

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.

RECORD ON APPEAL

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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

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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-_____

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

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SUBJECT TO ADMISSION PRO HAC VICE

xSTATE 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' MOTION FOR
TEMPORARY INJUNCTION**

Plaintiffs GREENVILLE BISTRO, LLC, d/b/a "*Buck's Racks & Ribs*," and FRONTAGE ROAD ASSOCIATES, INC., pursuant to Rule 65, S.C.R.C.P., move this Court for the entry of a Temporary Injunction, temporarily enjoining Defendants Greenville County and Will Lewis from violating the Consent Orders filed as Exhibits A and B to the Complaint herein, or, in any way, enforcing or attempting to enforce, Chapter 2.5 of the Greenville County Code against Plaintiffs, and as ground wherefore would show:

1. The parties are bound by the Consent Orders entered in 2002 and 2015, which Orders specifically apply to successors in interest to the original parties.
2. 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.
3. This Court has also found that Greenville Bistro wishes to operate "a similar business as Platinum Plus in the [same] location," (*ibid.*).
4. 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 presenting any form of entertainment at the site, thereby silencing multiple forms of protected speech.

5. Defendants have also unlawfully attempted to apply Chapter 2.5 of the Greenville County Code to Plaintiffs' business (Complaint, Exhibits F and I), when this Chapter has never applied to the business at the location, including the similar business Plaintiffs seek to operate.

6. A Temporary Injunction is necessary to preserve the *status quo ante*: the last non-discordant status between the parties which, in this case, was Plaintiffs complying with the 2017 Order of this Court and operating a "similar business" at the subject location.

7. Absent a Temporary Injunction, Plaintiffs and the public at large will suffer irreparable harm in that the silencing of protected speech *de jure* constitutes irreparable harm.

8. It is clear from the Complaint herein, and its attached Exhibits, that Plaintiffs have a substantial likelihood of success on the merits, primarily because all actions of Defendants complained of are in violation of multiple Orders of this Court.

9. Plaintiffs have no adequate remedy at law because, as a matter of law, monetary damages are inadequate compensation for the silencing of protected speech.

10. It is in the public interest to grant the requested Temporary Injunction because the preservation of constitutional rights and compliance with lawful orders of the courts always advance the public interest.

WHEREFORE, Plaintiffs respectfully move this Court to enter a Temporary Injunction pending a trial on the merits of this matter, with the Temporary Injunction enjoining Defendants from:

- a. Violating the 2002, 2015 and 2017 Orders of this Court;
- b. Interfering with Plaintiffs' ability to operate a business similar to the

- business previously operating on the site;
- c. Taking any enforcement action to silence any form of speech on the subject property; and
 - d. Enforcing, or attempting to enforce Chapter 2.5 of the Greenville County Code against Plaintiffs.

BANNISTER, WYATT & STALVEY, LLC

Dated: May 23, 2017

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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 Mohnney 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 Mohnney directly to reiterate that neither a sexually oriented business nor a nightclub is permitted at 805 Frontage Road. (February 24, Tollison Letter to Mohnney, 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 Mohny, 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.

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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' RESPONSE TO
	)	PLAINTIFFS' 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"), in opposition to Plaintiffs' Motion for Temporary Injunction, would provide the Court with the following memorandum of law.

Plaintiffs' Motion for Temporary Injunction is Without Merit

Unlike a governmental entity, which is entitled to an injunction upon showing that a violation of law is occurring, a private litigant bears a higher standard of proof. Here, the Plaintiffs bear the burden of showing entitlement to an injunction, and the complaint must allege facts sufficient to constitute a cause of action for injunction. *FOC Lawshe Ltd. Partnership v. Int'l Paper Co.*, 352 S.C. 408, 416 (Ct. App. 2002); *Peek v. Spartanburg Reg'l Health Sys.*, 367 S.C. 450, 454 (Ct. App. 2005). Specifically, to "establish a cause for injunction, the plaintiff must show '(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the

merits of the litigation; and (3) there is an inadequate remedy at law.” *Peek*, 367 S.C. at 454-55 (internal citation omitted).

A. Defendants’ enforcement of its SOB Ordinance and Zoning Ordinance against Greenville Bistro does not “violate” the 2002 Order.

Plaintiffs obtained a certificate of use and occupancy for a restaurant only. (Compl. Ex. F.) They can continue that use—a restaurant—unabated. But they cannot operate a *sexually oriented business* at 805 Frontage Road. Plaintiffs’ complaint has two counts: “(I) Violation of the 2002 Order,” and “(II) Ordinance 4869 Violates Plaintiffs’ Free Speech Rights.” Nothing in the referenced consent order gives Plaintiffs a right to operate a sexually oriented business at the site. County ordinances expressly prohibit that, as do the consent orders.

Moreover, nothing in the 2002 Order prohibited the Greenville County Council from adopting new legislation, such as Ordinance No. 4869. Nor does that Order prohibit the County from enforcing its Zoning Ordinance, which prohibits nightclubs in the S-1 zoning district. Finally, the new definition of semi-nudity in Ordinance No. 4869 is substantially similar to the definition of “nudity” in Ordinance No. 2673 that the Supreme Court has already upheld. In any event, the precise definition of “semi-nudity” has been upheld in several cases.

1. The 2002 Order was based on a permanent injunction against Platinum Plus because 805 Frontage Road is a prohibited location for a sexually oriented business.

The 2002 Order was prohibitory. It was a consent order *against* certain sexually oriented businesses, entered after a permanent injunction had been entered by the Court. The clubs “face[d] 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 in violation of Ordinance 2673.” (Compl. Ex. A at 1 (emphasis added).)

The 2002 Order emphasized that, because “[s]exually oriented businesses are also prohibited from locating within 1,500 feet of certain designated uses,” at “their present locations, Plaintiffs’ businesses are in violation of the locational requirements set forth in” Ordinance 2673. (*Id.* at 2.) The parties in the prior case reached an agreement about the meaning of “state of nudity” as that term was then—“currently defined in Greenville County Ordinance 2673.” (*Id.*)

Under Ordinance 2673 (online version attached as Exhibit 1 hereto), an “adult cabaret”—the type of sexually oriented business the prior Plaintiffs qualified as—was defined as follows:

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

- (1) Persons who appear in a state of nudity; or
- (2) Live performances which are characterized by the exposure of “specified anatomical areas” or by “specified sexual activities”; or
- (3) 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.”

(Ex. 1 at 2.)

The 2002 Order set forth the parties’ understanding as to the meaning of the term “state of nudity,” and also prohibited any “specified sexual activities” or display of “specified anatomical areas” on the premises of Platinum Plus and the other clubs involved in that case.

Significantly, the prohibitions in the 2002 Order were binding only on those plaintiffs’ successors and assigns, which were delineated in the Order those to whom the plaintiff “transfer their interest in their businesses.” (Compl. Ex. A at 3.) The order states: “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.* at 3.)

