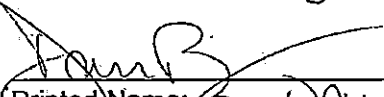
Personally appeared before me, Jason C. Mohny, who being duly sworn states as follows:

1. I am the principal of Greenville Bistro, LLC. I am making this affidavit to confirm that neither Ken Gaines, Elephant, Inc., nor Platinum Plus has any connection with Greenville Bistro, LLC.
2. I formed a new limited liability company, Greenville Bistro, LLC, and negotiated a new lease with Frontage Road Associates, Inc., and Tom Schweitzer.
3. Neither Elephant, Inc., nor Ken Gaines received any compensation or interest of any kind from me in my lease of the Frontage Road property.
4. Neither Elephant, Inc., nor Ken Gaines will receive any benefit from Greenville Bistro, LLC, if we are allowed to operate the Frontage Road business in Greenville.
5. Greenville Bistro, LLC, is completely separate from Elephant, Inc. and Ken Gaines.

Further, Deponent sayeth not.


 Jason C. Mohny

SWORN to before me this 1st
 day of January 2017


 Printed Name: Dawn Beasley
 Notary Public for: Hillsdale County
 My Commission Expires: 4-5-2019

DAWN BEASLEY
 Notary Public, State of Michigan
 County of Hillsdale
 My Commission Expires 04-05-2019
 Acting in the County of _____

Exhibit 5

ELECTRONICALLY FILED - 2017 Jun 14 10:33 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303372
ELECTRONICALLY FILED - 2017 Feb 10 11:43 AM - GREENVILLE - COMMON PLEAS - CASE#2015CP2302597

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	
State of South Carolina on the relation of	)	Civil Action No. 2015-CP-23-02597
William Walter Wilkins, III, Solicitor of the	)	
Thirteenth Judicial Circuit,	)	
	)	
	)	
Petitioner,	)	
vs.	)	ORDER
	)	
Elephant, Inc., Gregory Kenwood Gaines,	)	
	)	
Respondent.	)	
	)	
In Re: Frontage Road Associates, Inc.,	)	
	)	
Movant.	)	

This matter is before the Court on motion by Frontage Road Associates, Inc. ("Frontage Road") by and through its President, Mr. Thomas Schweitzer, seeking an Order to release certain real property it owns from the previous Orders of this Court. At the call of the case Frontage Road was present with its attorney, as well as the attorney for both Elephant, Inc. and Gregory Kenwood Gaines. The Solicitor for the 13th Judicial Circuit and the Deputy Solicitor also appeared.

BACKGROUND

Frontage Road is the owner of property located at 805 Frontage Road in Greenville, South Carolina. Elephant, Inc. and Gregory Kenwood Gaines leased the property from Frontage Road Associates and operated an adult entertainment business on the premises for approximately 15 years.

As a result of litigation between Elephant, Inc., d/b/a Platinum Plus, Kenwood Enterprises, Inc., Kenwood Gaines and others against Greenville County, those parties entered into a Consent Order on January 24, 2002. Essentially, the Consent Order bound those parties as to the state of dress and conduct of employees of their respective businesses.

In April of 2015, the Solicitor of the 13th Judicial Circuit filed an action under South Carolina Code §15-43-10, et. seq. (Nuisance Statutes) on behalf of the State alleging that Platinum Plus had become a public nuisance and sought closure of the business for up to one year.

On May 6, 2015, this Court, after a full hearing, granted a temporary injunction against Elephant, Inc. and Frontage Road Associates from continuing to operate a business at 805 Frontage Road based upon, among other things, violations of the January 24, 2002 Order in regard to states of dress and conduct.

Thereafter, the parties entered into a Consent Order on June 4, 2015, which, among other things, required the business to be shut down for a six month period and, upon re-opening, for enhanced and independent monitoring of the subject property. At that time, Frontage Road Associates specifically agreed that the Nuisance Statutes applied to owners of real property in South Carolina to ensure a public nuisance as defined by South Carolina Code §15-43-10, et. seq., is not occurring on their property regardless of whether the property is rented or in another party's possession. The Consent Order specifically included all "assigns, heirs, and successors in interest and all such other parties who may occupy the Subject Premises for purposes of operating a business for entertainment purposes". (See, 2015 Consent Order, Para. IX,F). In the Consent Order, Frontage Road Associates was not specifically bound by any monitoring requirement.

On July 27, 2016, this Court, upon Motion of the State and after a full hearing, issued an Order finding Elephant, Inc., and Gregory Kenwood Gaines in contempt for violating the previous Order regarding the state of dress and conduct of employees on the premises of 805 Frontage Road. Elephant, Inc. was held in contempt for allowing the violation of the previous Order and the location was again closed for an additional 180 days and Elephant, Inc. was fined \$100,000. That Order is now under appeal.

As part of that Order, the Court allowed a fourteen (14) day winding down period and

then all business would be suspended for an additional period of 180 days. That 180 day period ended February 7, 2017. On December 5, 2016, Frontage Road filed the present Motion, supported by an Affidavit from its principal officer, requesting that the property at 805 Frontage Road be released from all of the Orders pertaining to Elephant, Inc. and Kenwood Gaines. The basis for the Motion was that Elephant, Inc. and Gaines had ceased paying the rent and had removed themselves from the building. In short, Frontage Road contends that Elephant, Inc. and Gaines have abandoned the lease. The attorney for Elephant, Inc. and Gaines did not contest the claim of abandonment. Coincidentally, it is clear that the State has allowed Frontage Road access to the property for maintenance, upkeep, etc since the last Order closed the business.

Prior to the hearing before this Court, Frontage Road caused to be filed an Affidavit by one Jason C. Mohny who alleges he established Greenville Bistro, LLC, and that that limited liability company has no connection with Elephant, Inc., Kenwood Gaines, or the business named Platinum Plus. Greenville Bistro, LLC. is seeking to commence operations of a similar business as Platinum Plus in the location.

At the hearing before this Court the Solicitor introduced a lease entered into between Frontage Road and Greenville Bistro, LLC. Other than that lease, the Solicitor presented no affidavits, witness testimony or other evidence.

ANALYSIS

The Court must be mindful of the fact that the previous Orders of this Court were based upon the conduct allowed and/or condoned by Elephant, Inc. and Kenwood Gaines, which conduct constituted a violation of the 2002 Order and was also found to be a nuisance within the applicable statutes. The removal of Elephant, Inc. and Kenwood Gaines from possession of the property at 805 Frontage Road and their subsequent abandonment of the lease and the premises appears to have effectively abated the nuisance.

While under S.C. Code 15-43-110, the property owner may seek release of real

property upon filing a motion with the court, filing a bond, and providing assurances that the nuisance has been or will be abated, the Court need not reach that issue.

CONCLUSION

In that the 180 day closure set forth in the Order filed July 27, 2016 has now expired and the former tenants to whom the Court's previous Orders were directed have now vacated the premises and abandoned the lease, the Court finds that Frontage Road, as owner of the real property, has the right to re-enter and take possession of the premises. Further, in that there is no evidence at this time of any connection between Elephant, Inc., Gaines and Greenville Bistro, the Court is without authority to continue or impose the previously ordered ongoing requirements, which were directed personally to Gaines and Elephant, Inc., on a new tenant. However, and as noted on the record during the hearing on January 26, 2017, in the event evidence later establishes a connection between these parties, the State may immediately move to have all requirements reinstated. Further, and again as noted on the record at the January 26, 2017 hearing, in the event that Greenville Bistro, or any other adult entertainment venue, commences operating at the location, full and complete compliance with all applicable laws, ordinances, etc is expected and failure to do so will likely result in further orders, including sanctions against the entities, individual owners and responsible parties.

IT IS SO ORDERED.

JUDGE'S ELECTRONIC SIGNATURE ON FOLLOWING PAGE



County Attorney's Office

Mark W. Tollison
County Attorney
mtollison@greenvillecounty.org
(864) 467-7110
www.greenvillecounty.org

Exhibit 6

February 24, 2017

Jason Mohney
PO Box 408
Durand, MI 48429

Re: 805 Frontage Road Property

Dear Mr. Mohney:

I understand that you have been in touch with Greenville County's Building Safety Division regarding the property at 805 Frontage Road in Greenville, SC and the possible operation of a business at that location. This letter is intended to provide you with some information about this property and the ordinances and zoning regulations that now directly impact what business activity can and cannot take place there.

First, there are two main Greenville County ("County") regulations that will guide all future land uses on the 805 Frontage Road property: the Greenville County Zoning Ordinance ("GCZO") and County Ordinance Nos. 2673 and 4869 ("Adult Entertainment Ordinance"). As a zoning matter, the 805 Frontage Road property is currently in an S-1 (Services) zoning district.

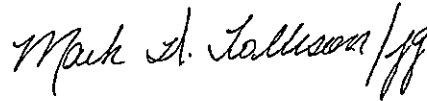
The Adult Entertainment Ordinance includes several provisions that directly impact the 805 Frontage Road property. The setback provisions in the Adult Entertainment Ordinance require a sexually oriented business (which includes any establishment that features persons who appear in a state of nudity or semi-nudity) to be 1,500 feet from several types of properties and land uses, including the boundary of a residential zoning district. Today, there are two residential boundaries that are less than 1,500 feet from the building at 805 Frontage Road. One is the Roper Mountain Apartments, which is zoned R-M2 (a residentially zoned district); and the other is Bradford Place, which is a single-family residential subdivision, zoned R-M20 (a residentially zoned district). These two properties, and potentially others, will prohibit the operation of a sexually oriented business at 805 Frontage Road.

Additionally, since 805 Frontage Road is zoned S-1, any use of the property must now conform to the regulations governing the S-1 district. Nightclubs are a permitted use only in a C-2 zoning district and are not allowed in the S-1 district.

February 24, 2017
Page 2 of 2

I understand that you have contacted County officials seeking the proper permits for your business. I hope this information will clarify the zoning and setback issues associated with the property located at 805 Frontage Road, Greenville, SC. Please feel free to contact the County Building Safety Division or Zoning Administrator with any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark W. Tollison / jg".

Mark W. Tollison

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Exhibit 9

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ARTICLE 6: USE REGULATIONS

Section

Use Regulations

- 6:1 Permitted uses, special exceptions, and conditional uses
- 6:1.1 Uses permitted by right = P
- 6:1.2 Uses subject to conditions = C
- 6:1.3 Special exceptions uses = SE
- 6:1.4 Uses not allowed
- 6:1.5 New or unlisted uses

Use Conditions

- 6:2 Use Conditions

USE REGULATIONS

§ 6:1 PERMITTED USES, SPECIAL EXCEPTIONS, AND CONDITIONAL USES.

Principle uses shall be allowed within the base zoning districts of this ordinance in accordance with Table 6.1
(Ord. passed 6-7-2005)

§ 6:1.1 USES PERMITTED BY-RIGHT = P.

A "P" indicates that a use type is permitted by-right in the respective zoning district, subject to compliance with all other applicable regulations of this ordinance.
(Ord. passed 6-7-2005)

§ 6:1.2 USES SUBJECT TO CONDITIONS = C.

A "C" indicates that a use type is permitted in the respective zoning district only if it complies with use-specific conditions and all other applicable regulations of this ordinance. The applicable conditions are found at the end of Table 6.1. The number following the "C" provides a cross-reference to the use-specific conditions.
(Ord. passed 6-7-2005)

§ 6:1.3 SPECIAL EXCEPTION USES = SE.

An "SE" indicates that a use type is permitted only if reviewed and approved in accordance with the Special Exception procedures of Article 11, subject compliance with use-specific conditions and all other applicable regulations of this ordinance.
(Ord. passed 6-7-2005)

§ 6:1.4 USES NOT ALLOWED.

A blank cell indicates that a use type is not permitted in the respective zoning district, unless it is otherwise expressly allowed by other regulations of this ordinance.
(Ord. passed 6-7-2005)

§ 6:1.5 NEW OR UNLISTED USES.

If an application is submitted for a use type that is not listed as an allowed use in 1 or more zoning districts, the Zoning Administrator shall be authorized to make a similar use interpretation.
(Ord. passed 6-7-2005)

Table 6.1 Uses Permitted, Uses by Special Exception, and Conditional Uses																		
Use	R-R3	R-R1	R-S	R-20 - R-6	R-20A	R-M2 - R-M20	R-MA	R-MHP	O-D	POD	NC	C-1	C-2	C-3	S-1	I-1	I-2	ESD-PM
ABC (liquor sales)													P					
Adult entertainment establishments (sexually oriented business)															C ¹			
Agricultural crops, trees	P	P	P												P	P		
Amusement/theme park															P			
Amusements - commercial													P	P	P			
Animal shelters													P	P	P			
Arena, stadium, exhibition hall														SE	SE	SE		
Armory													SE	SE				
Auction house/auction lots - cars equipment													P	P	P			
Auditorium													SE	SE	SE			
Automatic teller machines									P	P	P	P	P	P	P	P	P	
Automobile repair facility															C ²	C ³		
Automobile service facility													P	P	P			
Automobile service station													P	P	P			
Automobile, boats, motorcycles, and rv sales, service and rental													P	P	P			
Automobile storage - wrecked or damaged (See Salvage & Junkyards)															C ²	C ³		
Automobile wash (all types)												C ²	P	P	P			
Bank, savings and loan association, or similar financial institution									P	P	P	P	P	P	P			
Barber and/or beauty shop											P	P	P	P	P			
Bed and breakfast	C ¹	C ²	C ³	C ⁴	C ⁵						P	P	P	P				

Use Regulations

Table 6.1 Uses Permitted, Uses by Special Exception, and Conditional Uses

Use	R-R3	R-R1	R-S	R-20 - R-6	R-20A	R-M2 - R-M20	R-M1A	R-M1HP	O-D	POD	NC	C-1	C-2	C-3	S-1	I-1	I-2	ESD-PM
Big box retail													C ¹⁰	C ¹⁰				
Boathouse	C ¹	C ¹	C ¹	C ¹	C ¹	C ¹	C ¹	C ¹										
Broadcasting studio, radio or TV									P	P		P	P	P	P			
Business incubator centers									P	P		P	P	P	P	P	P	
Cabinets/carpentry/carpenter shop														P	P	P		
Care facilities - child/adult																		
Care center						C ⁴	C ⁴		P	P	P	P	P	P	P			
Day care center						SE	SE		P	P	P	P	P	P	P			
Day care center in a church	C ⁷	C ⁷	C ⁷	C ⁷	C ⁷	C ⁷	C ⁷	C ⁷	P	P	P	P	P	P	P			
Day care home	C ¹¹	C ¹¹	C ¹¹	C ¹¹	C ¹¹	C ¹¹	C ¹¹	C ¹¹										
Group care home						SE	SE											
Group homes	C ¹⁵	C ¹¹	C ¹²	C ¹¹	C ¹¹	C ¹¹	C ¹¹											C ¹¹
Nursing care facility									P	P		P	P	P	P			
Nursing care in home	SE	SE	SE	SE	SE	SE	SE	SE										
Catering establishment													P	P	P			
Cemetery	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	
Chickens				C ¹⁹		C ¹⁹	C ¹⁹											
Church	SE	SE	SE	SE	SE	SE	SE	SE	P	P	P	P	P	P	P	P		SE
Clothing alteration											P	P	P	P	P			
Columbaria	C ¹	C ¹	C ¹	C ¹	C ¹	C ¹	C ¹	C ¹				P	P	P	P			
Communication towers	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	P	P	P	P		

Table 6.1 Uses Permitted, Uses by Special Exception, and Conditional Uses																		
Use	R-R3	R-R1	R-S	R-20 - R-5	R-20A	R-M2 - R-M20	R-MA	R-MHP	O-D	POD	NC	C-1	C-2	C-3	S-1	I-1	I-2	ESD-PM
Concert hall													P	P	P			
Dance studio												P	P	P				
Data centers															P	P	P	
Dry cleaning/laundry (on premises if clothing is brought in by customers)											P	P	P	P				
Dry cleaning, institutional															P	P		
Dwelling - accessory									C'	C'	C'	C'	C'	C'	C'	C'		
Dwelling - accessory, temporary	SE	SE	SE	SE	SE	SE	SE	SE										
Dwelling - multiple-family						P	P			P	P							
Dwelling - single-family attached				C ¹⁰	C ¹⁰	P	P			P	P							
Dwelling - single-family detached	P	P	P	P	P	P	P			P	P							P
Dwelling - two-family (duplex)				C ¹⁰	C ¹⁰	P	P			P	P							
Dwelling - zero lot line	P	P	P	P	P	P	P			P	P							P
Dwelling - manufactured multi- section home	C ¹¹	C ¹¹	C ¹¹	C ¹¹	C ¹¹	C ¹¹	C ¹¹	P										
Dwelling, manufactured single- section home	C ¹¹	C ¹¹	C ¹¹				C ¹¹	P										
Electronics and home appliance repair													P	P	P			
Emergency service, fire, police, EMS	SE	SE	SE	SE	SE	SE	SE				P	P	P	P	P	P	P	
Equipment sales and rental													P	P	P	P		
Fairgrounds - public													SE	SE	SE			
Farm animals, livestock, barns, stables	P	P	P		C ¹²													

Use Regulations

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2015 S-18

Table 6.1 Uses Permitted, Uses by Special Exception, and Conditional Uses																		
Use	R-R3	R-R1	R-S	R-20 - R-6	R-20A	R-M2 - R-M20	R-MA	R-MHP	O-D	POD	NC	C-1	C-2	C-3	S-1	I-1	I-2	ESD-PM
Feed and seed sales													P	P	P	P		
Fireworks stands, temporary													P	P	P			
Flea market													P	P				
Florists, flower and gift shops									P	P	P	P	P	P				
Funeral home	SE	SE	SE	SE	SE	SE	SE					C ¹⁷	P	P	P			
Garden center												P	P	P				
Gas sales - commercial and industrial															P	P		
Golf courses	SE	SE	SE	SE	SE								P	P	P	P	P	
Government facilities and operations	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE
Group industrial development															P	P	P	
Gunsmith											P	P	P	P	P			
Home occupation	C ¹³	C ¹³	C ¹³	C ¹³	C ¹³	C ¹³	C ¹³											C ¹³
Horses in residential zones	P	P	P	C ¹⁴	C ¹⁴													C ¹⁴
Hospital									P	P			SE	P	SE			
Hotel/motel													P	P	P			
Industrial/service															P	P	P	
Industrial light																P	P	
Industrial heavy																P		
Junkyards (See Salvage & Automobile Storage)																SE		
Kennel (outside runs)															P			

Table 6.1 Uses Permitted, Uses by Special Exception, and Conditional Uses

Use	R-F3	R-R1	R-S	R-20 - R-6	R-30A	R-M2 - R-M20	R-MA	R-MHP	O-D	FOD	NC	C-1	C-2	C-3	S-1	I-1	I-2	ESD-FM
Laboratories															P	P	P	
Landfills - sanitary															P	P		
Landscape business													P	P	P			
Laundromat, self-service											P	P	P	P	P			
Library											P	P	P	P	P			
Linen or towel supply business													P	P	P			
Locksmith											P	P	P	P	P			
Lumber yards															P			
Mail order house													P	P	P			
Manufactured home park office								P										
Manufactured home sales													P	P	P			
Medical clinic									P	P		P	P	P	P			
Mega-church												P	P	P	P	P		
Merchant power plants																P		
Mini-warehouses													C ¹⁹	C ¹⁹	P	P		
Monuments and tombstones sales													P	P	P			
Motor sport/race track																P		
Museum	SE	SE	SE	SE	SE								P	P	P			
Music teachers/schools									P				P	P				

Use Regulations

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Table 6.1 Uses Permitted, Uses by Special Exception, and Conditional Uses

Use	R-R3	R-R1	R-S	R-20 - R-6	R-20A	R-M2 - R-M20	R-MA	R-MHP	O-D	POD	NC	C-1	C-2	C-3	S-1	I-1	I-2	ESD-PM
Nightclub, tavern													P					
Non-commercial nursery/ greenhouse	P	P	P		P													
Nursery/greenhouse	P	P	P									P	P	P	P			
Office - business									P	P	P	P	P	P	P	P	P	
Office - medical									P	P	P	P	P	P	P	P	P	
Parking facility (indoor/outdoor)												P	P	P	P			
Pawn shop													P	P				
Pest or insect control business													P	P	P			
Pet grooming/boarding (indoor)											P	P	P	P	P			
Photo processing (production)															P			
Photography studios									P	P	P	P	P	P	P			
Plumbing business													P	P	P			
Post offices									C ^{1A}	C ^{1A}	C ^{1A}	C ^{1A}	C ^{1A}	C ^{1A}	C ^{1A}			
Primary metal industries																P		
Print shop													P	P	P			
Public utility	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE
Quarries																P		
Recreation - (commercial) indoor or outdoor including skating, swimming, game courts, health facilities, driving ranges												P	P	P	P			

Use	R-R3	R-R1	R-S	R-20 - R-6	R-20A	R-M2 - R-M20	R-MA	R-MHP	O-D	POD	NC	C-1	C-2	C-3	S-1	I-1	I-2	ESD-PM
Recreation - (private/public/ nonprofit) indoor or outdoor including skating, swimming, game courts, health facilities, driving ranges	SE	SE	SE	SE	SE	SE	SE					P	P	P	P			
Recreation - (community area)	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷	C ¹⁷
Recreation - private, game courts and swimming pools on single- family lots	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸	C ¹⁸
Recording studio									P	P			P	P	P			
Recycling collection and processing center																SE		
Recycling convenience center													P	P	P	P		
Recycling drop box	C ¹⁹	C ¹⁹	C ¹⁹	C ¹⁹	C ¹⁹	C ¹⁹	C ¹⁹	C ¹⁹	P	P	P	P	P	P	P	P	P	
Recycling trailer									P	P	P	P	P	P	P	P		
Restaurant											P	P	P	P	P			
Retail/mercantile											C ³	C ³	P	P				
Riding academies	SE	SE	P		P													
Salvage yard (See Junkyard & Automobile storage)																SE		
Sand and gravel pits															P	P		
Schools - colleges, universities	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹	C ²¹			
Schools - commercial												P	P	P	P			
Schools, primary, secondary	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE	SE			SE
Shopping center											P	P	P	P				
Shooting range, outdoor	SE	SE	SE												SE	SE		
Shooting range, indoor													C ²²	C ²²	C ²²			

Use Regulations

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Table 6.1 Uses Permitted, Uses by Special Exception, and Conditional Uses

Use	R-R3	R-R1	R-S	R-20 - R-6	R-20A	R-M1 - R-M20	R-MA	R-MHP	O-D	POD	NC	C-1	C-2	C-3	S-1	I-1	I-2	ESD-PM
Sign, painting, manufacturing													P	P	P			
Special Event Facility	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	P	P	P			SE
Storage buildings for on-site residents						P	P	P										
Storage units (temporary, portable)	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰		C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰	C ³⁰
Theatre/motion pictures (indoor)												C ³⁰	P	P				
Tire recapping and retreading plant																P		
Trim/upholstery													P	P	P			
Truck terminal															P	P		
Veterinary hospitals	SE	SE	SE												P			
Veterinary offices and clinics	SE	SE	SE						SE	SE		P	P	P	P			
Welding shop															P	P		
Wholesaling, warehousing, flex space and distribution															P	P		

(Ord. passed 6-7-2005; Am. Ord. No. 3968, § 2, passed 11-1-2005; Am. Ord. No. 4004, § 1, passed 4-18-2006; Am. Ord. No. 4022, § 2, passed 6-6-2006; Am. Ord. No. 4081, § 1, passed 2-20-2007; Am. Ord. No. 4089, § 1(1), passed 3-6-2007; Am. Ord. 4215, § 1(1), passed 8-5-2008; Am. Ord. 4224, § 1(2), (3), passed 9-16-2008; Am. Ord. 4272, § 1, passed 4-7-2009; Am. Ord. 4280, § 1, passed 5-5-2009; Am. Ord. 4389, § 1(2), passed 11-2-2010; Am. Ord. 4390, § 1(2), 11-2-2010; Am. Ord. 4543, § 2(1), 3-5-2013; Am. Ord. 4610, § 2(2), passed 1-21-2014; Am. Ord. 4638, § 1(2), 7-8-2014; Am. Ord. 4670, § 3, 11-2-2014)

USE CONDITIONS

§ 6:2 USE CONDITIONS.

(1) Adult Entertainment Establishments (Adult Oriented Business)

Sexually Oriented Businesses may be permitted subject to the district requirements and the current provisions of County Adult Oriented Business Ordinance No. 2673 (Appendix F).

(2) Automobile, Boat, Motorcycle, and RV Storage and Repair (Temporary)

Temporary auto storage and repair may be permitted subject to the district requirements and the following conditions:

A. Storage yards of all wrecked, disassembled, damaged, and inoperable boats and vehicles must be enclosed by a continuous screen. The screen shall be a wall, fence, compact evergreen plant material or a combination of fence and evergreen plant material at least 8 feet in height.

B. Long term storage of wrecked, disassembled, damaged, and inoperable boats and vehicles are subject to the requirements of County Junk Yard Ordinance #1777 (Appendix D).

[Text Continues on Page 59]

Exhibit 10

ARTICLE 4: DEFINITIONS

§ 4:1 DEFINITIONS.

Except where specifically defined herein, all words used in this Ordinance shall carry their customary meanings. Words used in the present tense include the future tense; the singular number includes the plural. The word shall is mandatory, not directory.

Nightclub. Any establishment, whether public or a private club, including cocktail lounges, etc., serving a predominantly adult clientele, and whose primary business is the sale of alcoholic beverages, including beer and wine, for consumption on the premises in conjunction with dancing or live performances. The purchase of food is at the option of the customers and not required by the operator. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic-Beverage Licensing Board.

ARTICLE 13: VIOLATIONS, PENALTIES AND ENFORCEMENT

§ 13:3 PENALTIES FOR VIOLATIONS.

Any person, firm, corporation or agent, who shall violate the provisions of this ordinance shall be guilty of a misdemeanor and shall be punished within the jurisdictional limits of magistrate's court. Each such person, firm, corporation or agent shall be deemed guilty of a separate offense for each and every day or portion thereof during which any violation of any of the provisions of this Ordinance is committed, or continued.

The Zoning Administrator or other appropriate county official may also seek injunctive relief or any other appropriate action in courts of competent jurisdiction to enforce the provisions of this Ordinance.

(Ord. passed 6-7-2005)

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I hereby certify that on June 15, 17
this document is a copy of the original
and the contents have been verified.
Signed Theresa B. Kyer

No. 4869

AN ORDINANCE

Exhibit 4a

AN ORDINANCE TO AMEND ORDINANCE NO. 2673, CONCERNING ADULT
ENTERTAINMENT REGULATIONS TO MODIFY CERTAIN DEFINITIONS.

BE IT ORDAINED by the Greenville County Council:

Section 1. Findings.

The Greenville County Council finds the following:

- 1) County Council hereby reaffirms its findings set forth in County Ordinance No. 2673, where it was stated that:

"It is the purpose of this article to regulate sexually oriented businesses to promote the health, safety, morals and general welfare of the citizens of the county, and to establish reasonable and uniform regulations to prevent the continued deleterious location and concentration of sexually oriented businesses within the county. The provisions of this article have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent or effect of this article to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent of this article to condone or legitimize the distribution of obscene material."

- 2) County Council further finds that that:

A. The South Carolina Supreme Court has recognized the regulatory provisions of Greenville County's Adult Entertainment Ordinance as constitutional and as a proper exercise of the County's police powers in the cases of *Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000) and *Greenville County v. Kenwood Enterprises*, 353 S.C. 157, 577 S.E.2d 428 (2003).

B. Adult entertainment establishments, as commercial uses, continue to be associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation all of which increase demands on law enforcement resources and are detrimental to the community.

C. Adult entertainment establishments should continue to be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other adult entertainment establishments, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of adult entertainment establishments in one area.

D. Each of the foregoing negative secondary effects constitutes a harm which the County continues to have a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the county's rationale for this article, exists independent of any comparative analysis between sexually-oriented and non-sexually-oriented businesses. Additionally, the county's interest in regulating adult entertainment establishments extends to preventing future secondary effects of either current or future adult entertainment establishments that may locate in the county. The County finds that law enforcement records associated with adult entertainment establishments are reasonably believed to be relevant to said secondary effects.

Section 2. Amend "Section 2 Definitions" of Ordinance No. 2673 at Subsections (3)(a) and (12) to be revised as follows.

A. The definitions appearing in Sections 2(3)(a) "*Adult cabaret*" and 2(13) "*Semi-nude*" of Ordinance No. 2673 are amended to read as follows:

"(3) *Adult cabaret* means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(a) Persons who appear in a state of nudity, or in a state of semi-nudity; or"

"(13) *Semi-nude* or a *state of semi-nudity* means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part."

B. The previous definitions for "*Adult cabaret*" and "*Semi-nude*" appearing in Section 2 of Ordinance No. 2673 are hereby replaced.

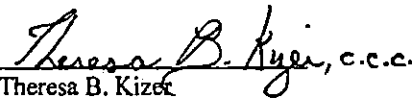
Section 3. Severability. Severability is intended throughout and within the provisions of this Ordinance. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, then that decision shall not affect the validity of the remaining portions of this Ordinance.

Section 4. Repeal. All ordinances or parts of ordinances in conflict with this Ordinance, or inconsistent with its provisions, are hereby repealed or superseded to the extent necessary to give this Ordinance full force and effect.