Nothing in the 2002 Order purported to limit the Greenville County Council from passing legislation or adopting amendments to the County’s sexually oriented business regulations. Nor

does that Order limit the County's authority to enforce its Zoning Ordinance's prohibition against nightclubs in the S-1 district. Thus, Plaintiffs' argument is no defense to the County's enforcement efforts.

2. **The February 10, 2017 Order releasing the property at 805 Frontage Road shows—indeed, is premised upon—the fact that Greenville Bistro is not a “successor or assign” of Platinum Plus’s business.**

On December 5, 2016, the property owner (Frontage Road Associates, Inc.) filed a motion “requesting that the property at 805 Frontage Road *be released from all of the Orders* pertaining to Elephant, Inc. and Kenwood Gaines.” (Feb. 10, 2017 Order at 3 (emphasis added).)

To support the argument that Greenville Bistro was wholly separate from the prior businesses that occupied the property, Frontage Road submitted the affidavit of Jason C. Mohney, which alleged that Greenville Bistro “has no connection with Elephant, Inc., Kenwood Gaines, or the business named Platinum Plus.” (*Id.*)

Thus, it is clear from the pleadings and attachments thereto that Greenville Bistro is not an entity to whom Platinum Plus and Kenwood Gaines have “transfer[red] their interest in their business” as required by the 2002 Order.

In short, the 2002 Order did not benefit, but rather burdened, the clubs, and Greenville Bistro is not a successor within the meaning of the 2002 Order. The February 10, 2017 Order makes this even more clear when it states that the Court's prior orders (including the 2015 and 2016 orders) “appear to have effectively abated the nuisance,” and that the Court was “without authority to continue or impose the previously ordered ongoing requirements, which were directed personally to Gaines and Elephant, Inc., on a new tenant.” (Feb. 10, 2017 Order at 3-4.)

3. **The February 10, 2017 Order warns that the requirements of the prior orders could be reinstated, and that an adult entertainment establishment is prohibited at the site.**

The Court's 2017 Order cautioned, however, that if a connection between Greenville Bistro and the previous tenants were established, then "the State may immediately move to have all requirements reinstated." (Feb. 10, 2017 Order at 4.) Thus, it is plain that the Court considered the prior orders of no effect against Greenville Bistro, the current and unrelated tenant. But the Court cautioned that violations of the County's sexually oriented business / adult entertainment regulations would not be countenanced:

"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."

(Feb. 10, 2017 Order at 4 (emphasis added).)

The foregoing shows that Plaintiffs herein cannot prove *any* of the elements necessary for injunctive relief, let alone all three. They cannot show irreparable harm in the failure to honor the 2002 Order when Plaintiffs went to great lengths—and the Court's orders show—that the 2002 Order does not apply to or benefit them. They also cannot show a likelihood of success on the merits, because they cannot show that the 2002 Order bars enforcement of either Ordinance No. 4869 or the Greenville County Zoning Ordinance.

B. Ordinance 4896 is constitutional, and the injunction should be denied as to Count II.

Ordinance 4896, adopted in April 2017, added the phrase "or in a state of semi-nudity" to the definition of "adult cabaret," and then replaced the definition of "state of semi-nudity" with the following:

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.

(Compl. Ex. G, Ordinance 4896, at 2.)

Plaintiffs have failed to establish the invalidity of this definition in any way.

In any event, laws employing this same definition have been upheld on numerous occasions. *MJJG Restaurant, LLC v. Horry County*, 102 F. Supp. 3d 770 (D.S.C. 2015); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728 (Ga. 2015); *Ocello et al. v. Koster, Missouri Attorney General*, 354 S.W.3d 187 (Mo. 2011); *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009); *Keepers, Inc. et al. v. City of Milford, Conn.*, 944 F. Supp. 2d 129 (D. Conn. 2013).

The injunction should be denied because Plaintiffs have not demonstrated *any* likelihood of success on the merits. Instead, Plaintiffs claim that a 2002 Consent Order with a different business preempts the County's adult establishment regulations even when the Order specifically states otherwise.

Plaintiffs cannot carry their "burden of proving [the Ordinances'] unconstitutionality beyond a reasonable doubt," even at this early stage of litigation, with conclusory allegations alone. *City of Beaufort v. Baker*, 315 S.C. 146, 154 (1993). "[A] duly enacted ordinance is presumed constitutional . . . even where the ordinance allegedly violates First Amendment rights." *Id.* at 153-54.

Plaintiffs do not dispute that they are in violation of Ordinance No. 4869 or Ordinance No. 2673, and instead make bare recitations of legal claims against the County's Ordinances. These are plainly insufficient under governing law to justify any injunctive relief.

As to enforcement, police officers are fully justified to arrest persons they suspect of committing a misdemeanor. *See, e.g., Prosser v. Parsons*, 245 S.C. 493, 499 (1965) (noting that

this power derives from common law); *City of Columbia v. Brown*, 316 S.C. 432, 433 (Ct. App. 1994) (affirming constitutionality and custodial arrest of individual who violated City loitering ordinance).

Further, Plaintiffs argue that stifling their speech would cause irreparable harm and leave them without adequate remedy to engage in protected speech. But Plaintiffs' manner of engaging in that speech is against the County's laws, and there is no harm in obeying the law.

The public interest prong also favors the County. A violation of a local ordinance is presumed to be detrimental to the public interest. *County of Richland v. Simpkins*, 348 S.C. 664, 669 (Ct. App. 2002). This detriment is doubly strong in cases like this, where the regulations at issue are specifically designed to protect the public health, safety, and welfare. (See, e.g., Compl. Ex. G at 1 ("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").) Plaintiffs bear the burden to prove *all three* elements of entitlement to injunctive relief, but can show none.

Finally, pursuant to SCRCP 65(c), Plaintiffs have posted not security for a TRO in the event that the County is wrongfully enjoined from enforcing its laws. For this reason alone, Plaintiffs' motion for temporary injunction should be denied. *Id.*

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Attorneys for Defendants

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.

BANNISTER, WYATT & STALVEY, LLC

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 Mohney, 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, al 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*, 861 F. 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

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 SUBJECT TO ADMISSION
 PRO HAC VICE

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.