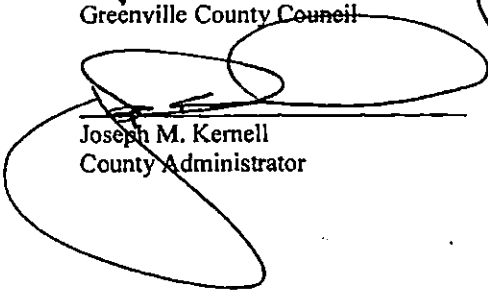
Section 5. Effective Date. This Ordinance is effective upon adoption and is subject to the pending ordinance doctrine and is enforceable upon its introduction and notice of Public Hearing.

DONE IN REGULAR MEETING THIS 21 DAY OF February, 2017.

ATTEST:


Theresa B. Kizer
Clerk to Council


Chairman
Greenville County Council


Joseph M. Kernell
County Administrator

AFFIDAVIT OF RICHARD HANNING

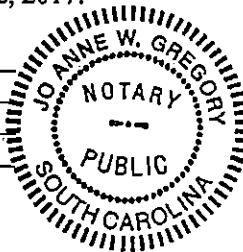
1. My name is Richard Hanning. I am over 18 years of age. I am a competent adult resident of the State of South Carolina.
2. I am the GIS Division Manager for Greenville County and have served in this position since 12/1997. I use mapping data and geographic information software to analyze land use, zoning, and other matters relative to land development and County regulations.
3. The property at 805 Frontage Road is in unincorporated Greenville County and is zoned S-1. Under the County's Zoning Ordinance, a regular nightclub is not allowed in the S-1 district. An "adult cabaret," which is a sexually oriented nightclub, is allowed only if it is more than 1,500 feet from the land uses and districts specified in Section 12 of Ordinance No. 2673 (which is codified at § 2.5-82 of the County Code).
4. The building at 805 Frontage Road is less than 1,500 feet from a residential district (R-M20), a church (Seacoast Church), a child care facility at that church, a nursing care facility (Patewood Rehabilitation and Healthcare Center), and a lot that is primarily devoted to residential use (apartments). Map #1 attached to this affidavit depicts the location of the building at 805 Frontage Road and the distances to these other land uses. Under the County's regulations, a sexually oriented business may not operate in the building at 805 Frontage Road because it is less than 1,500 feet from the land uses and districts discussed above.
5. Using the County's GIS system, I identified sites in unincorporated Greenville County that, according to the GIS data available to the County, meet the location regulations for sexually oriented businesses. Map #2 (attached) generally depicts the areas where a sexually oriented business may operate in unincorporated Greenville County in compliance with the County's location regulations.
6. The County's location regulations allow a sexually oriented business to locate on an S-1 parcel if its building is at least 1,500 feet away from the buffered land uses. Using the County's GIS system, I identified 89 parcels in the unincorporated County that are zoned S-1 and have area that meets the location regulations to operate a sexually oriented business. Table #1 (attached) lists the available S-1 parcels by parcel ID number (PIN) and states the available acreage for each parcel. There are more than 150 acres zoned S-1 where a sexually oriented business could locate. On Map #2, the red dots reflect the location of available S-1 parcels.
7. Large areas of unincorporated Greenville County, in the northern and southern ends of the County, consist of unzoned parcels. In those unzoned areas, the GIS data does not contain the data necessary to implement a buffer from lots primarily devoted to residential use. It does contain data necessary to implement a buffer from other uses and districts listed in § 2.5-82 of the County Code. There are 23,757 parcels with area that is more than 1,500 feet away from a: church, school, residential district, retirement center or nursing care facility, family-oriented recreation facility, day nursery or licensed child care facility, and public library. Table #2, a 259-page document (attached), lists those unzoned parcels by parcel identification number (PIN) and states the acreage that is outside these buffers. The total area outside the buffers on these identified parcels equals approximately 210,305 acres.

Further, affiant sayeth not.

Richard Hanning
Richard Hanning

SWORN to before me this 16th day of June, 2017.

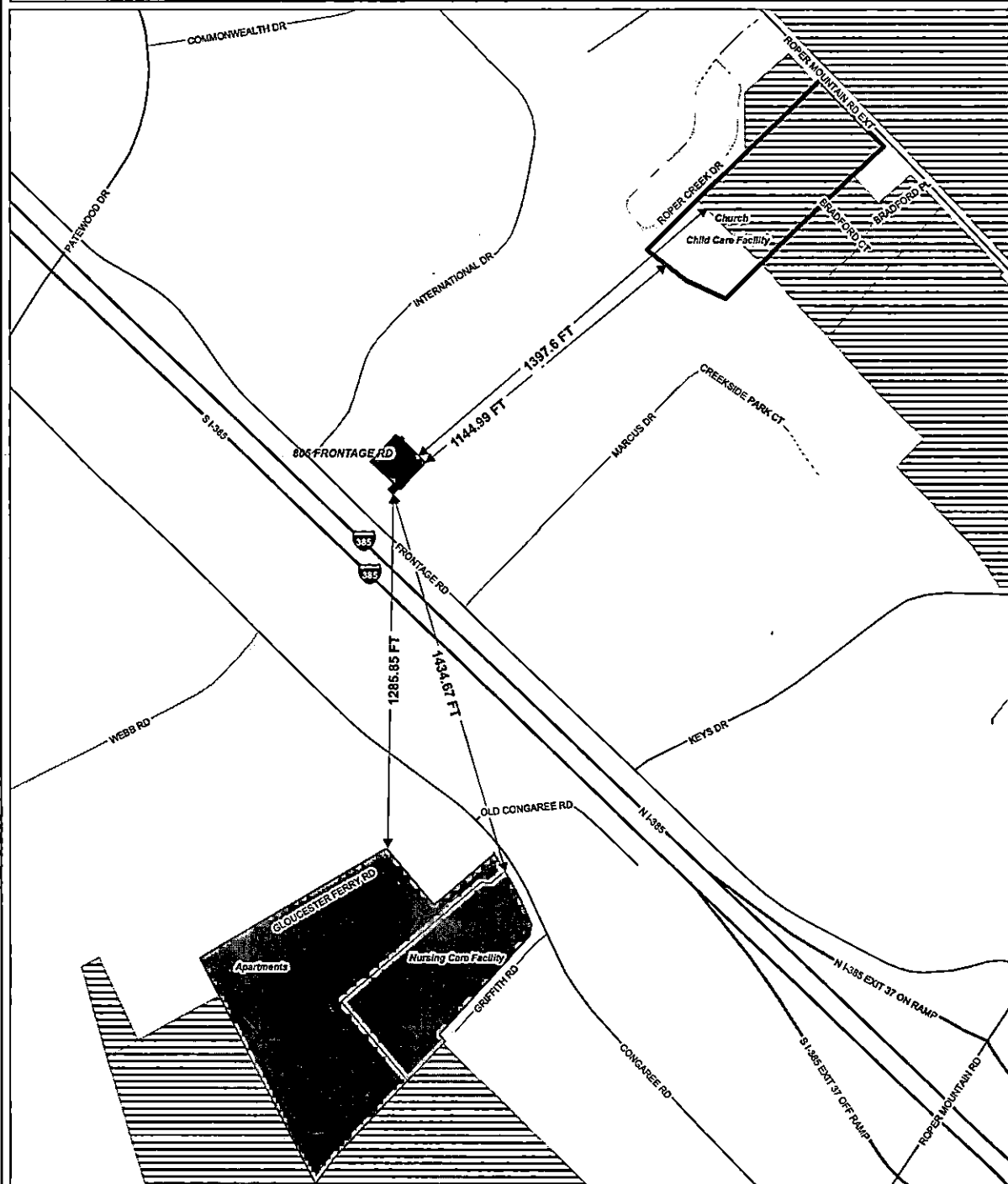
Jo Anne W. Gregory
Printed name: Jo Anne W. Gregory
Notary Public for: South Carolina
My Commission Expires: 12/3/25



805 Frontage Road Not Available for Sexually Oriented Businesses

Hanning Aff. Map. 1

Exhibit 19a



Legend

- 805 Frontage Road Building
- Continuous Retirement/Nursing Care Parcel
- Church and Child Care Parcel
- Parcel Devoted Primarily to Residential Use
- Residential District



0 0.075 0.15 0.225 Miles

This map is not a Land Survey and its intended use is for general reference purposes only. Greenville County expressly disclaims responsibility for damages or liability that may arise from the use of this map.



Greenville County
Geographic Information Systems
(C) 2017
June 14, 2017



Codes Enforcement Office

(864) 467-7090

www.greenvillecounty.org

May 15, 2017

FRONTAGE ROAD ASSOCIATES INC
 VISION HOMES INC
 103 BARFIELD DR
 EASLEY, SC 29642

Re: CASE NO:	17-90001976
TAX MAP NO:	0543.01-01-001.01
LOCATION OF PROPERTY:	805 FRONTAGE RD
CORRECTION BEFORE:	IMMEDIATELY

OFFICIAL NOTICE

An inspection of the above-referenced property conducted on MAY 12, 2017 revealed that you are in violation of The Code of the County of Greenville South Carolina. Please see the following page for details concerning your violation(s).

You are hereby ordered to correct this violation by the above-stated CORRECTION BEFORE DATE. Failure to comply with this order will leave us no alternative but to proceed with further legal actions available under Greenville County Ordinances and/or Codes.

You have the right to appeal this order to the Greenville County Board of Zoning Appeals. The written appeal must be filed with the Secretary of the Zoning Board within 30 days after the notice or order is served. There is a filing fee due when the appeal is submitted.

Your cooperation in this matter is appreciated and if you have any questions please contact us at (864) 467-7090.

Respectfully,

JESSICA JORDAN
 Code Enforcement Officer
 864 467 7247

County Square | 301 University Ridge | Suite 4100 | Greenville, SC 29601 | Fax (864) 467-7164

EXHIBIT E

05/13/2017 22:01 8642951377

VISION HOMES
VIOLATION DETAIL

PAGE 02/02
PAGE 1

CASE NUMBER 17-90001976
PROPERTY ADDRESS 805 FRONTAGE RD

VIOLATION: PERMITTED USES QUANTITY: 1
DESCRIPTION: ZONING ORD SECTION 6:1 DATE: 5/12/17
LOCATION:

NARRATIVE :

THE CERTIFICATE OF OCCUPANCY ISSUED IS FOR A RESTAURANT AND DOES NOT HAVE LIVE ENTERTAINMENT. ALL PATRONS/PERSONELL MUST BE PROPERLY CLOTHED. NO SWIMSUITS ETC. THE USE OF THE STRUCTURE IS FOR A RESTAURANT ONLY. CEASE ALL USE FOR LIVE ENTERTAINMENT.

ORDINANCE DESCRIPTION :

6:1 PERMITTED USES, SPECIAL EXCEPTIONS AND CONDITIONAL USES
Principle uses shall be allowed within the base zoning districts of this ordinance in accordance with Table 6:1.

CAS.
ENC

CORRECTIVE ACTION REQUIRED :

Correct the violation(s) by ceasing to use the property for any use not specifically allowed in this district.

CAS
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CAS
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17

ELECTRONICALLY FILED - 2017 May 23 5:01 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303372

ARTICLE 4: DEFINITIONS

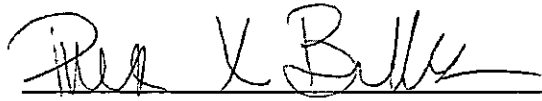
§ 4:1 DEFINITIONS

Except where specifically defined herein, all words used in this Ordinance shall carry their customary meaning. Words used in the present tense include the future tense; the singular number includes the plural. The word shall is mandatory, not directory.

Accessory Use. A use of land or of a building or portion thereof customarily incidental to the principal use of the land or building and located on the same lot with such principal use. For the purpose of this Ordinance, accessory uses include, but are not limited to, swimming pools and game courts and shall meet the requirements of Article 6.

CERTIFICATE OF AUTHENTICITY

I hereby certify that the attached document, consisting of 20 pages, is a true and accurate copy of Article 4 "Definitions" of the Official Zoning Ordinance for Greenville County.



Phoenix X. Buathier
Greenville County Zoning Administrator

Date: 12/5/18
Greenville, South Carolina

ARTICLE 4 DEFINITIONS

Except where specifically defined herein, all words used in this Ordinance shall carry their customary meanings. Words used in the present tense include the future tense; the singular number includes the plural. The word shall is mandatory, not directory.

Accessory Building – An incidental subordinate building customarily incidental to and located on the same lot occupied by the main use or building, such as a detached garage.

Accessory Living Quarters – An accessory building used solely as the temporary dwelling for guests of the occupants of the premises; such dwelling having no kitchen facilities and not rented or otherwise used as a separate dwelling unit.

Accessory Use – A use of land or of a building or portion thereof customarily incidental to the principal use of the land or building and located on the same lot with such principal use. For the purpose of this Ordinance, accessory uses include, but are not limited to, swimming pools and game courts and shall meet the requirements of Article 6.

Agriculture, Farming – The science or art of cultivating the soil, producing crops, plants, trees or shrubs, and/or raising livestock or fowl which does not require a tax license by the state of South Carolina.

Alley – Any public or private way or thoroughfare through a continuous row of houses, 10 feet to 16 feet in width, permitting access from the street to backyards, garages, etc.

Alteration – Any change, addition or modification in construction, occupancy or use.

Apartment – Same as *"Dwelling, Multiple-Family."*

Arcade – An area contiguous to a street or plaza that is open and unobstructed, and that is accessible to the public at all times. Arcades may include building columns, landscaping, statuary and fountains. Arcades do not include off-street loading/unloading areas, driveways or parking areas.

Articulate – To give emphasis to or distinctly identify a particular element. An articulated facade would be the emphasis of elements on the face of a wall including a change in setback, materials, roof pitch or height.

Assembly – Includes the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation.

Assembly Operations - Companies engaged in value-added processing and light manufacturing.

Auditorium – An indoor building/facility used by the public for viewing events such as concerts, plays, indoor sports, and public gatherings etc.

Automobile sales – Establishments engaged in the sale or rental of vehicles, except motorcycles, designed and used for the transportation of 12 or less persons along public streets and highways.

Automotive Repair Facility – A building or part thereof, which is used for painting, body and fender work, engine overhauling, or other major repairs of motor vehicles. These repairs typically take more than one day to complete. These facilities may not dispense flammable or combustible liquids.

Automotive Service Facility – A building or part thereof, which is used for minor repairs, such as, oil changes, tune-ups, brake jobs, engine and transmission repair, replacing mufflers, etc. These facilities may dispense flammable and combustible liquids.

Automobile Service Station – An establishment used for the servicing of automobiles including the sale of gasoline, oil, grease, minor accessories, and washing and polishing, but excluding the sale of automobiles, body repairing, major motor repairing, and painting.

Automotive Storage Facility – A lot or facility in which automobiles are stored for periods greater than five (5) days.

Automobile Wash, Automated – Any automobile cleaning facility which provides exterior washing and cleaning on a drive-through or roll-over basis.

Automobile Wash, Full-Service – Any automobile cleaning facility which provides exterior and interior washing and cleaning services for automobiles and other motor vehicles.

Automobile Wash, Self-Service – Any automobile cleaning facility where equipment and/or facilities are provided for the self-service cleaning of automobiles and other motor vehicles.