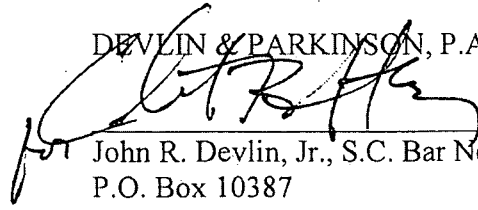
Greenville County, a Political Subdivision of the State of South Carolina,
and Will Lewis, in his Official Capacity as Sheriff of Greenville County, ... Appellants

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

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Greenville Bistro, LLC, a South Carolina Limited Liability Company,
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Greenville County, a Political Subdivision of the State of South Carolina,
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PROOF OF SERVICE

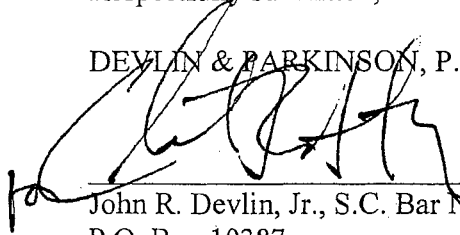
I certify that on August 15, 2017, I served the Notice of Appeal on Respondents Greenville Bistro, LLC, d/b/a Buck's Racks & Ribs, and Frontage Road Associates, Inc. by depositing a copy of the same in the United States Mail, postage prepaid, addressed to their attorneys of record, listed below:

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Attorneys for Respondents

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 Plaintiffs' 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) 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:

OSCAR W. BANNISTER, ESQ.
LUKE ANTHONY BURKE, ESQ.
LUKE CHARLES LIROT, ESQ.
Attorney for the Plaintiffs

SCOTT BERGTHOLD, ESQ.
JOHN R. DEVLIN, JR., ESQ.
Attorney for the Defendant

CHERYL A. SMITH
Circuit Court Reporter

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Certificate of 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. Mohney 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. Mohney. 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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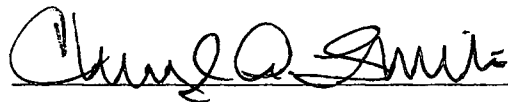
CERTIFICATE OF REPORTER

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

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. S.C.
PAUL G. WICKREPSHAW

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

R. p. 133

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, 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".

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

AK [Signature]

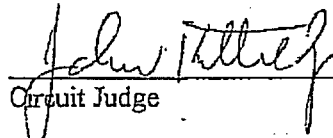
- b. A human buttock is exposed with anything less than a completely opaque covering of the genitalia and anus and a completely opaque covering over the buttocks with a minimum width of two (2) or more inches, at the sacrum. As an illustration, completely opaque "thongs", bikini bottoms, and "T-bar" 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

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.

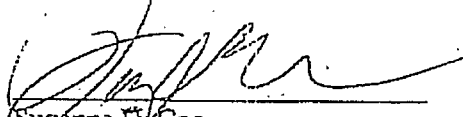
Based upon the foregoing, it is **ORDERED** that this action is dismissed without prejudice in accordance with the terms and provisions set forth hereinabove.

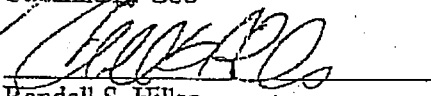
IT IS SO ORDERED.

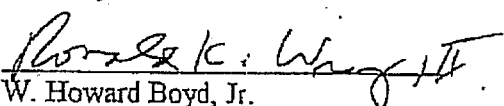

Circuit Judge

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 R. 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
R. p. 137

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:

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.

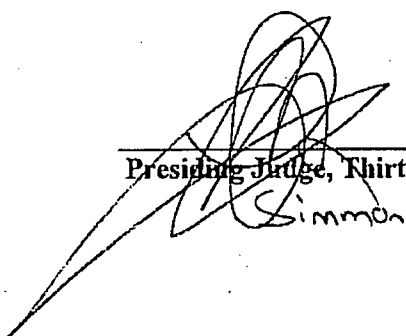


G. The recitals to this Consent Order are intended to be incorporated as a material part of this Order and the agreement of the undersigned parties.

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.

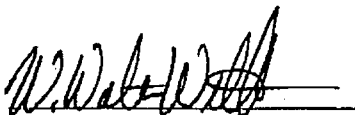
IT IS SO ORDERED.

6/3/2015
Date


Presiding Judge, Thirteenth Circuit

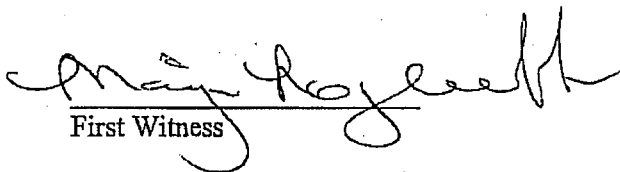
Simmons

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



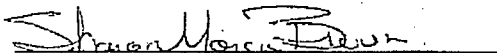
First Witness



Second Witness

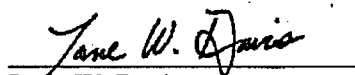
SWORN TO before me this

1 day of June, 2015.


Notary Public for South Carolina

My Commission Expires Dec 10, 2020
(SEAL)

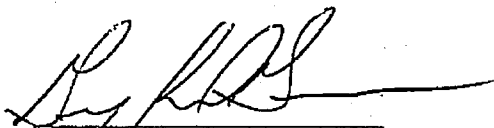
Approval and consent of counsel of record:



Lane W. Davis
Special Prosecutor, Thirteenth Judicial Circuit
Nelson Mullins Riley & Scarborough, LLP
SC Bar #68796

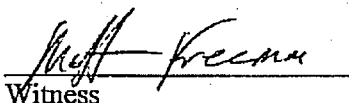
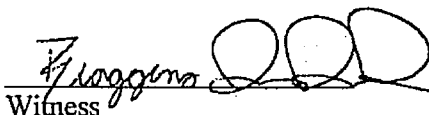


WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF
THIS ORDER:



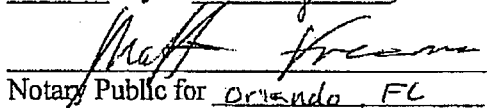
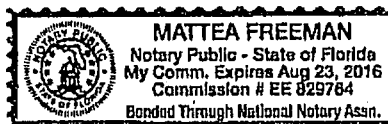
Gregory Kenwood Gaines
In his Individual Capacity

5-30-15
Date


Witness
Witness

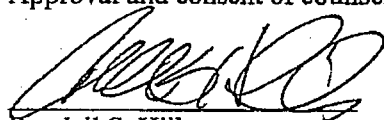
SWORN TO before me this

30th day of May, 2015.


Notary Public for Orlando, FL

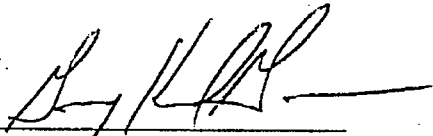
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(SEAL)

Approval and consent of counsel of record:



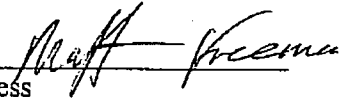
Randall S. Hiller
Randall S. Hiller, P.A.
SC Bar #2513

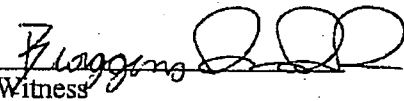
WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS ORDER:



Gregory Kenwood ("Ken Wood") Gaines
On behalf of Elephant, Inc.
As Its Sole Shareholder and Chief Executive Officer
and Authorized Signatory

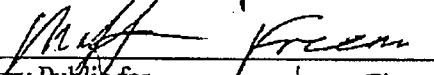
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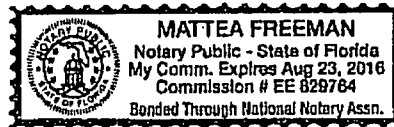

Witness


Witness

SWORN TO before me this

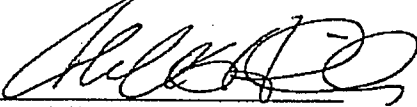
30th day of May, 2015.