Banquet Hall – See Special Event Facility

Barn – A structure that may be used to house animals, farm equipment, feed, storage or other farm related items.

Basement – Any floor level below the first story in a building, except that a floor level in a building having only one floor level shall be classified as a basement unless such floor level qualifies as a first story as defined herein.

Bed and Breakfast – Private home offering lodging and breakfast to guests. This type of establishment is primarily a private home offering lodging and breakfast to guests.

Berm – An earthen mound formed to shield undesirable views, decrease noise, and/or add topographical interest. The slope of a berm should not exceed a rise of one (1) foot in two (2) horizontal feet.

Berm (Big Box Retail) – An earthen mound designed to provide visual interest on a site, screen undesirable views, reduce noise or provide a buffer from adjoining uses.

Big Box Development – A shopping center, mall or free standing site whose primary use is or was a retail sales facility with at least one tenant or occupant located in a forty thousand (40,000) square foot or larger building or structure. (Consistent with the terms of the "SC Retail Facilities

Revitalization Act” originally House Bill H.3841, codified in Chapter 34, Title 6 of the S.C. Code of Laws, as amended.

Blue Line Stream – Any stream shown as a solid or broken blue line on 7.5 Minute Series quadrangle maps prepared by the U.S. Department of the Interior Geological Survey (USGS).

Boathouse – A structure designed and constructed for the purpose of storing a boat(s) in a body of water.

Board – The Greenville County Board of Zoning Appeals.

Breezeway – A structure for the principal purpose of connecting a main building or structure on a property with other buildings.

Buffer – An area of land used to physically separate one use from another or which acts as a separation between two land uses of different intensity.

Buffer (Big Box Retail) – Also known as a “screen”. An area provided to reduce the conflict between two different land uses. Buffers are intended to mitigate undesired views, noise and glare – effectively providing greater privacy to neighboring land uses. Typical buffers consist of materials that serve this purpose and include, but are not limited to, plant materials, walls, fences and/or significant land area to separate the uses.

Buffer Strip – A portion of a lot or property used to visually separate one use from another through the use of vegetation, distance or other approved method.

Building – Any structure having a roof supported by columns or walls and intended for the shelter, housing, or enclosure of any person, process, equipment, or goods.

Building, Accessory – A structure attached to or detached from a principal building on the same lot and customarily incidental to the use of the principal building.

Building Code – The current codes adopted by Greenville County Council as established by the South Carolina Building Code Council.

Building Face, Front – Any building face, which can be touched by a line, drawn perpendicular to street (public or private).

Building Face, Public – Any building side that is visible from public or private right-of-ways and/or the faces that contain public entry.

Building Permit – A certificate which has been endorsed by the Zoning Administrator that a proposal to use or occupy a building; or to erect, install, or alter a structure, building, or sign that fully meets the requirements of this Ordinance.

Building Setback Line – A line establishing the minimum allowable distance between the nearest portion of any building excluding steps, gutters, and similar fixtures, and the property line when measured perpendicularly thereto.

Building, Temporary – A building used temporarily for the storage of construction materials and equipment incidental and necessary to on-site permitted construction of utilities, buildings, or other community facilities, or used temporarily in conjunction with the sale of property within a subdivision under construction.

Business or Financial Services – An establishment intended for the conduct of professional business services by a commercial enterprise.

Business Incubator Centers – A business/office building that provides space for multiple tenants.

Caliper – A unit of physical measure for defining the diameter of a planted tree measured eighteen (18) inches above ground level.

Canopy – A rooflike, unenclosed (except when connected to a building) shelter having various means of support and generally used for protection from weather for pedestrians.

Care Facilities – Child/Adult

Care Center – A facility that provides personal care service for 6 or more persons on a 24 hour basis. (*Personal care service* - The care of residents who do not require chronic or convalescent medical or nursing care. Personal care involves responsibility for the safety of the residents while at the facility.)

Day Care Center – A facility that provides personal care service for 6 or more persons and less than 24 hours. (*Personal care service* - The care of persons who do not require chronic or convalescent medical or nursing care. Personal care involves responsibility for the safety of the person while at the facility.)

Day Care Center in a Church – A facility operated by a church that provides personal care service for 6 or more persons and less than 24 hours. (*Personal care service* - The care of persons who do not require chronic or convalescent medical or nursing care. Personal care involves responsibility for the safety of the occupants while at the church.)

Day Care Home – A residential home that serves as a personal care facility for 5 or less persons. Only those residing in the home may be involved in the day-to-day operation of the adult / childcare home. (*Personal care service* - The care of persons who do not require chronic or convalescent medical or nursing care. Personal care involves responsibility for the safety of the persons while at the home.)

Group Care Home – A residential home that serves as a personal care facility for 5 or less persons on a 24-hour basis. Only those residing in the home may be involved in the day-to-day operation of the adult / childcare home. (*Personal care service* - The care of residents who do not require chronic or convalescent medical or nursing care. Personal care involves responsibility for the safety of the resident while at the home.)

Nursing Care Facility – A facility that serves as a personal nursing care facility for 6 or more persons on a 24-hour basis.

Nursing Care in Home – A residential home that serves as a personal nursing care facility for 5 or less persons on a 24-hour basis. Only those residing in the home may be involved in the day-to-day operation of the adult / childcare nursing home.

Cemetery – Land used or intended to be used for the burial of the dead, including columbariums, mausoleums, and chapels when operated in conjunction with and within the boundaries of such cemetery.

Certificate of Occupancy – A statement signed by the Building Official setting forth that the building, structure, or use complies with the adopted building codes.

Certificate of Use – A statement signed by the Zoning Administrator setting forth that the building, structure, or use complies with the Zoning Ordinance and that the same may be used for the purpose stated herein.

Change of Tenancy/Ownership – Taking possession or occupancy of land or premises under lease and/or purchase from a previous tenant or owner.

Chickens – Any member of the species *Gallus gallus domesticus*, regardless of sex. Chickens kept, raised, or used in accordance with Use Condition 29 are not considered farm animals as defined by the Greenville County Zoning Ordinance, as amended.

Church – A building for public worship regardless of denomination or religious affiliation.

Church, Mega – A house of worship that has a seating capacity of more than 1750 persons in the sanctuary, and that may include such non traditional accessory uses as retail sales, residential sales, amusements parks, and sport and entertainment facilities, as an integrated part of the development.”

Clean Manufacturing - Clean Manufacturing in which waste minimization and prevention practices are continuously applied. These practices include conservation of raw materials and energy, elimination of toxic inputs, and reduction in toxic outputs.

Clear Cutting – The removing of all trees and other vegetation from an area during land development.

Collection Center for Recyclable Consumer Items – A facility designed to receive household consumer items for recycling, such as metal food containers and cans, glass food containers, beverage bottles, discarded newspapers, magazines, card board and flat paper.

Columbaria – A building or structure designed with niches for the location of urns to hold the ashes of cremated persons. Columbaria shall be operated only within the boundaries of cemeteries and churches.

Common Open Space – Land and/or water within or related to a open space residential development, not individually owned, which is designed and intended for the common use or enjoyment of the residents of the development or the public, which may contain such accessory structures and improvements as are necessary and appropriate for passive recreational purposes.

Communication Antenna – A device used to transmit and/or receive radio or electromagnetic waves between terrestrially or orbitally based structures.

Communication Tower – A tower of any size which supports communication (broadcast or receiving) equipment utilized by commercial, governmental, or other public and quasi-public users. This does not include communication equipment operated by a public service agency, private home use of satellite dishes and television antennas, or amateur radio operators as licensed by the Federal Communications Commission.

Community Recreational Area – A recreational area shown on the approved subdivision plat comprised of one or more of the following: swimming pools, picnic shelter, game courts, and neighborhood clubhouses. A community recreational area is intended to serve the residents of the subdivision in which it is located. It does not include for-profit, privately owned and operated facilities.

Conditional Use – Provisions that impose conditions, restrictions, or limitations on a permitted use that are in addition to the restrictions applicable to all land in the zoning district.

Condominium – A multiple dwelling or development containing individually owned dwelling units and jointly owned and shared areas and facilities, which dwellings or development is subject to the provisions of state law.

Conservation Subdivision – A residential development where 50% percent or more of the developable land area is designated as permanent open space; thereby permanently protecting significant open space within the parcel. The remaining developable land is subdivided into buildable lots.

Conventional Development – A conventional development is a nonresidential development or residential development in which all land area within the development is devoted to building lots that comply with minimum lot size and maximum density/intensity limits of the underlying zoning district.

Corporate Headquarters - Corporate Headquarters is the part of a corporate structure that deals with important tasks such as strategic planning, corporate communications, taxes, law, finance, human resources and information technology.

Cropland – Land suitable for or used for the cultivation of crops.

Data Centers – A large group of networked computer servers typically used by organizations for the remote storage, processing, or distribution of large amounts of data where the majority of the space is occupied by computers and/or related equipment and where information is processed, transferred, or stored.

Density – The number of dwelling units that are allowed on an area of land, and that area of land shall be permitted to include dedicated streets contained within the development.

Developable Land – Land which is suitable as a location for structures.

District, Zoning – Any section of Greenville County in which zoning regulations are uniform.

Dormer – A window set vertically forming a gable projecting from a sloping roof.

Drainage Plan – A site plan showing contours, drainage structures (including, but not limited to pipes, ponds, ditches, etc.); anticipated flow calculations, destination of run-off to nearest identifiable drainage way, and any other data required to clearly define the proposed drainage system.

Dry Cleaning/Laundry Establishment – Pick-up and delivery stations where limited cleaning is done on site including self-service laundries open to the public.

Dry Cleaning/Laundry Establishment (Institutional) – A production facility in which commercial laundering and dry cleaning are conducted that is not open to the public. Solvent quantities and classifications will determine the occupancy as either Factory Industrial or Hazardous.

Dwelling – Any building used exclusively for human habitation including any permitted home occupation but excluding hotels, motels, and rooming and boarding houses.

Dwelling Unit – One or more rooms with a kitchen and toilet facilities used as a place of residence for one family.

Dwelling, Multiple-Family – A residential building containing three or more individual dwelling units located on a single lot or parcel of ground. A multiple-family dwelling, commonly known as an apartment house, generally has a common outside entrance(s) for all the dwelling units, and the units are generally designed to occupy a single floor one above the other.

Dwelling, Single-Family – A residential building containing only one dwelling unit and not occupied by more than one family.

Dwelling, Single-Family Attached – Two or more single-family dwelling units, each with its own outside entrance, which are generally joined together by a common party wall or connecting permanent structures such as breezeways, carports, or garages, whether or not such a group is located on a single lot or parcel of ground or on adjoining individual lots. For the purpose of this Ordinance, dwellings such as townhouses, and condominiums shall be treated as single-family attached dwellings.

Dwelling, Single-Family Detached – A single-family dwelling unit which is entirely surrounded by open space or yards on the same lot.

Dwelling, Two-Family (Duplex) – A residential building containing two individual dwelling units located on a single lot or parcel of ground.

Dwelling, Zero Lot Line – A single-family dwelling that has a zero-foot setback from a side and/or rear property line. For the purpose of this Ordinance, a zero lot line dwelling shall be treated as a single-family detached dwelling.

Equipment Sales and Rental – Establishments primarily engaged in the sale, service or rental of tools, trucks, tractors, construction equipment, agricultural implements, party supplies, and similar

industrial equipment, and the rental of temporary office/storage trailers. Included in this use type are the incidental storage, maintenance, and servicing of such equipment.

Evergreen Shrub – Any self-supporting woody plant with several stems, retaining leaves throughout the year, easily maintained at thirty (30) to forty (40) inches in height.

Façade – The portion of any exterior elevation on the building extending from grade to the top of the parapet, wall or eaves and extending the entire length of the building.

Family – One or more persons living together as a single housekeeping unit. For the purposes of this Ordinance, such persons may include gratuitous guests, foster children, and domestic servants employed in the same.

Farm Animals – Animals that are specifically kept or raised, including cattle, livestock, poultry or fowl commonly used for pleasure or marketed in agricultural operations.

Fireworks Stands, Temporary – This facility consists of a temporary structure for the purpose of the retail sales of fireworks in accordance with the Rules and Regulations of the State Board of Pyrotechnics Safety Board and shall be located in such a manner as to make it immobile and to prevent it from shifting or blowing over. Tie down devices shall be affixed and wheels shall be removed.

Flea Market – An occasional or periodic market held in an open area or structure where groups of individual sellers offer goods for sale to the public.

Flex Space – A building designed and constructed to accommodate a variety of office, warehousing, distribution, and manufacturing operations.

Floodplain – A relatively flat or low area adjoining a river, stream, or watercourse which is subject to partial or complete inundation, or an area subject to the unusual and rapid accumulation of runoff of surface areas.

Fraternity/Sorority House – A house or structure occupied by a college or university fraternity or sorority containing sleeping rooms, bathrooms, common rooms, and a central kitchen and dining area maintained exclusively for members of the fraternity or sorority and their guests or visitors.

Funeral Home, Mortuary – An establishment in which the dead are prepared for burial or cremation. The facility may include a chapel for the conduct of funeral services and spaces for funeral services and informal gatherings, and/or display of funeral equipment.

Gable – A triangular wall section at the end of a pitched roof, bounded by the two roof slopes.

Garden Center – Generally a retail business engaged in the sale to the public of garden related items to include but not limited to, bedding plants, potted trees, potted shrubs, annual flowers and vegetable plants, seed, outdoor furniture, lawn ornaments, fertilizers, mulches, gardening implements and that buys goods or products in quantity from manufacturers and importers either directly or through a wholesaler, and may also include provisions for landscape design and installation services.

Government Facilities and Operations – A building or facility owned, leased or operated by the State, County or political sub- division of the State, or other public agency.

Greenhouse – A glassed or plastic enclosure used for the cultivation or protection of tender plants.

Gross Leasable Area – The total floor area designed for tenant occupancy and exclusive use including basements, mezzanines, and upper floors, if any, expressed in square feet and measured from the center line of joint partitions and from outside wall faces.

Group Home – A use, structured as a single housekeeping unit and in accordance with any applicable state code, rules and regulations, that provides a support setting for persons, who by reason of mental or physical disability, addiction to drugs or alcohol or family and/or school adjustment problems, require a specialized residential setting.

Group Non-Residential Development – A building or group of buildings which consists of more than one office, commercial, retail or industrial structure erected on one or more parcels of ground developed with a common plan for the protection, maintenance and improvement of the parcels with reciprocal easements and rights in one or more of the parcels and governed by an Owner's Association or developed as a horizontal property regime.

Group Residential Development – A building or group of buildings containing three (3) or more dwellings units located on one or more parcels of ground developed with a common plan for the protection, maintenance and improvement of the parcels with reciprocal easements and rights in one or more of the parcels and governed by an Owner's Association or developed as a horizontal property regime.

Height – The vertical distance from grade plane to the average height of the highest roof surface.

Hip Roof – Roof without gables.