Notary Public for Orlando, FL



My Commission Expires: Aug 23rd 2016
(SEAL)

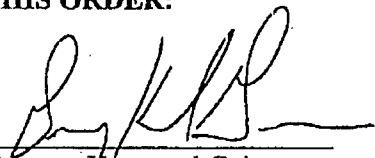
Approval and consent of counsel of record:



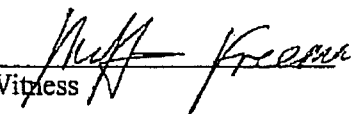
Randall S. Hiller
Randall S. Hiller, P.A.
SC Bar #2513

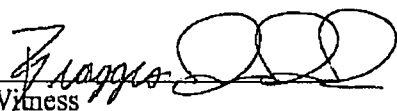
12 

WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF
THIS ORDER:


Gregory Kenwood Gaines
In his Individual Capacity

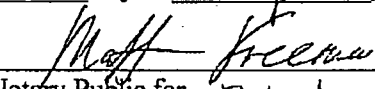
5-30-15
Date

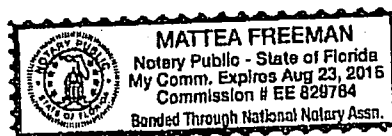

Witness


Witness

SWORN TO before me this

30th day of May, 2015.


Notary Public for Orlando, FL



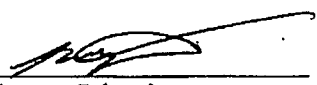
My Commission Expires: Aug 23rd 2016
(SEAL)

Approval and consent of counsel of record:

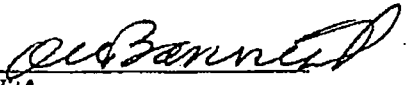

Randall S. Hiller
Randall S. Hiller, P.A.
SC Bar #2513

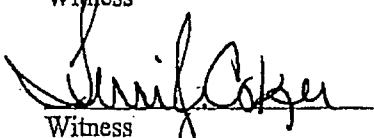


WE HEREBY CONSENT TO BE BOUND BY THE TERMS AND CONDITIONS OF
THIS ORDER:


Thomas Schweitzer
On behalf of Frontage Road & Associates, Inc.
As its President and Authorized Signatory

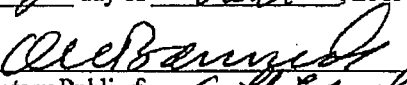
June 2, 2015
Date


Witness


Witness

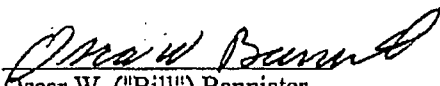
SWORN TO before me this

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.

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



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.

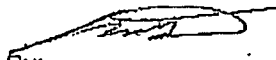
4. Except as specifically provided in this Amendment, the terms and conditions of the Lease shall remain in full force and effect.

[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.

LANDLORD:

FRONTAGE ROAD ASSOCIATES, INC.

 PB 6

By:
Thomas Schweltzer
Its President

TENANT:

GREENVILLE BISTRO, LLC

By:
Jason C. Mohnhey
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

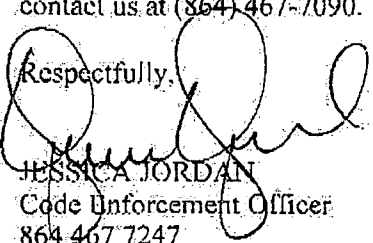
An inspection of the above-referenced property conducted on **MAY 12, 2017** revealed that you are in violation of The Code of the County of Greenville South Carolina. Please see the following page for details concerning your violation(s).

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
R. p. 171

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.
END

CORRECTIVE ACTION REQUIRED :

Correct the violation(s) by ceasing to use the property for any use not specifically allowed in this district.

END

GREENVILLE
SOUTH CAROLINA
GREENVILLE ROAD
GREENVILLE, SC 29615

RE CASE NO:
TAX MAP NO:
EDUCATION OF PROPERTY
CORRECTION BEFORE

17-00001976
05-13-01-01-001-03
805 FRONTAGE RD
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 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,

TAMARA JORDAN
County Enforcement Officer

VIOLATION DETAIL

NUMBER 17-90001976
PROPERTY ADDRESS 605 FRONTAGE RD

VIOLATION: PERMITTED USES
DESCRIPTION: ZONING ORD SECTION 5:1
LOCATION:

QUANTITY:
DATE: 5/12/17

NARRATIVE

THE CERTIFICATE OF OCCUPANCY ISSUED IS FOR A RESTAURANT. IT DOES NOT HAVE LIVE ENTERTAINMENT. ALL PATRONS/PERSONNEL 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

5:1 PERMITTED USES, SPECIAL EXCEPTIONS AND CONDITIONAL USES
Principle uses shall be allowed within the base zoning districts of this ordinance in accordance with table 5.1.

~~REQUIRED ACTION~~

Correct the violation(s) by ceasing to use the property for any use not specifically allowed in this district.

COUNTY OF GREENVILLE
BUILDING SAFETY DIVISION
301 UNIVERSITY RIDGE STE 4100
GREENVILLE SC 29601

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
Christopher 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

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.

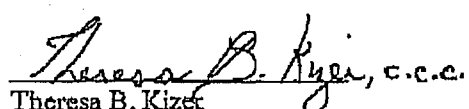
Section 3. Severability. Severability is intended throughout and within the provisions of this Ordinance. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, then that decision shall not affect the validity of the remaining portions of this Ordinance.

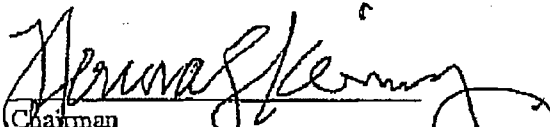
Section 4. Repeal. All ordinances or parts of ordinances in conflict with this Ordinance, or inconsistent with its provisions, are hereby repealed or superseded to the extent necessary to give this Ordinance full force and effect.

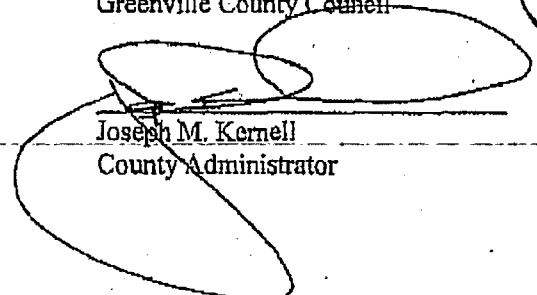
Section 5. Effective Date. This Ordinance is effective upon adoption and is subject to the pending ordinance doctrine and is enforceable upon its introduction and notice of Public Hearing.