Home Occupation - Any use of principal and accessory buildings clearly incidental to their uses for dwelling purposes and conducted for compensation by a resident thereof within a residential district and meeting the requirements of Article 6 of this Ordinance.

Hospital – An institution designed for the diagnosis, treatment and care of human illness or infirmity and providing health services, primarily for inpatients, and including as related facilities, laboratories, outpatient departments, training facilities and staff offices.

Hotel or Motel – A building or group of buildings containing individual sleeping or living units designed for the temporary occupancy of transient guests and which has conveniently located parking.

Illegal Use – Those uses that are illegally established in a particular zoning district in which the use may not be conducted, and was established after the inception of zoning for that particular parcel of land.

Impervious Surface – Any hard-surfaced, man –made area that does not readily absorb or retain water, including but not limited to building roofs, parking and driveway areas, graveled areas, sidewalks, and paved recreation areas.

Industrial/Service – Enterprises engaged in the processing, manufacturing, compounding, assembling, packaging, treatment or fabrication of materials and products, from processed or previously manufactured materials. Included would be assembling electrical appliances, bottling, foodstuffs, and printing plants, and the manufacturing of paint, oils, pharmaceuticals, cosmetics, solvents and other chemicals, and the production of items made of stone, metal or concrete.

Industrial, Heavy – An establishment, which has the potential to be dangerous or extremely obnoxious. Included are those in which explosives are stored, petroleum is refined, natural and liquid gas and other petroleum derivatives are stored and/or distributed in bulk, radioactive materials are compounded, pesticides and certain acids are manufactured, natural resources are mined or quarried, and hazardous waste is treated or stored as the establishment's principal activity.

Industrial, Light – Enterprises in which goods are generally mass produced from raw materials on a large scale through use of an assembly line or similar process, usually for sale to wholesalers or other industrial or manufacturing uses. Included in this use type are industries involved in processing and/or refining raw materials such as chemicals, rubber, wood or wood pulp, forging, casting, melting, refining, extruding, rolling, drawing, and/or alloying ferrous metals, and the production of large durable goods such as automobiles, manufactured homes, or other motor vehicles.

Junk Yards – Any property which is used in part or in whole for the storing, keeping, buying or selling of items defined as “junk”, excluding properly licensed landfills, but including but not limited to abandoned barrels or drums, dismantled or inoperable industrial or commercial equipment or machinery being salvaged for parts, and the following old, scrap or used items: metal; rope; rags; batteries; paper; cardboard; plastic; rubber; pallets; appliances; motors; industrial or commercial fixtures; rubbish; debris; wrecked, dismantled or disabled motor vehicles or parts thereof.

Kitchen – Any room or portion of a room within a building designed and intended to be used for the cooking or preparation of food.

Laboratories – Establishments primarily engaged in performing research or testing activities into technological matters. Typical uses include engineering and environmental laboratories, medical, optical, dental and forensic laboratories, x-ray services, and pharmaceutical laboratories only involved in research and development. Excluded are any laboratories which mass produce one or more products directly for the consumer market.

Landscaping - The improvement of the appearance of an area by the planting of trees, grass, shrubs, or other plant materials, or by the alteration of the contours of the ground.

Legislative Body – Greenville County Council.

Loading Space, off-street – Space for bulk pick-ups and deliveries, scaled to delivery vehicles expected to be used, and accessible to such vehicles when required off-street parking spaces are filled.

Lot – A parcel of land designated by number or other symbol as a part of a legally approved and recorded subdivision or as described by metes and bounds and recorded in the office of the Greenville County Register of Deeds.

Lot of Record – A lot existing before the adoption of the Zoning Ordinance and as shown or described on a plat or deed in the records of the Greenville County Register of Deeds.

Lot Line, Front – That line which separates the lot from a street right-of-way.

Lot Line, Rear – Ordinarily that lot line which is opposite and most distant from the front lot line.

Lot, Corner – A lot abutting upon two or more streets at their intersection or upon two parts of the same street forming an interior angle of less than 135 degrees. The point of intersection of the street lines or of the street lines as extended is the corner.

Lot, Depth – The horizontal distance between the front and rear property lines of a lot.

Lot, Double Frontage – A lot which extends through a block having frontage on two roads.

Lot, Width - The distance between the side lot lines at the front setback line as measured along a straight line parallel to the front line or parallel to the chord thereof.

Manufactured Home – *See Manufactured Single-Section and Multi-Section Homes.*

Manufactured Home Park – Any place, area, or tract of land maintained, offered, or used for parking of two or more manufactured homes used or intended to be used for living or sleeping purposes regardless of whether or not a charge is made for such accommodations.

Manufactured Home Space – That portion of land in a manufactured home park allotted to or designed for the accommodation of one manufactured home.

Manufactured Multi-Section Home – A portable unit designed and built to be towed on its own chassis, comprised of frame and wheels, connected to utilities, and designed to be used without a permanent foundation for a permanent residence. It contains two or more separately towable sections designed to be joined into one integral unit capable of being again separated into components. Either or both units may contain parts that may be folded, collapsed, or telescoped when being towed and expanded later to provide additional cubic capacity. These units may only be used for residential purposes. Travel trailers, travel motorized homes, pick-up coaches, and camping trailers are excluded from this definition. This definition includes units referred to as double-wide manufactured homes built prior to the enactment of the Federal Manufactured Home Construction and Safety Standards Act of 1974, which became effective June 15, 1976.

Manufactured Single-Section Home – A portable unit designed and built to be towed on its own chassis, comprised of frame and wheels, connected to utilities, and designed to be used without a permanent foundation for a permanent residence. A single-section unit may contain parts that may be folded, collapsed, or telescoped when being towed and expanded later to provide additional cubic capacity. These units may only be used for residential purposes. Travel trailers, travel motorized homes, pick-up coaches, and camping trailers are excluded from this definition. This definition includes units referred to as single-wide manufactured homes built prior to the

enactment of the Federal Manufactured Home Construction and Safety Standards Act of 1974, which became effective June 15, 1976.

Manufacturing Facility – A building/plant that uses raw materials and converts, compounds, processes, assembles, or packages them to a useful product such as petroleum products converted to plastics, rubber and petroleum products and carbon black converted to tires, wheat converted to flour etc.

Mausoleum – A building or structure designed with vaults to hold caskets or crematory urns. Mausoleums shall be operated only within the boundaries of approved cemeteries.

Mini-Warehouse – A facility composed of one or multiple structures divided into sections for use as storage of items either temporary or long-term and not to be used for any other purpose (such as small office, garage, etc.). Such a facility may include one accessory manager's office/apartment which is clearly subordinate to the primary use of the facility for warehousing purposes.

Modular Home – A home consisting of two or more factory fabricated components that do not have an integrated chassis which are transported to the home site where they are put on a permanent foundation or slab and joined to make a permanent single-family house. Such units shall comply with all state laws and adopted building codes.

Mulch – A protective covering (such as pine straw, shredded bark, or other materials) spread evenly around trees, shrubs, and ground covers to reduce evaporation, maintain even root temperatures, prevent erosion, and control weeds.

Nightclub – Any establishment, whether public or a private club, including cocktail lounges, etc., serving a predominantly adult clientele, and whose primary business is the sale of alcoholic beverages, including beer and wine, for consumption on the premises in conjunction with dancing or live performances. The purchase of food is at the option of the customers and not required by the operator. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic-Beverage Licensing Board.

Nonconforming Lot – A lot of record at the time of this Ordinance which does not meet the requirements for area and/or width applicable in the district in which such lot is located.

Nonconforming Structure – A structure which existed lawfully on the date this Zoning Ordinance became effective and which does not conform with the permitted uses for the zoning district in which it is situated. Nonconforming uses are incompatible with permitted uses in the districts involved. Such nonconformities are permitted to continue until they are removed or vacated.

Nonconforming Use – A use that lawfully occupied a building or land at the time this Code became effective, which has been lawfully continued and which does not now conform with the use regulations.

Nursery – An agricultural activity or location where plants, such as trees, shrubs and other plants are grown for transplanting, or for use as stocks for grafting or budding.

Obsolete District – A zoning district that was contained in the Greenville County Zoning Ordinance rescinded on January 5, 2005, and is no longer contained in the Greenville County Zoning Ordinance

adopted on January 5, 2005. For the purposes of this ordinance, Obsolete District(s) will be maintained as an appendix in the adopted Greenville County Zoning Ordinance. Obsolete District(s) will continue to be designated on the Official Zoning Map and continue to be subject to the provisions of the obsolete district. No additional properties will be rezoned to the obsolete district classification.

Office – Business – A location, usually a building or portion of a building, where a company conducts its business. A company can have just one office, known as its home office, or a main office and a variety of field offices or branch offices

Open Space – Land areas that are not occupied by buildings, structures, parking areas, streets, alleys or required yards. Open space shall be permitted to be devoted to landscaping, preservation of natural features, and recreational areas and facilities.

Open Space Development – A form of residential subdivision that permits housing units to be grouped on sites or lots with dimensions, frontages, and setbacks reduced from conventional sizes, provided the density of the tract as a whole shall not exceed the density allowed by the zoning district under existing regulations and the remaining land area is devoted to common open space.

Office Support Services – Office Support Services where the office services are the portion of a company made up of administrative and support personnel who are not client facing. People who hold jobs in office positions carry out functions such as settlements, clearances, record maintenance, regulatory compliance, accounting and IT services.

Owner's Association – A private non-profit association which is organized by the developer of a development in which individual owners share common interests in open space and/or facilities and are in charge of preserving, protecting, managing, and maintaining the common property, and enforcement of any protective covenants, easement and/or restrictions.

Parapet – The portion of a wall that extends above the roofline.

Parking Facility (Indoor/Outdoor) – Use of a site for surface parking or a parking structure unrelated to a specific use which provides one or more parking spaces together with driveways, aisles, turning and maneuvering areas, incorporated landscaped areas, and similar features meeting the requirements established by this ordinance. This use type shall not include parking facilities accessory to a permitted principal use.

Parking Space – The storage space for one automobile including the necessary access space and located outside the dedicated street right-of-way.

Parties in Interest – Those persons which include the applicant and/ or appellant, and other persons who have submitted a written statement to the Board of Zoning Appeals or Zoning Administrator indicating their interest in the matter before the Board.

Pedestrian Oriented Development – Development designed with an emphasis primarily on the street sidewalk and on pedestrian access to the site and buildings/structures rather than auto access. The buildings/structures are generally located close to the public or private right-of-way and the main entrance(s) is oriented to the street sidewalk.

There are generally windows or display cases along building facades. Although parking is provided, it is generally limited in size and location.

Pedestrian Walkway – A surfaced walkway, separate from the traveled portion of a public or private right-of-way or parking lot/driving aisle.

Permitted Use – Use or activity which because of its nature and impact is allowed to occur within a designated zoning or regulating district as a use by right or a special use.

Personal motorized vehicle sales and rental - Establishments primarily engaged in the sale, service or rental of motorcycles, atv's, mopeds, golf carts and other vehicles intended for off-road recreational use. Included in this use type are the incidental storage, maintenance, and servicing of such equipment.

Pervious Surface – A surface that presents an opportunity for precipitation to infiltrate into the ground.

Planned Development District – A development project comprised of housing of different types and densities and of compatible commercial uses, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development, and is in accordance with an approved development plan.

Portico – A porch or walkway with a roof supported by columns, leading to the entrance to a building.

Principal Building or Structure – A building or structure in which the primary use of the lot on which the building is located is conducted.

Principal Use – The main use of land or structures as distinguished from a secondary or accessory use

Private Recreation Area – A recreation area maintained for members including but not limited to golf courses, swimming pools, tennis clubs, and neighborhood clubhouses any and each of which must comply with all requirements of the Zoning Ordinance.

Public/Private Right of Way – Any public or private road, access easement intended to provide public access to any lot/development, but excluding any service road or internal driving aisles (i.e., within parking lots).

Public Utility – Any agency which, under public franchise or ownership, provides the general public with electricity, gas, heat, steam, communication, rail transportation, water, sewage collection, or other service.

Public Utility Station – A structure or facility used by a public or quasi-public utility agency to store, distribute, generate electricity, gas, telecommunications, and related equipment, or to pump or chemically treat water. That does not include storage or treatment of sewage, solid waste or hazardous waste.

Quorum – A majority of the authorized members of a board or commission.

Recreation, Indoor – An establishment providing completely enclosed recreation activities. Accessory uses shall be permitted to include the preparation and serving of food and/or the sale of equipment related to the enclosed uses. Included in this definition shall be bowling, roller-skating or ice-skating, billiards, pool, motion picture theatres, and related amusements.

Recreation, Outdoor – An area free of buildings except for restrooms, dressing rooms, equipment storage, maintenance buildings open-air pavilions and similar structures used primarily for recreational activities.

Recreational Vehicle (RV) - A vehicular unit, which is designed as a temporary dwelling for travel, recreational, and vacation use, and which is self-propelled, mounted on, or pulled by another vehicle. Examples include but are not limited to a travel trailer, camping trailer, truck camper, motor home, fifth-wheel trailer, or van.

Recyclable Materials – Reusable material including, but not limited to, glass, clothing, plastics, paper products (e.g. news papers, stationary, scrap paper, computer paper and corrugated cardboard) rubber, batteries, ferrous and non-ferrous metals, concrete asphalt, wood, building materials, and yard wastes.

Recycling Collection Center – A facility located within an enclosed building that accepts recyclable materials by donation, redemption or purchase. May allow sorting, limited compacting and/or crushing of recyclable materials for shipment to other locations. This type of facility is considered to be the intermediate storage and hauling site, between recycling drop-off boxes and recycling processing centers, for recyclable materials.

Recycling Convenience Center – A staffed enclosed facility which receives and sorts banned materials (e.g. used oils, tires, white goods and batteries) and waste into separate weather-resistant containers. Such facilities are prohibited from processing recyclable materials on-site and are intended to provide citizens with easy and accessible solid waste and recyclable disposal services.

Recycling Drop Box – A single container with a maximum dimension of nine (9) feet by thirty-two (32) feet used for public disposal of recyclable products.

Recycling Drop-Off Trailer – A non-motorized trailer designed and/or maintained as a temporary or permanent use to accept donated recyclable goods. A recycling drop-off trailer may be pulled by a truck for purposes of selling or recycling the goods at a different location.

Recycling Processing Center – A facility that accepts, stores, and processes recyclable materials whether or not maintained in connection with another business. Processing includes, but is not limited to, bailing, briquetting, crushing, compacting, grinding, shredding, sawing, shearing, composting and sorting of recyclable materials, and may include the heat reduction or melting of such materials. Examples of such facilities include:

- a) **Materials Recovery Facility ("MRF")** – A facility which accepts recyclable materials that have been separated from the waste stream and are delivered either by private citizens, businesses or recyclables collectors (i.e. "source separated" recyclables) to be processed in order to meet market specifications.