DONE IN REGULAR MEETING THIS 21 DAY OF February, 2017.

ATTEST:


Theresa B. Kizer
Clerk to Council


Chairman
Greenville County Council


Joseph M. Kernell
County Administrator

Form 6-428
Rev. 02/2014

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA
VERSUS

FIRST NAME Raul		MIDDLE NAME "Tony"		LAST NAME Kabaleti	
STREET 516 E. Ave J					
CITY Grand Prairie		STATE TX		ZIP CODE 75050	
DL STATE TX		DRIVER'S LICENSE NO. 3584777		CLASS C	
FACE W	SEX M	BIRTH DATE 11/29/86	HGT. 5'11"	WGT. 210	HAIR GRAY
VEH. LIC. NO.	DATE OF VEH. REG.	YEAR	MAKE	MODEL	TYPE
VEHICLE OWNER FIRST NAME Wade Hampton					
OWNER STREET Summary		CITY Taylor		STATE SC	
YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT					
NAME OF TRIAL COURT Summary		STREET 2801 Wade Hampton Blvd		CITY Taylor	
DATE OF TRIAL 6/21/17		TIME OF TRIAL 1400		STATE SC	
VIOLATION SECTION NO. CO 4869		VIOLATION - COURT APPEARANCE REQUIRED YES NO Adult Entertainment Reg		YES NO	
DATE OF VIOLATION 5/11/17		TIME OF VIOLATION 1935		B.A. LEVEL 729	
VIOLATION LOCATION 805 Frontage Rd		CITY Greenville		COUNTY 23	
NAME AND RANK OF ARRESTING OFFICER B. Hunnicutt #1336		OFFICER'S NUMBER 729		SECURITY NUMBER 7246-3392	
BAIL DEPOSITED None		DATE OF ARREST 5/11/17		BOND AMOUNT REQUESTED	
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 NOLO CONTENDERE, 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		TICKET# 5102P0052785			

Form 6-428
Rev. 02/2014

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA
VERSUS

FIRST NAME Brooke		MIDDLE NAME Miriam		LAST NAME Duhon	
STREET 6918 Mazy Lane					
CITY Rowlett		STATE TX		ZIP CODE 75080	
DL STATE TX		DRIVER'S LICENSE NO. 41543999		CLASS ID	
FACE W	SEX F	BIRTH DATE 04/15/93	HGT. 5'02"	WGT. 130	HAIR BLK
VEH. LIC. NO.	DATE OF VEH. REG.	YEAR	MAKE	MODEL	TYPE
VEHICLE OWNER FIRST NAME Wade Hampton					
OWNER STREET Summary		CITY Taylor		STATE SC	
YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT					
NAME OF TRIAL COURT Summary		STREET 2801 Wade Hampton Blvd		CITY Taylor	
DATE OF TRIAL 6/21/17		TIME OF TRIAL 1400		STATE SC	
VIOLATION SECTION NO. CO 4869		VIOLATION - COURT APPEARANCE REQUIRED YES NO Adult Entertainment Reg		YES NO	
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NAME AND RANK OF ARRESTING OFFICER B. Hunnicutt #1336		OFFICER'S NUMBER 729		SECURITY NUMBER 7246-3392	
BAIL DEPOSITED None		DATE OF ARREST 5/11/17		BOND AMOUNT REQUESTED	
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SEE IMPORTANT INFORMATION ON THE REVERSE SIDE OF THIS TICKET.					
VIOLATOR'S COPY		TICKET# 5102P0052784			

AN ORDINANCE

Exhibit 1

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

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

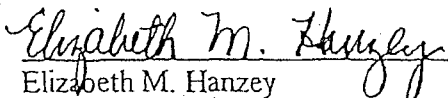
This ordinance shall take effect upon the date of its adoption.

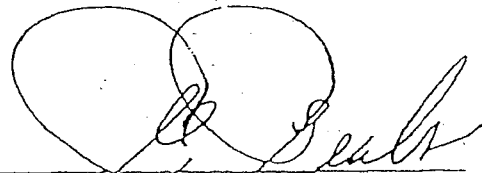
DONE IN REGULAR MEETING THIS 7th DAY OF February, 1995.



Chairman,
Greenville County Council

ATTEST:


Elizabeth M. Hanzey
Clerk to Council



Gerald Seals
County Administrator

J Bueriss @ Greenville County - ORG

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

CASE NO.:

00-CP-23-4752
00-CP-23-4645
00 CP 23 4752

Exhibit 2

Greenville County

Kenwood Enterprises Inc
d/b/a Platinum Plus
H&M d/b/a Neatbreaker
Pretty Woman Inc.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this _____ day of _____, 2001.

Court Reporter:

See Attached Order

PRESIDING JUDGE -

This judgment was entered on the 19 day of January 2001, and a copy mailed first class this 19 day of January 2001 to attorneys of record or to parties (when appearing pro se) as follows:

Bon Gray

ATTORNEY(S) FOR THE PLAINTIFF(S)

Suzanne Cole
Randy Miller
Robbie Childs

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Paul B. Wickensimer - Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Greenville County,

Plaintiff,

v.

Kenwood Enterprises, Inc. and Elephant,
Inc., d/b/a Platinum Plus, and Ken Wood,

Defendants.

Greenville County,

Plaintiff,

v.

HH& M, Inc., and First Five Management,
Inc., d/b/a Heartbreakers,

Defendant.

Greenville County,

Plaintiff,

v.

Pretty Woman, Inc.

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No. 2000-CP-23-4645

FILED
CLERK OF COURT
GREENVILLE
S.C.
JUN 19 11:14
ORDER

C.A. No. 2000-CP-23-4751

C.A. No. 2000-CP-23-4752

This matter is before the Court on Plaintiff's motion for summary judgment. A hearing on this matter was held before me on January 3, 2001, attended by counsel for all parties. Prior to the hearing, the parties provided the Court with memoranda and other materials supporting their respective positions. Additional documents, depositions and other materials were made a part of the record at the hearing.

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The Court has carefully considered the extensive record before it and all matters proper for consideration under Rule 56 of the South Carolina Rules of Civil Procedure. Based upon the Court's review and analysis of this extensive record and the arguments of the parties at the hearing and in their briefs, the Court finds that there is no dispute as to any genuine issue of material fact and that Plaintiff is entitled to judgment in its favor as a matter of law. Accordingly, for the reasons set forth below, Plaintiff's motion for summary judgment is hereby granted and judgment is entered in Plaintiff's favor.

PLEADINGS AND BACKGROUND

Greenville County ("County") initiated these three actions as Plaintiff alleging claims for injunctive relief against Defendants. County alleges that Defendants are the owners and/or operators of "sexually oriented businesses" as defined in Greenville County Ordinance 2673. Ordinance 2673, which was adopted by Greenville County Council on February 7, 1995, regulates the time, place and manner of operation of sexually-oriented businesses. In its complaints, County seeks an order of this Court granting a mandatory injunction against Defendants requiring Defendants to cease their operations in violation of the Ordinance and requiring Defendants to comply with the Ordinance.

Defendants filed answers in which they denied County is entitled to the injunctive relief it seeks and asserted various affirmative defenses. Among other defenses, Defendants contended that the Ordinance is unconstitutional and County is not entitled to enforce it. Defendants also asserted counterclaims against County. County timely filed its replies to Defendants' counterclaims denying liability on the counterclaims and asserting affirmative defenses to Defendants' counterclaims.

By order of the Honorable Larry R. Patterson, Chief Administrative Judge, these cases were consolidated for purposes of discovery and trial, designated as complex cases, and assigned to me for further handling. Judge Patterson's order also established a scheduling order to govern these cases, including the establishment of time deadlines for the completion of discovery and the filing of motions. County timely filed a motion for summary judgment in accordance with the deadline established in the scheduling order. None of the Defendants timely filed motions for summary judgment. Although Defendant First Five Management filed a motion for summary judgment a few days before the hearing on Plaintiff's motion for summary judgment, County objected to the Court's consideration of the motion because it was not timely filed and because counsel for County had not been served with the motion.¹ However, although not timely filed, I have nevertheless considered First Five's motion. In light of my findings of fact and conclusions of law set forth herein, First Five's motion is denied.

FINDINGS OF FACT

On February 7, 1995, Greenville County Council enacted Greenville County Ordinance 2673 (the "Ordinance"). Among other provisions, the Ordinance regulates the time, place and manner of operation of sexually oriented businesses such as those operated by Defendants. At the outset of the hearing held before me, Defendants stipulated that their businesses are "sexually oriented businesses" as defined in the Ordinance.

Prior to enacting the Ordinance, Greenville County Council reviewed studies, detailed reports and summaries of studies from numerous cities that had researched the

¹ Counsel did, however, receive the brief filed by First Five in support of its motion.

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impact sexually oriented businesses have on a community.² These studies document that sexually oriented businesses generate negative secondary effects such as increased crime, decrease in property values, and decline in the quality of life for residents in areas where sexually oriented businesses are located. Greenville County Council enacted the Ordinance as a means of combating these secondary effects.

The initial draft of the Ordinance reflects that Council initially considered adopting the Ordinance as an amendment to the Greenville County Zoning Ordinance. (Exhibit 8). In the draft, sexually oriented businesses were to be located either in a designated S-1 or I-1 district. However, like many counties in South Carolina, the unincorporated areas of Greenville County are not completely zoned. In fact, approximately 28 to 37 percent of the approximately 795 square miles of land in Greenville County is unzoned. (Nomikos depo., pp. 85; 91) Thus, when members of the Greenville County Planning Commission staff reviewed the draft of the Ordinance and in meetings to discuss the Ordinance, staff expressed concern with the impact on the unzoned areas of the County if the Ordinance did not apply Countywide. Planning Commission staff therefore recommended that the Ordinance be revised to apply Countywide and not be limited to the zoned areas. Accordingly, the Ordinance was revised to add section 12(i), which provides that with the exception of section 12(a),³ the provisions of the Ordinance apply in the unzoned areas of the County.

² A listing of the studies and summaries is set forth in the preamble to the Ordinance and are a part of the record before me as Exhibit 1.

³ 12(a) requires that sexually oriented business located in the zoned parts of the County be located within a S-1 district.

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The record is clear that the Ordinance was sent to the Greenville County Planning Commission prior to adoption and that Planning Commission staff was involved with the enactment of the Ordinance. This included staff reviewing the drafts of the Ordinance, making comments and suggested revisions on the drafts, obtaining sample ordinances from other local governments and meeting to discuss the Ordinance. (Owings deposition: Exhibits 8, 27 and 30). Indeed, before the first draft of the Ordinance was even prepared, the Greenville County Attorney had asked for assistance and input from the Executive Director of the Planning Commission with regard to enacting the Ordinance. (Exhibits 25 and 26). The Planning Commission staff also advertised the public hearing on the Ordinance and attended the public hearing. (Exhibits 21 and 32). At the behest of the Planning Commission staff, Greenville County Council conducted a public workshop on the Ordinance between second and third reading that was attended by Planning Commission staff and others interested in the Ordinance, including representatives of sexually oriented businesses operating in Greenville County who were opposed to the Ordinance. Planning Commission staff recommended approval of the Ordinance, but with the recommendation that the workshop conducted by County Council be held. (Exhibits 29 and 33).

As noted above, as finally adopted by Council, the Ordinance did not become a part of the Greenville County Zoning Ordinance. Rather, the Ordinance is a stand-alone ordinance that applies countywide in both the zoned and unzoned areas of the County. Pursuant to the Ordinance, sexually oriented businesses may only operate in the unzoned areas of the County or in a designated S-1 district. The Ordinance also provides that sexually oriented businesses may not be located within 1,500 feet of any of the following:

(a) a church; (b) a public or private elementary or secondary school; (c) the boundary of a residential district; (d) a public park adjacent to any residential district; (e) the property line of a lot devoted primarily to residential use; (f) a continuous care retirement center or nursing care facility; (g) a family oriented recreation facility; (h) a day nursery or licensed child care facility; or (i) a public library.

Defendants stipulated at the motion hearing that they are owners and/or operators of a "sexually oriented business" as defined in the Ordinance. Defendants Kenwood Enterprises, Elephant, Inc. and Ken Wood operate Platinum Plus ("Platinum"); Defendants First Five Management, Inc. and HH & M, Inc. operate Heartbreakers; Defendant Pretty Woman, Inc. operates Diamonds.⁴ Platinum, Heartbreakers and Diamonds all offer adult-entertainment in the form of nude or semi-nude dancing.

I find and conclude based upon the record before me that none of the Defendants' businesses comply with the location restrictions set forth in the Ordinance. Diamonds admits in its answer and admitted at the hearing on County's motion for summary judgment that it does not meet the requirements of being 1,500 feet from the delineated uses set forth in the Ordinance and it is not in an S1 zone or unzoned area of the County. (Diamonds Answer, par. 16). Thus, there is no dispute on this issue as it pertains to Diamonds. Although Platinum and Heartbreakers denied in their pleadings that they are in violation of the location provisions in Section 12, I find and conclude that there is no genuine issue of material fact on this issue and that County has established this issue with its submissions in support of its motion for summary judgment. Specifically, County submitted surveys and an affidavit of its expert witness, Thomas A. Sherard,

⁴ For ease of reference, Defendants will hereinafter be referred to by the name of the business they operate.

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demonstrating that while both Platinum and Heartbreakers are located in an S-1 district, both are within 1,500 feet of the delineated uses set out in Section 12. 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. Heartbreakers, which is located in the center of a residential subdivision, is within a few hundred feet of numerous lots devoted primarily to residential use. (Sherard Affidavit and Exhibits 4, 5 and 38).