- b) **Dirty Materials Recovery Facility ("DMRF")** – A facility which separates recyclable materials from a combined stream of household refuse and processes the recyclables in order to meet market requirements.
- c) **Co-composting Facility** – A facility which accepts yard waste, industrial process wastes, agricultural wastes, residues from agricultural products processing, or sludge, functioning as a nitrogen source, to be combined in a manner that will lead to its biological or natural degradation.

Research and Development – Research and Development is the investigative activities a business conducts to improve existing products and procedures or leads to the development of new products and procedures.

Restaurant – An establishment that sells prepared food for consumption. Restaurants shall be classified as follows:

- a) **Drive-Through or Fast Food** – An establishment that sells food already prepared for consumption, packaged in paper, styrofoam or similar materials, and may include drive-in or drive-up facilities for ordering.
- b) **General** – An establishment that sells food for consumption on or off the premises. Restaurants have a designated full-service kitchen, dining room equipment, and staff to prepare and serve meals. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic Beverage Licensing Board.
- c) **Take-Out** – An establishment that sells food only for consumption off the premises.

Right-of-Way – A legally established area or strip of land, either public or private, on which an irrevocable right of passage has been recorded, and which is occupied or intended to be occupied by a street, utility service, water main, sanitary or storm sewer main, or other similar use.

Right-of-Way Line – The dividing line between a lot, tract, or parcel of land and a contiguous street, railroad, or public utility right-of-way.

Riparian Buffer – An area of trees and other vegetation adjacent to a watercourse that forms a transition area between the aquatic and terrestrial environment. The riparian buffer is designed to intercept runoff from upland sources for the purpose of mitigating the effects of nutrients, sediment, organic matter, pesticides, or other pollutants prior to entry into surface waters.

Roadside Buffer – The designated area between the road right-of-way and the parking area used to soften the impact of dissimilar land uses and provide screening to satisfy the requirements of this Ordinance.

Rural Estate Lot Development – A residential development of large lots that are developed consistent with the preservation of rural character.

Salvage Yard – Any land or area used, in whole or in part, for salvaging or processing scrap metal, motor vehicle parts, or machinery parts. Salvage yards are subject to the requirements of the Greenville County Storm Water Utility Program and the requirements of the EPA/DHEC National Pollutant Discharge System (NPDES).

School, Commercial – An establishment that provides for the teaching of industrial, clerical, managerial or artistic skills. This definition applies to schools that are owned and operated privately for profit and that do not offer a complete educational curriculum (*e.g., beauty school, modeling school, karate or dance school).

Schools, Primary, Secondary – A public, private, or parochial school offering instruction at the elementary, middle, and high school levels in the branches of learning and study required to be taught in the public schools of the state.

Screening – The method by which a view of one site from another adjoining site is shielded, concealed, or hidden.

Setback – The minimum distance by which any building or structure must be separated from a street right-of-way or lot line.

Setback Line – That line which is parallel to and a given distance from the right-of-way or lot line of a lot or parcel of land at such distance as is required in this Ordinance.

Shade Tree – Any tree, evergreen or deciduous, of a species which normally reaches a height of thirty (30) feet or more and a crown spread of twenty (20) feet or more at maturity.

Shooting Range, Outdoor – The use of land for archery and the discharging of firearms for the purposes of target practice, skeet and trap shooting, mock war games, or temporary competitions, such as a turkey shoot. Excluded from this use type shall be general hunting, and unstructured and non-recurring discharging of firearms on private property with the property owner's permission.

Shopping Center – A group of commercial establishments planned, constructed and managed as a total entity with shared access, customer and employee parking provided on-site, and provision of goods delivery separated from customer access.

Shoreline – The area immediately adjacent to any state water, including lakes, ponds, and streams. More specifically, the line where open waters abut wetlands or dry land during non-flood and non-drought periods.

Sign – *(See County Sign Ordinance Appendix B.)*

Significant Trees – Any tree of at least 12" DBH that is healthy and not listed on the USDA Natural Resources Conservation Service South Carolina State listed Noxious Weeds and the South Carolina Exotic Pest Plant Council list.

Site Plan – A plan that outlines the use and development of any tract of land.

Small Tree – A single or multi-stem tree of a species that normally reaches a mature height between eight (8) and thirty (30) feet and a crown spread of less than twenty (20) feet at maturity.

Special Event – A Special Event is a celebration, ceremony, wedding, reception, corporate function, or similar activity that takes place on a regular basis, involving the gathering of individuals assembled for the common purpose of attending an event. Special Events are subject to a use agreement between a facility owner and another party. Uses that are accessory to a single family

residential use and are not subject to a use agreement are not defined as a special event and are not regulated under this ordinance. These include, but are not limited to, private parties, gatherings, and similar activities. This definition does not include churches and similar congregations where a wedding or funeral is an ancillary use.

Special Event Facility – A facility where Special Events are permitted to occur under this ordinance. Facilities may operate entirely within a structure, outside of a structure, or both inside and outside of a structure.

Stadium – An outdoor open-air facility with tiers of seats for viewing events such as sports and concerts etc.

Steep Slope – Those areas of land where the grade is fifteen (15) percent or greater. Slopes shall be measured as the change in elevation over the horizontal distance between consecutive contour lines and expressed as a percent. For the purpose of application of these regulations slope shall be measured over three (3) or more two (2) foot contour intervals (six (6) cumulative vertical feet of slope).

Storage Unit, temporary portable – A temporary portable storage unit means any unit not less than six hundred (600) cubic feet in size, including, but not limited to, a trailer, box, or other shipping container, primarily for use as storage space.

Street – A dedicated public right-of-way which affords the principal means of access to abutting property and which has been accepted for maintenance by Greenville County or the State Highway Department. For the purposes of these regulations, the term street or streets shall also mean avenues, boulevards, roads, lanes, and other public ways.

- a) **Arterial Street** – A high-volume street that carries traffic between commercial centers or communities. For Example: Wade Hampton Boulevard.
- b) **Collector Street** – A street designed primarily to connect residential service streets with arterial streets, or to provide a direct connection between two arterial streets, with traffic having neither origin nor destination on the street.
- c) **Residential Street** – A street used primarily to provide access from major or minor collector streets to residential units. By nature of their design, these streets serve vehicles passing through the area with either origin or destination within the area. The classes of residential streets are listed in the Land Development Regulations, Section 1.2.

Streetscape – All elements of a development or area that are in view from other points along a street.

Street, Private – Right-of-way and roadway which has not been dedicated, recorded, or officially accepted by a state or local government

Structure – Anything constructed or erected which requires permanent location above grade. For purposes of this Ordinance, "structure" does not include landscape features such as ornamental pools, planting boxes, sculpture, bird baths, open terraces, walkways, driveways, walls or fences,

shelters for pets, playhouses, open stairs, recreational equipment, flagpoles, light standards, game courts, swimming pools, underground fallout shelters, air conditioning compressors, pump houses or wells, mailboxes, outdoor fireplaces, gatehouses, burial vaults, or bus shelters.

Subdivision – The division of a tract, lot or parcel of land into two or more lots, plats, sites or other divisions of land.

Tavern – Any establishment, whether public or operated as a private club, including cocktail lounges, etc., serving a predominantly adult clientele, and whose primary business is the sale of alcoholic beverages, including beer and wine, for consumption on the premises, and where the purchase of food is at the option of the customers and not required by the operator. The State Alcoholic Beverage Licensing Board must license the sale of alcoholic beverages, beer, and wine.

Theater – A building used primarily for the presentation of live stage productions, performances or motion pictures.

Townhouse – A one-family dwelling unit with a private entrance, which is part of a structure whose dwelling units are attached horizontally in a linear arrangement, and having a totally exposed front and rear wall to be used for access, light, and ventilation.

Tract – An area, parcel, site, piece of land, or property.

Traditional Neighborhood Design (TND) – A pedestrian-oriented neighborhood, with variable lot widths and sizes, a mix of dwelling unit types, and non-residential uses generally located along a neighborhood center or fronting on a community park.

Undevelopable Land – Land that has development constraints due to one of the following constraining factors: land with a slope greater than 30 percent, lakes, marshes, sloughs, wetlands, areas within the Area of Special Flood Hazard, defined as the land in the floodplain within a community subject to inundation by the base flood having a one percent or greater chance of being equaled or exceeded in any given year, and areas of recent or active landslides.

Uses By Special Exception – A Special Exception use is one which is not permitted by right, but which may be permitted after assessing and addressing potential uses. The Zoning Ordinance lists, by zoning district, those uses that may be allowed by right or by Special Exception. Only uses contained in these lists will be considered in each zoning district.

Utility Quasi-Public – Essentially a public use, although under private ownership or control.

Variance – A variance is a waiver of the dimensional terms of the Zoning Ordinance where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of actions of the applicant, a literal enforcement of the Ordinance would result in unnecessary and undue hardship; and does not involve a change in the use of the property.

Vegetative Buffer – Perennial vegetation established or left undisturbed adjacent to the shoreline of a watercourse intended to filter out sediment and other nonpoint source pollutants from runoff before it reaches a watercourse. Also includes vegetation along property lines.

Veterinary Clinic – An indoor facility used for treatment of domesticated animals. This facility does not include outdoor kennels.

Veterinary Hospital – An indoor or outdoor facility that may contain outdoor kennels used for treatment of all animals.

Veterinary Office - A facility for diagnosis, treatment, and care of small domestic animals. Sick or injured animals may be boarded on a short-term basis. No commercial boarding is allowed in the veterinary office facility. All activities related to this facility shall be enclosed in a self-contained, free-standing building wholly occupied by activities related to the veterinary office.

Warehouse / Distribution – A distribution center for a set of products in a warehouse or other specialized building, often with refrigeration or air conditioning, which is stocked with products (goods) to be redistributed to retailers, to wholesalers, or directly to consumers.

Wedding Chapel – See Special Event Facility

Wetlands – Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Yard, Front – An area extending across the full width of the lot and lying between the front lot line and the setback line as required in the applicable district. The front is normally determined by the address established by the E-911 staff.

Yard, Rear – An area extending across the full width of the lot and lying between the rear lot line and the setback line as required in the applicable district.

Yard, Required – The open space between a lot line and the buildable area within which no structure may be located except as otherwise provided in this Ordinance. All yards referred to in this Ordinance are minimum required yards.

Yard, Side – An area extending along the length of the lot between the required front yard and the required rear yard and between the side lot line and the setback line as required in the applicable districts.

(Am. Ord. No. 3968, § 1, passed 11-1-2005; Am. Ord. No. 4089, § 1(2), passed 3-6-2007; Am. Ord. 4224, § 1(3), passed 9-16-2008; Am. Ord. 4272, § 2, passed 4-7-2009; Am. Ord. 4402, § 2, passed 2-1-2011, Am. Ord. 4610, § 2, passed 1-21-2014; Am. Ord. 4638, §1(1), passed 7-8-2014; Am. Ord. 4670, §1, passed 11-2-2014, Am. Ord. 4789, §1, passed 4-5-2016; Am. Ord. 4917, §1, passed 7-18-2017; Am. Ord. 4942, §1, passed 10-3-2017)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Civil Action No. 2017-CP-23-03372
Appellate Case No. 2017-001747

Greenville Bistro, LLC, a South Carolina Limited Liability Company, d/b/a Buck's Racks &
Ribs, and Frontage Road Associates, Inc., a South Carolina Corporation, ... Respondents,

v.

Greenville County, a Political Subdivision of the State of South Carolina, and Will Lewis, in his
Official Capacity as Sheriff of Greenville County, ... Appellants.

APPELLANTS' INITIAL BRIEF

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Preliminary Statement

This case has a long backstory, but this appeal presents a simple issue. Greenville County appeals an injunction against the enforcement of its ordinance governing the location of sexually oriented businesses (Ordinance No. 4869), which was entered without any suggestion that the ordinance is invalid. Plaintiff Greenville Bistro, LLC obtained a certificate of occupancy to operate a “restaurant,” but then began illegally operating a sexually oriented business and sued.

The trial court recognized that an injunction is a “drastic remedy” that should only be granted if the moving party carries its burden of demonstrating (1) irreparable harm, (2) likelihood of success on the merits, and (3) the absence of an adequate remedy at law. (Injunction Order at 3.) Plaintiffs demonstrated none of these three prerequisites.

As for irreparable harm, the trial court properly stated the law that the “[l]oss of First Amendment freedoms constitutes irreparable injury,” (*id.* at 3), but then concluded only that “the Plaintiffs would suffer irreparable harm *if* the subject ordinance abridges its constitutional freedom of expression.” (*Id.* at 4 (emphasis added).) No such finding was made. The trial court did not explain why free speech would be abridged by requiring Plaintiffs to obey a valid law.

The court held that “[t]he Plaintiff has met its burden with respect to” likelihood of success on the merits regarding Ordinance No. 4869, (*id.* at 5), but gave no reason why this was so.

On inadequate remedy at law, the injunction order states only that “Plaintiffs have no adequate remedy at law because Defendants’ efforts to regulate Plaintiffs’ business threaten Plaintiffs with the loss of constitutionally protected rights and freedoms.” (*Id.* at 5.) Again, no reason is given why the Ordinance, which the Court did not rule unconstitutional, would occasion such a loss. Further, Plaintiff provided no argument as to why money damages, if awarded, would not sufficiently compensate it.

For these reasons and for those set forth below, Greenville County brings this appeal.

Statement of Issue on Appeal

When a plaintiff's prima facie case depends on a claim that a law is unconstitutional, the trial judge must consider the merits of that claim to determine its likelihood of success on the merits—a required showing for a temporary injunction. Absent such a showing, the plaintiff cannot prove irreparable harm or inadequate remedy at law, as there is neither harm in complying with a valid law, nor an injury to be remedied.

Here, the trial court enjoined enforcement of Ordinance No. 4869 without stating any reason why the Ordinance might be unconstitutional.

Statement of the Case

On May 23, 2017, Plaintiffs Frontage Road Associates, Inc. (“Landlord”) and Greenville Bistro, LLC d/b/a Bucks Racks & Ribs (“Tenant” or “Club”) filed a two-count complaint, with exhibits, in the Greenville County Court of Common Pleas. The complaint sought declaratory and injunctive relief against enforcement of Greenville County’s Sexually Oriented Business Code (“the Code”), which was established in 1995 by Ordinance No. 2673, and amended in 2017 by Ordinance No. 4869.

Count I claimed that enforcement of the Code violated a 2002 consent order between the County and the *prior* tenant (“Platinum Plus”) at 805 Frontage Road (the “Property”), on the theory that the Club is a “successor” of the prior tenant. (Compl. at 13.) Count II claimed that the Code is unconstitutional on free speech grounds. (*Id.* at 14.)

On May 24, Plaintiffs filed a Motion for Temporary Injunction based on both counts of its complaint. On June 7, the trial court noticed a hearing for June 16.

On June 14, the County filed its Answer and Counterclaim for Injunction, with exhibits.

On June 15, the County responded to Plaintiffs’ motion, and filed its own motion for temporary injunction. On June 16, 2017, the trial court held a hearing on Plaintiffs’ motion only.