Diamonds is the only Defendant that was in operation at the time Greenville County Council enacted the Ordinance in 1995. Because Diamonds was open and operating at the time Greenville County Council enacted Ordinance 2673, Diamonds was provided with written notice that its location was not in compliance with the Ordinance and that the Ordinance contained a one-year amortization period, after which Diamonds would have to relocate or cease its operation as a sexually oriented business. (Exhibits 22 and 23). However, because of injunctions entered by the trial court in connection with earlier litigation against Greenville County which ultimately culminated in the Supreme Court's decision in Harkins v. Greenville County, Op. No. 25112 (refiled June 12, 2000) (Shearhouse Adv. Sheet No. 24 at 14), Greenville County could not enforce the Ordinance against Diamonds until the substituted opinion in Harkins clarified that only the licensing provisions had been held unconstitutional by the Court and the County could enforce the remaining provisions of the Ordinance.

Neither Platinum nor Heartbreakers, however, were operating at the time Greenville County enacted Ordinance 2673. Platinum, however, was aware of the Ordinance long before it opened for business. Platinum also knew that it could not operate a sexually

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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. (Exhibits 9 and 10). After the Supreme Court issued its substituted opinion in Harkins clarifying that only the licensing provisions were held unconstitutional and authorizing Greenville County to enforce the remainder of the Ordinance, the County again reminded Platinum that it could not operate as a sexually oriented business at its current location. The County also provided Platinum a copy of the Harkins opinion and told Platinum that a final certificate of occupancy would not be issued until the County was assured that the use of the premises would be consistent with the County's ordinances. (Exhibit 11). Again, this was before Platinum opened for business. In response, Platinum reaffirmed its commitment that it would be operated as a nightclub, a use permitted in the S-1 zone. (Exhibit 12). In reliance on this representation, Greenville County issued Platinum its certificate of occupancy.

Heartbreakers, like Platinum, also opened after the Supreme Court's initial opinion in Harkins. In fact, Heartbreakers received its certificate of occupancy on May 26, 2000, during the window of time between the initial opinion issued in Harkins on April 24, 2000 ("Harkins I") and the Supreme Court's withdrawal of the initial opinion and substitution of the revised opinion on June 12, 2000 ("Harkins II"). After the Supreme Court clarified in Harkins II that the County was entitled to enforce the remaining provisions in the Ordinance, the County instituted this action against Heartbreakers.

I find and conclude that the County employees and agents with whom Defendants dealt at all times acted fairly and in good faith. In the case of Platinum, the temporary certificates of occupancy and permanent certificate of occupancy were issued in good faith

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reliance on the affirmative misrepresentations made by Platinum as to the intended nature of its business. Although I find no evidence of misrepresentation by Heartbreakers, the certificate of occupancy it received was issued at a time when all parties were under a mistake of fact as to the ruling in *Harkins I* and at a time when the County was seeking clarification of the Court's order.

I also find and conclude, as the Supreme Court held in *Harkins*, that Ordinance 2673 does not zone sexually oriented businesses out of existence. There are a multitude of locations in Greenville County to which Defendants could relocate and be in compliance with the Ordinance. In fact, Defendants did not contest this issue and presented no evidence to the contrary in opposition to County's motion.

CONCLUSIONS OF LAW

Summary judgment is appropriate and must be granted "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. . . ." *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). The mere existence of a "scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). Furthermore, "[w]ith respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing the trial court there is an absence of evidence to support the nonmoving party's case." *McNair*, 499 S.E.2d at 493. See also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient

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to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Applying this standard to the present cases, I find and conclude that summary judgment in favor of County must be granted. There is no dispute as to any genuine issue of material fact, and construing the evidence in the light most favorable to the Defendants, the non-moving parties, Plaintiff is entitled to summary judgment. I simply cannot ignore the plain language of Section 4-9-25 of the South Carolina Code of Laws, which describes the police powers granted county governments and which authorizes Greenville County to enact ordinances like Ordinance 2673. This black-letter law enacted by the General Assembly, along with the undisputed evidence establishing Defendants' violation of the Ordinance, cannot be ignored by the Court and entitles County to summary judgment.

Section 4-9-25 of the South Carolina Code provides as follows:

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. Section 4-9-25 (Supp. 1999). The purpose of Ordinance 2673, as stated in Section 1 of the Ordinance, is clear. The primary purpose of the Ordinance is not to regulate the use of land, but to regulate the time, place and manner of operation of sexually-oriented businesses. Ordinance 2673 does affect location and concentration of sexually-oriented businesses, but it does not infringe upon the First Amendment rights of

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those who wish to express themselves by the operation of sexually-oriented businesses. The record undisputedly establishes that there are numerous locations available where sexually-oriented businesses can operate and be in compliance with the Ordinance. Unquestionably, an ordinance regulating the time, place and manner of operation of a sexually oriented business is within the County's police power. Harkins at 18. See also Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997) (holding that an ordinance addressing public nudity falls within the "broad grant of power" set out in Section 4-9-25); City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963).

I further find and conclude that Ordinance 2673 is not a part of the Greenville County Zoning Ordinance and does not have to be in order to be a valid exercise of the County's police power. Although the Ordinance refers to the Zoning Ordinance and uses terminology indigenous to zoning law, it applies in both the zoned areas of the County and the unzoned areas of the County. The Ordinance cites the S-1 zoning district as the area where First Amendment rights as contemplated in the Ordinance may be expressed within the zoned area of the County. This is in addition to the right of expression that is protected in the unzoned areas of the County, so long as the other provisions in Section 12 of the Ordinance are complied with. Thus, consistent with the constitutional and statutory grants of power given to counties, I find that Greenville County properly enacted Ordinance 2673 and, pursuant to Section 4-9-30(14) of the South Carolina Code of Laws, is entitled to bring this action requesting injunctive relief mandating compliance with the Ordinance.

Because I find and conclude that Greenville County had the authority to enact the Ordinance in accordance with its police powers granted by Section 4-9-25, I necessarily

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reject Defendants' contentions that such an ordinance can only be adopted as part of its zoning ordinance under the statutory provisions formerly set out in S.C. Code Ann. Section 6-7-310, et. seq. and S.C. Code Ann. Section 4-27-10, et. seq. and currently codified at S.C. Code Ann. Section 6-29-310, et. seq.⁵ I find and conclude that while a county may adopt land-use elements as part of a comprehensive plan, this does not preempt the exercise of police powers granted by Section 4-9-25. See Maynor v. Onslow County, 488 S.E.2d 289 (N.C. Ct. App. 1997), appeal dismissed, 493 S.E.2d 458, cert. denied, 496 S.E.2d 385 (N.C. 1997) (holding under similar statutory scheme in place in North Carolina that County could adopt ordinance regulating sexually oriented businesses either under authority of comprehensive planning act or under authority of County's police powers); Onslow County v. Moore, 499 S.E.2d 780 (N.C. Ct. App. 1998) (same).