On July 17, the trial court entered its Order for Partial Grant and Partial Denial of Temporary Injunctive Relief (the “Injunction Order” or the “Order”). The Injunction Order rejected the Club’s argument, under Count I of its complaint, that it is a “successor” to Platinum Plus. (Inj. Order at 2.) Nevertheless, pursuant to Count II, the Injunction Order enjoined the County and its agents “from, in any way, enforcing the provisions of Ordinance No. 4869 as to the Plaintiffs at the subject location. . . .” (*Id.* at 6.) The Injunction Order did not set forth any reason why Ordinance No. 4869 is invalid or unconstitutional.

On August 15, 2017, the County timely served its Notice of Appeal of the Injunction Order.

Statement of the Facts

- A. Since 1995, Greenville County's Sexually Oriented Business Code (adopted via Ordinance No. 2673) has prohibited a sexually oriented business at the Property.

For more than 20 years, Greenville County has regulated the location of sexually oriented businesses. In 1995, the County Council adopted Ordinance No. 2673, which defined various types of sexually oriented businesses, including an "adult cabaret," which is "a nightclub, bar, restaurant, or similar commercial establishment which regularly features" the following:

- (a) Persons who appear in a state of nudity¹; or
- (b) Live performances which are characterized by the exposure of "specified anatomical areas"² or by "specified sexual activities"³; or
- (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(Ans. & CC Ex. 1 at 3.)

Section 12(b) of Ordinance No. 2673 prohibits operation of a sexually oriented business within 1500 feet of, *inter alia*, a residential district, a lot devoted primarily to residential use, a church, a child care facility, or a family oriented recreation facility. (*Id.* at 10-11.)

At all relevant times, the Property at 805 Frontage Road has been within 1,500 feet of a

¹ "Nudity or a state of nudity means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast." (Ans. & CC Ex. 1 at 4.)

² "Specified anatomical areas means the male genitals in a state of sexual arousal or the vulva or more intimate parts of the female genitals." (*Id.* at 4.)

³ "Specified sexual activities means any of the following:

- (a) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- (c) Masturbation, actual or simulated; or
- (d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above."

(*Id.* at 5.)

disqualifying land use. (See Ans. & CC Ex. 6, Feb. 24, 2017 Letter, at 1; Hrg. Ex. 19, ¶ 4.)

- B. In 2000, the Supreme Court upheld the Code, and in 2003, affirmed a permanent injunction prohibiting Platinum (the prior tenant) from operating a sexually oriented business at the Property.**

In 2000, the South Carolina Supreme Court invalidated Ordinance 2673's permitting requirements, but specifically upheld the location restrictions in Section 12. *Harkins v. Greenville County*, 340 S.C. 606, 621, 533 S.E.2d, 886, 893 (2000).

After the Supreme Court upheld the location restrictions, the County sued multiple sexually oriented businesses, including the prior tenants at the Property—Kenwood Enterprises, Inc., and Elephant, Inc. d/b/a Platinum Plus, and Kenwood Gaines (collectively, “Platinum Plus” or “Platinum”)—to enjoin them from operating sexually oriented businesses.

On January 19, 2001, the trial court held that “Platinum is located within 1,500 feet of a church, the boundary of residential districts, the property lines of lots devoted primarily to residential use, and a family oriented recreation facility.” (See Ans. & CC Ex. 2, January 2001 Injunction, at 7.) Accordingly, Platinum “knew that it could not operate a sexually oriented business at its current location. Indeed, following discussions with County officials regarding this fact, Platinum affirmatively represented to County officials that it would not be operating as an adult entertainment establishment.” (*Id.* at 7-8.)

After rejecting all of Platinum's claims, the Court entered a permanent injunction:

Defendants are hereby enjoined from further operation of their businesses in violation of Ordinance 2673 and are ordered to comply with the Ordinance by ceasing operation of their businesses as sexually-oriented businesses at their current locations.

(*Id.* at 26.)

Platinum appealed the injunction, but the South Carolina Supreme Court, in pertinent part,

affirmed. *Greenville County v. Kenwood Enters., Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003).⁴

Thus, since January 19, 2001, a permanent injunction has been in place preventing the operation of a sexually oriented business at the Property located at 805 Frontage Road.

C. Platinum's collateral suit, while it was unsuccessfully appealing the permanent injunction, did not negate that injunction.

In March 2001, Platinum (and others) sued Greenville County for declaratory relief about the meaning of "nudity" in Ordinance No. 2673—under which Platinum had been enjoined and which it was then challenging on appeal. In January 2002, the court entered a consent order in that case, which it then dismissed without prejudice. *Elephant Inc. v. Greenville County*, Greenville County Court of Common Pleas, No. 01-CP-23-1793. (Compl. Ex. A, 2002 Order.)

The 2002 Consent Order bound those plaintiffs, including Platinum, all of whom agreed that they would *not* "engage in activities that if conducted, would constitute their business as a 'sexually oriented business' as that term is defined in Greenville County Ordinance 2673." (*Id.* at 2.) Platinum and the other plaintiffs recognized that "[a]t their present locations, Plaintiffs' businesses are in violation of the locational requirements set forth in Section 12 of Ordinance 2673 if their businesses are found to be 'sexually oriented businesses.'" (*Id.*)

The 2002 Consent Order set forth an understanding as to the meaning of the term "state of nudity," and also specifically prohibited any "specified sexual activities" or display of "specified anatomical areas," as those terms are defined in Ordinance No. 2673, on the premises of Platinum and the other clubs involved in that case. (*Id.* at 3.)

The prohibitions in the 2002 Order also bound those plaintiffs' "successors and assigns," which were delineated as persons and entities to whom the plaintiffs "transfer their interest in their

⁴ One portion of the *Kenwood Enterprises* decision that is not relevant here—involving the rule for stating a takings claim—was overruled by *Byrd v. City of Hartsville*, 365 S.C. 650 (2005).

businesses.” Specifically, “Plaintiffs agree that if they transfer their interest in their businesses, they will inform their successors and assigns of the agreements set forth in this order and that this order shall be binding upon Plaintiffs’ successors and assigns.” (*Id.*)

The 2002 Order also specified that violations of the order “shall be punishable as contempt of Court and/or the County may pursue any other relief provided by law.” (*Id.* at 4.)

Significantly, the order did not state that it was modifying the permanent injunction—entered by a different judge in a separate case—prohibiting the operation of a sexually oriented business at the Property. Nor did (or could) the 2002 Order purport to limit the Greenville County Council from passing legislation or adopting amendments to the Code.

D. In 2015, the trial court closed Platinum for six months as a public nuisance, and in 2016, the court imposed a second six-month closure as well as contempt sanctions.

In April 2015, the Greenville County Solicitor brought an action against Platinum-related entities and persons, including Frontage Road Associates, Inc., Elephant, Inc., and Ken Gaines, alleging that the Property was being operated as a public nuisance. In June 2015, the court entered a consent order, wherein Elephant, Inc. and Gaines stipulated that the Solicitor possessed present sufficient evidence for the court to “find that Platinum Plus Greenville constituted a public nuisance within the meaning of the Nuisance Statute.” (Compl. Ex. B, 2015 Consent Order, at 3.). The 2015 Consent Order required Platinum to shut down for 180 days and, thereafter, to comply with extensive monitoring requirements and the 2002 Order.

After the shut-down period, Platinum reopened, but did not change its ways. On April 27, 2016, the Solicitor filed a Verified Petition seeking contempt findings against Elephant, Inc. and Ken Gaines for violating the 2015 Order. On July 27, 2016, the trial court found that Elephant, Inc. and Gaines were operating Platinum Plus in violation of the 2015 Order, and entered criminal and civil contempt sanctions against them, including a \$100,000 fine payable to the Clerk of Court,

extension of the monitoring requirements, and an additional 180-day closure. (Compl., Ex. C,⁵ 2016 Order, at 4-5 (factual findings), 13-16 (contempt sanctions).)

E. Platinum abandoned the closed Property; Frontage Road and Greenville Bistro sought access to it by disavowing any relation to Platinum-related entities and people.

After the trial court entered the 2016 Order, Platinum appealed it but otherwise abandoned the Property. (Ans. & CC Ex. 5, at 2.) Thereafter, Frontage Road Associates, the owner of the Property, filed a motion to have the Property at 805 Frontage Road released from all orders relating to Platinum (i.e., Elephant, Inc. and Ken Gaines). (*Id.* at 3.) Frontage Road also submitted an affidavit from Jason C. Mohny, the principal of Greenville Bistro, LLC, averring that “neither Ken Gaines, Inc., Elephant, Inc., nor Platinum Plus has any connection with Greenville Bistro, LLC,” which entity is “completely separate” from them. (Ans. & CC Ex. 3, at 1 ¶¶ 1, 5.)

Based on this representation, on February 10, 2017, the trial court released the Property, finding that “the former tenants to whom the Court’s previous Orders were directed have now vacated the premises,” and that “the Court is without authority to continue or impose the previously ordered ongoing requirements, which were directed personally to Gaines and Elephant, Inc., on a new tenant.” (Ans. & CC, Ex. 5, Feb. 2017 Order, at 4.)

The February 2017 Order issued a strong warning against operating a sexually oriented business at the site:

However, as noted on the record during the hearing on January 26, 2017, in the event evidence later establishes a connection between these parties, the State may immediately move to have all requirements reinstated. Further, and again as noted on the record at the January 26, 2017 hearing, *in the event that Greenville Bistro, or any other adult entertainment venue, commences operating at the location, full and complete compliance with all applicable laws, ordinances, etc. is expected and failure to do so will likely result in further orders, including sanctions against the entities, individual owners and responsible parties.*”

⁵ The July 27, 2016 Order is unmarked, but appears between Exhibits B and D of the Complaint.

(*Id.* at 4 (emphasis added).)

F. In February 2017, Greenville County passed an amendment to the Code (Ordinance No. 4869).

On February 21, 2017, the County Council passed, on first reading,⁶ Ordinance No. 4869 to update its Sexually Oriented Business Code. (Compl. Ex. G at 2; Compl. at 11, ¶ 61.) Consistent with several recent cases, Ordinance No. 4869 reaffirmed the Council's focus on mitigating the harmful secondary effects of sexually oriented businesses, and added the phrase "or in a state of semi-nudity" to the definition of "adult cabaret." Ordinance No. 4869. (Compl. Ex. G at 2.) The phrase is defined as follows:

Semi-nude or a state of semi-nudity means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.

(*Id.*)

G. The County warned Greenville Bistro about the longstanding prohibition on operating a sexually oriented business at the Property.

On February 24, 2017, the County Attorney wrote Greenville Bistro's principal, Jason Mohny, to reiterate that the Sexually Oriented Business Code (a.k.a. Adult Entertainment Ordinance), which consists of "Ordinance Nos. 2673 and 4869," prohibit a sexually oriented business at the Property. (Ans. & CC Ex. 6, Feb. 24, 2017 Letter, at 1).

The letter explained:

The Adult Entertainment Ordinance includes several provisions that directly impact the 805 Frontage Road property. The setback provisions in the Adult Entertainment Ordinance require a sexually oriented business (which includes any establishment that features persons who appear in a state of nudity or semi-nudity) to be 1,500 from several

⁶ Ordinance No. 4869 was adopted on third and final reading on April 26, 2017. *See Sherman v. Reavis*, 273 S.C. 542, 257 S.E.2d 735 (S.C. 1986) (pending ordinance binding from the time it is first noticed for public hearing).

types of properties and land uses, including the boundary of a residential zoning district. Today, there are two residential boundaries that are less than 1,500 feet from the building at 805 Frontage Road. One is the Roper Mountain Apartments, which is zoned RM-2 (a residentially zoned district); and the other is Bradford Place, which is a single-family residential subdivision, zoned R-M20 (a residentially zoned district). These two properties, and potentially others, will prohibit the operation of a sexually oriented business at 805 Frontage Road.

(*Id.*)

H. In March 2017, Greenville Bistro obtained a Certificate of Occupancy to operate a “restaurant,” but then instead opened a sexually oriented business and was ticketed.

On March 27, 2017, Greenville Bistro received a Certificate of Occupancy to operate as a “restaurant” called Buck’s Racks & Ribs. (Compl. Ex. F.)

Nevertheless, an inspection on May 11, 2017, revealed that Greenville Bistro was operating a sexually oriented business, specifically an “adult cabaret.” (Compl. Ex. H, May 11, 2017 Tickets.) The definition of “adult cabaret” was established in Ordinance No. 2673, and amended by Ordinance No. 4869, to read as follows:

Adult cabaret means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

- (a) Persons who appear in a state of nudity, or in a state of semi-nudity; or
- (b) Live performances which are characterized by the exposure of “specified anatomical areas” or by “specified sexual activities”; or
- (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of “specified sexual activities” or “specified anatomical areas.”

Greenville Bistro operates as an adult cabaret because it regularly features persons who appear in a state of semi-nudity and live performances characterized by an emphasis on specified sexual activities. (Hrg. Ex. 14, Redman Aff. ¶ 5 (“The dancer’s breasts were exposed, except that pasties covered her nipples and areolas. The dancer also wore a type of bikini bottom that exposed her buttocks.”); *id.* at ¶ 6 (“On that visit to Buck’s, I saw several other women who were wearing bottoms that exposed their buttocks.”); *id.* at ¶¶ 7-9 (noting that on a May 24, 2017 return visit, he

saw a woman exposing the majority of her buttocks on the large stage, and that he “saw two additional female dancers at Buck’s who were wearing attire that exposed their buttocks,” but “no menus or advertising for food”); Hrg. Ex. 15, Hunnicutt Aff., ¶¶ 5-9 (observing exposed female breasts and buttocks, sexual movements on same dates).)

Significantly, Plaintiff never argued that the “performances” or the attire worn by the “performers” complied with either Greenville County Ordinance 2673 or 4869. It is Plaintiff’s position instead that it was entitled to rely on the limitations in the 2001 Order which only applied to its predecessors.⁷

I. The trial court enjoined the enforcement of Ordinance No. 4869 without making even a preliminary finding of unconstitutionality.

After a temporary restraining order was granted in part and denied in part on June 1, 2017 (Gravely, J.), the trial court (Stilwell, J.) held a hearing on June 16, 2017, and received evidence and argument from the parties.

The County submitted, *inter alia*, Ordinance No. 2673 (Hrg. Ex. 1), certified copies of the secondary effects studies supporting the regulations (Hrg. Ex. 1b), the 2001 Injunction against Platinum (Hrg. Ex. 2), and the South Carolina Supreme Court’s decision in *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003), upholding that permanent injunction. (Hrg. Ex. 2b).

The County also submitted the affidavits of code enforcement and law enforcement officers

⁷ Despite the clear prohibition against operating a sexually oriented business at the Property, Greenville Bistro has continued—even after being ticketed—to operate such a business. (Hrg. Ex. 16, Hayden Aff. ¶¶ 5-12 (describing observations on May 18 and May 24, including dancers showing their buttocks, making sexual movements around a pole on stage, offering lap dances, grinding her exposed buttocks on patron’s crotch, rubbing her breasts, rubbing her vaginal area, and pressing her breasts against patron’s face); Hrg. Ex. 17, Arflin Aff. ¶¶ 5-10 (describing similar “specified sexual activities” on June 14, including dancers grinding their vaginal areas on pole, erotically rubbing their breasts and fondling their crotches, and simulating intercourse while grinding their butts on patron’s covered crotch area); Hrg. Ex. 18, Whitmire Aff. (same).)

referenced above (Hrg. Exs. 14-18), an expert affidavit showing that Ordinance Nos. 2673 and 4869 are supported by significant secondary effects evidence (Hrg. Ex. 12, McCleary Aff., at 5-8), and an affidavit from the County's GIS (Geographic Information System) Division Manager showing that while a sexually oriented business is prohibited at 805 Frontage Road, there are 89 zoned parcels (and thousands of parcels in the unzoned portion of the County) that meet the location regulations for sexually oriented businesses. (Hrg. Ex. 19, Hanning Aff. ¶¶ 4-7.)

During the hearing, Judge Stilwell explained his view that the underlying merits of the case are irrelevant to the temporary injunction analysis. "One of those elements is not who's right and who's wrong with respect to the underlying merits of the case." (Hrg. Tr. at 16:6-8.) He was "not convinced that [the merits are] relevant to what I'm here to decide today." (*Id.* at 16-10-11.)

On July 17, 2017, Judge Stilwell issued an order concluding that Greenville Bistro was *not* a successor to Platinum, and thus denied temporary injunctive relief under Plaintiffs' theory in Count I of the Complaint. (Injunction Order at 4.) But the Order enjoined the County from enforcing Ordinance No. 4869—without finding that the Ordinance is somehow unconstitutional, as alleged in Count II of the Complaint. Apparently driven by the proposition that the merits are not relevant to Plaintiffs' burden of showing likelihood of success on the merits, the court made no mention in the Injunction Order of any particular aspect of Ordinance No. 4869.

Instead, the court simply stated that "Plaintiffs would suffer irreparable harm *if* the subject ordinance [4869] abridges its constitutional freedom of expression." (Injunction Order at 4 (emphasis added).) Thus, the court concluded, "Plaintiff has met its burden" as to likelihood of success as to "enforcement of Ordinance 4869," (*id.* at 5); and Plaintiffs have no adequate remedy at law regarding such potential "loss of constitutionally protected rights and freedoms."

The trial court then enjoined the County from enforcing Ordinance No. 4869 "in any way" at

“the subject location.” (Injunction Order at 6.)

Argument

I. Standard of Review

A trial court’s grant of a temporary injunction is reviewed for abuse of discretion. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). “An abuse of that discretion occurs where the trial judge is controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support.” *Id.*

An action for an injunction is equitable. *Blanks v. Rawson*, 296 S.C. 110, 370 S.E.2d 890 (Ct. App. 1988). An injunction is not granted as a matter of right, but only when review of all of the evidence establishes that it is necessary to prevent irreparable harm. *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (1930); *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969). “The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willingly or wantonly neglected.” *Seabrook Island Prop. Owner Ass’n v. Marshland Trust, Inc.*, 358 S.C. 655, 666, 596 S.E.2d 380, 385 (Ct. App. 2004) (internal citations and quotation marks omitted).

To show entitlement to a temporary injunction, the movant must show: (1) that it would suffer irreparable harm if the injunction is not granted, (2) that it has a likelihood of success on the merits, and (3) that there is no adequate remedy at law. *Rawlinson Rd. Homeowners Assoc., Inc. v. Jackson*, 395 S.C. 25, 35, 716 S.E.2d 337, 343 (Ct. App. 2011).

The burden to obtain an injunction is even greater when one seeks to enjoin legislation designed to protect public health, safety, and welfare. “As with other legislative enactments,” our Supreme Court “accords ordinances regulating sexually oriented businesses a presumption of constitutionality which the attacking party has the burden of overcoming.” *Harkins v. Greenville Cty.*, 340 S.C. 606, 621, 533 S.E.2d 886, 894 (2000). This rule applies at the temporary injunction

stage. *Alston v. Ball*, 93 S.C. 553, 553, 77 S.E. 727, 728 (1913).

II. The trial court's injunction was controlled by an error of law, namely that it did not have to consider the merits of Plaintiffs' constitutional attack on Ordinance No. 4869 before enjoining that ordinance.

The trial court did not identify any part of Ordinance No. 4869 that was likely invalid or unconstitutional. Nor could it have, as the Ordinance merely added a definition of "semi-nudity," and adult business laws employing that same definition have been upheld as constitutional on numerous occasions. *MJJG Rest., LLC v. Horry Cty.*, 102 F. Supp. 3d 770, 778 n.6, 792 (D.S.C. 2015); *Richland Bookmart, Inc. v. Knox Cty.*, 555 F.3d 512, 528-31 (6th Cir. 2009); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728, 741 (Ga. 2015); *Keepers, Inc. v. City of Milford*, 944 F. Supp. 2d 129 (D. Conn. 2013); *Ocello v. Koster*, 354 S.W.3d 187 (Mo. 2011); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 294-95 (6th Cir. 2008).

Rather, the trial court explicitly refused to engage the merits of Plaintiffs' constitutional challenges at all, but still enjoined Ordinance No. 4869. In doing so, it abused its discretion.

In a constitutional case, entitlement to a temporary injunction turns on the movant showing a likelihood that it will succeed on the merits of its constitutional claim. *Harkins, supra*. If the movant fails to make such a showing, then he cannot show irreparable harm because there is no harm in obeying a valid law. Likewise, there is no need to examine the adequacy of remedies at law (e.g., damages), because one is not entitled to damages for enforcement of a valid law.

Here, the trial court stated that its decision on likelihood of success on the merits "is based solely on the moving party's alleged facts without regard to the ultimate merits of the case." (Injunction Order at 5.) But the trial court did not even *identify* what alleged facts he was relying on, as required by Rule 65(d), SCRPC (requiring every injunction order to "set forth the reasons for its issuance"). Moreover, a legislative enactment's presumption of constitutionality trumps conclusory allegations and Plaintiffs' invocation of the "free speech" label.

A. The trial court erred in finding that Plaintiffs had met their burden of showing likelihood of success on the merits of their constitutional claim.

The trial judge emphasized that he was not going to engage the merits in considering Plaintiffs' motion for temporary injunction. (Hrg. Tr. 34:13-15; Injunction Order at 5.) But governing law *required* the judge to consider the merits of Plaintiffs' constitutional challenges, even at the temporary injunction stage.

When a party brings suit alleging the unconstitutionality of a statute, the trial court must make a preliminary resolution on the merits in order to grant or deny a temporary injunction:

When a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate determination of the case on the merits. However, when a plaintiff's prima facie case depends on an allegation that a statute is unconstitutional, the trial judge must consider the matter in determining the reasonable necessity for a temporary injunction.

Curtis v. State, 345 S.C. 557, 576-77, 549 S.E.2d 591, 601 (2001).

"While a judge, at chambers, cannot *finally decide* anything as to the merits, he can and ought to look into the merits, whether they present issues of law or fact, and consider them to the extent necessary to enable him to exercise his discretion wisely." *Alston v. Ball*, 93 S.C. 553, 77 S.E. 727, 727-28 (1913). For "even if the complaint states a cause of action for injunction, a temporary injunction should not follow automatically," *id.* at 728, because "the court should consider the showing made in opposition thereto, and must determine, *in view of all the circumstances* (italics added), whether an injunction is reasonably essential to protect the legal right of the plaintiffs pending the litigation, subject to review by this court." *Id.* (quoting *Crawford v. Lumber Co.*, 77 S.C. 81, 57 S.E. 670 (1907)). Because "[t]he question is one of law, in which the presumption is in favor of the validity of the statute," the reviewing court "must review the constitutional question." *Id.* (quoting *Hutchison v. York*, 86 S.C. 405, 68 S.E. 578 (1910)).

Here, Plaintiffs' prima facie case depends on an allegation that Ordinance No. 4869 is

unconstitutional. (Compl. at 14 (“Count II – Declaratory and Injunctive Relief – Ordinance 4869 Violates Plaintiffs’ Free Speech Rights”).) Thus, the trial court should have considered the merits of the constitutional claim in order to determine likelihood of success on the merits, a prerequisite to temporary injunctive relief. *Curtis*, 345 S.C. at 570 (“Because Curtis does not establish an infringement of a constitutional right, the trial court was correct in holding he is not likely to succeed on the merits of the following constitutional challenges.”); *id.* at 577 (“[I]t was proper for the trial judge to consider the merits because Curtis’ prima facie case depended on an allegation that section 16-13-470 was unconstitutional.”)

Because the trial court enjoined Ordinance No. 4869 without identifying any constitutional defect as to which Plaintiffs’ had demonstrated a likelihood of success on the merits, the injunction should be reversed for this reason alone.

But even if the trial court had engaged the merits, there would have been no basis for enjoining Ordinance No. 4869.

There is no allegation that the ordinance was not duly adopted, nor that the County Council was somehow prohibited by law or a court order from adopting it. As noted above, the definition that Ordinance No. 4869 added to Ordinance No. 2673 has repeatedly withstood constitutional challenge. *See, e.g., Sensations*, 526 F.3d at 294-95; *MJG Rest.*, 102 F. Supp. 3d at 778 n.6, 792; *Richland Bookmart*, 555 F.3d 512 at 528-31.

Further, the South Carolina Supreme Court has already rejected challenges to the County’s location regulations, which have not changed since they were adopted via Ordinance No. 2673. In *Harkins*, the Court held that nine sites in Greenville County’s S-1 district constituted “more than enough” sites “where the six Adult Businesses could relocate.” 340 S.C. at 621. Now there are 89 sites legally available in that district, along with thousands more in other portions of the County.

(Hrg. Ex. 19, Hanning Aff.)

In *Harkins* and numerous other cases, the Court has upheld adult business ordinances as valid time, place, and manner regulations that served the content-neutral, significant government interest in preventing the negative secondary effects of adult businesses, while allowing adequate alternative sites where such businesses could operate. See, e.g., *Centaur, Inc. v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (1990); *Rothschild v. Richland County Bd. of Adjustment*, 309 S.C. 194, 420 S.E.2d 853 (1992). These decisions rejected arguments (like those asserted here) about the “commercial viability” of alternative sites and the timing and alleged legislative motives for an ordinance’s adoption. *Rothschild*, 309 S.C. at 198 (rejecting arguments about commercial viability of alternative sites), *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146 (4th Cir. 1991) (rejecting commercial viability, timing, and motive arguments); *Cricket Store 17, L.L.C. v. City of Columbia*, 97 F. Supp. 3d 737, 746-47 (D.S.C. 2015), *aff’d*, 676 F. App’x 162, 165 (4th Cir. 2017) (same).

One final, irrefutable reason mandates reversal of the order below. The Supreme Court has already affirmed a *permanent injunction prohibiting a sexually oriented business from operating at this address*, 805 Frontage Road. *Greenville Cty. v. Kenwood Enters., Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003). The trial court’s order effectively undoes that Supreme Court ruling and affirmatively allows a sexually oriented business to operate in a prohibited location, too close to residences, a church, and a child care facility. (Hrg. Ex. 19, Hanning Aff. at 1, ¶ 4.)

B. Plaintiffs did not demonstrate irreparable harm because obeying Ordinance No. 4869 does not violate their constitutional rights.

The trial court found that Plaintiffs based on the oft-repeated rule that “[t]he loss of First Amendment freedoms constitutes irreparable injury as a matter of law.” (Injunction Order at 3 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This is true, but stating the rule only begs the

question of the whether Ordinance No. 4869 violates the First Amendment. *Id.* In light of the absence of any demonstration that the ordinance is unconstitutional, Plaintiff's claim is defeated by the principle set forth in *Harkins*: "statutes are to be construed in favor of constitutionality, and the court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made." 340 S.C. at 602, 533 S.E.2d at 893.

Here, Ordinance No. 4869 does not violate the First Amendment, and the trial court gave no analysis to the contrary. *Alston v. Ball*, 93 S.C. 553, 77 S.E. 727, 728 (1913) (holding that if unconstitutionality of the law is not established, then "the necessity [for a temporary injunction] is not made to appear"); *cf. WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) ("[A] plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of plaintiff's First Amendment claim.").

Because Plaintiffs failed to establish a likelihood of success on their constitutional claim, they failed to carry their burden to show irreparable harm. There is no harm in obeying a valid law. Instead of operating a sexually oriented business in an unlawful location, Plaintiffs could simply operate a restaurant, consistent with the certificate of occupancy that they sought and obtained. It is Greenville County that is harmed by an injunction against a presumptively valid statute targeting negative secondary effects. *Harkins*, 340 S.C. at 621; *accord Maryland v. King*, 567 U.S. 1301, 1301 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

C. Plaintiffs do not lack an adequate remedy at law because there is no need for any remedy against Ordinance No. 4869.

The trial court's "inadequate remedy" discussion merely confirms that the court's injunction is based solely on its erroneous conclusion about likelihood of success on the merits. The trial court stated that "Plaintiffs have no adequate remedy at law because Defendants' efforts to regulate

Plaintiffs' business threaten Plaintiffs with the loss of constitutionally protected rights and freedoms." (Injunction Order at 5.) But as shown above, Plaintiffs did not demonstrate that Ordinance No. 4869 is unconstitutional, and thus did not show that its enforcement would cause a loss of constitutional rights. The Injunction Order's conclusion flows directly from its flawed premise.

Finally, Plaintiffs have not cited any authority holding that money damages would be insufficient to remedy any lost profits that Plaintiffs might suffer from having to operate a restaurant, instead of a sexually oriented business, at the Property. And any economic injury, of course, would be wholly self-inflicted—the *Kenwood Enterprises* permanent injunction was entered years ago, and the County Attorney reminded Greenville Bistro about the location restrictions well before it opened. So even if Plaintiffs could, under some theory, show that enforcement is improper, they give no reason why money damages would be inadequate.

For this additional reason, the Injunction Order is flawed.

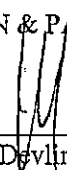
Conclusion

The County's regulations have prohibited sexually oriented businesses at 805 Frontage Road for more than twenty years. The County obtained a permanent injunction against the prior tenant that enforced the location regulation. Greenville Bistro obtained permission to open a restaurant *only*, but then blatantly opened a sexually oriented business after being warned by the County that it was against the law. The trial court countenanced Greenville Bistro's continued unlawful operation by enjoining Ordinance No. 4869 without giving a reason that it was invalid or unconstitutional. Its decision to do so is an abuse of discretion.

For all these reasons, this Court should reverse the trial court's injunction prohibiting the enforcement of Greenville County Ordinance No. 4869.

Respectfully submitted,

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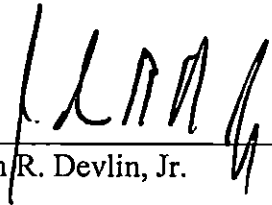
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Certificate of Compliance with Rule 210(g)

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



John R. Devlin, Jr.

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