I also disagree with Defendants' argument that Greenville County is not entitled to bring this action for injunctive relief. The law is clear that a violation of a county ordinance may be enforced by criminal penalty and judicial review under that avenue or by injunctive relief as Plaintiff seeks here. S.C. Code Ann. Section 4-9-30(14) (Supp. 1999). Ordinance 2673 therefore is not in conflict with any general law of the State, including the zoning statutes.

Furthermore, I find that even if Defendants contentions that the Ordinance had to be adopted under the comprehensive planning act scheme were correct, County would still be entitled to summary judgment. I find and conclude that County substantially complied with these statutory provisions. See Peterson v. City of Clemson, 312 S.C. 162, 439 S.E.2d 317 (Ct. App. 1993) (holding that although no written report was prepared by

⁵ Chapter 27 of Title 4 and Sections 6-7-310 through 6-7-11110 were repealed by 1994 Act No. 355, Section 2 as amended by 1999 Act No. 15, Section 1.

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the Planning Commission as required by City Ordinance, the action taken by Council was nevertheless valid since there was sufficient compliance with the Ordinance provisions and testimony established that it was the customary way Planning Commission reports were made to Council). Greenville County is not required by any element of the Comprehensive Planning Statutes to adopt a zoning regulation affecting the entire County. The law clearly allows Greenville County to opt to apply elements of its comprehensive plan only to certain parts of the County. S.C. Code Ann. Section 6-29-330(A) (Supp. 1999) ("a county may exercise the powers granted under the provisions of this chapter in the total unincorporated area or specific parts of the unincorporated area.") (emphasis added); S.C. Code Ann. Section 6-29-720(A) (Supp. 1999) (authorizing the governing body of the County to adopt a zoning ordinance and create "zoning districts of such number, shape and size as the governing authority determines to be best suited to carry out the purposes of this chapter.") (emphasis added).

Moreover, even assuming for purposes of argument that Defendants were correct and that Ordinance 2673 was a part of the Greenville County Zoning Ordinance, Defendants' claims would still fail as a matter of law. Section 6-29-760 of the South Carolina Code of Laws provides in pertinent part as follows:

No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made 60 days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the Planning Commission.

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S.C. Code Ann. Section 6-29-760 (Supp. 1999) (emphasis added). Greenville County Council enacted Ordinance 2673 on February 7, 1995. Obviously, more than 60 days have elapsed and Defendants challenges to the validity of the Ordinance are time-barred.⁶

Defendants have also asserted a number of challenges to Ordinance 2673 alleging that the Ordinance violates their First Amendment rights. Of course, as the parties attacking the constitutionality of the Ordinance, Defendants bear the burden of proving the unconstitutionality of the Ordinance beyond a reasonable doubt. As the Supreme Court has emphasized, "a duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt." City of Beaufort v. Baker, 315 S.C. 146, 432 S.E.2d 470, 474 (1993). See also Rothschild, 309 S.C. 194, 420 S.E.2d 853 (1992). "This is so even where the ordinance allegedly violates First Amendment rights." Beaufort, 432 S.E.2d at 474; Thompson Newspapers, Inc. v. City of Florence, 287 S.C. 305, 338 S.E.2d 324 (1985).

In Harkins, the South Carolina Supreme Court considered a challenge to the constitutionality of Ordinance 2673. With the exception of the permitting provisions that are not at issue here and which the Court held were severable, the Court upheld the constitutionality of the Ordinance. The Court noted that "sexually oriented business regulations will be upheld if they are designed to serve the substantial governmental interest of preventing harmful secondary effects and they allow for reasonable avenues of communication." Harkins at 17. As noted above, Ordinance 2673 easily satisfies both prongs of this test.

⁶ Even under the repealed statute formerly set out in Section 6-7-730, Defendants claims would not be timely since the prior law precluded any challenge brought more than two years after the public hearing. The public hearing on Ordinance 2673 was held in December, 1994.

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Additionally, numerous decisions of both the United States Supreme Court and South Carolina Supreme Court have upheld ordinances like Ordinance 2673. In its most recent pronouncement on this issue, the United States Supreme Court again affirmed the authority of local governments to enact time, place and manner provisions regulating the manner of operation of sexually oriented businesses. City of Erie v. Pap's A.M., 120 S.Ct. 1382 (2000). Although Pap's involved a public nudity ordinance and not an ordinance with provisions regulating the location of sexually oriented businesses, the Court has likewise upheld location provisions. See Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

Relying upon Young and Renton, on numerous occasions the South Carolina Supreme Court has upheld ordinances like Ordinance 2673 which regulate the location of sexually oriented businesses. In both Centaur, Inc. v. Richland County, 301 S.C. 374, 392 S.E.2d 165 (1990), and Rothschild v. Richland County Board of Adjustment, 309 S.C. 194, 420 S.E.2d 853 (1992), the Court upheld the Richland County zoning ordinance upon which Greenville County Ordinance 2673 is modeled. Later, in Condor, Inc. v. Board of Zoning Appeals, City of North Charleston, 328 S.C. 173, 493 S.E.2d 342 (1997), the Court upheld the City of North Charleston's ordinance. Finally, in Restaurant Row Associates v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999), the Court upheld Horry County's ordinance.

In evaluating the constitutional validity of content-neutral ordinances like Ordinance 2673, courts have generally applied the four-part test first set out in United States v. O'Brien, 391 U.S. 367 (1968). The O'Brien test holds that a government regulation is sufficiently justified if (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial government interest; (3) the interest is unrelated to the

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suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 376-77.

At the hearing before me, Defendants did not contest that prongs two and three of the test are met. In any event, I find and conclude as recognized in Pap's, Renton, Playtime, Harkins and numerous other cases that Ordinance 2673 furthers an important governmental interest. Also, because the Ordinance is designed to combat the secondary effects associated with sexually oriented businesses, the governmental interest is unrelated to the suppression of free expression. Further, although Defendants did argue that the Ordinance is not within the constitutional power of County to enact, as noted above I find and conclude that the Ordinance is a constitutional exercise by County of its police power.

With respect to the fourth prong of the O'Brien test, Defendants argue that the requirement that sexually oriented businesses be located at least 1,500 feet from each other and from the delineated uses set out in Section 12 of the Ordinance fails to satisfy constitutional requirements. Defendants also argued that County had no evidence before it justifying the 1,500 feet restriction ultimately adopted, and that this also renders the Ordinance invalid and unconstitutional. I disagree with Defendants.

First, as indicated above, the South Carolina Supreme Court specifically held in Harkins that "sexually oriented business regulations will be upheld if they are designed to serve the substantial governmental interest of preventing harmful secondary effects and they allow for reasonable avenues of communication." Harkins at 17. Defendants did not contest either of these requirements, and I find that the evidence in the record conclusively establishes that they have been met. The Ordinance is designed to serve the substantial government interest of preventing harmful secondary effects and there are more than

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adequate reasonable alternative avenues for communication. See also, Pap's, 120 S.Ct. at 1397 (noting that where the ordinance regulates conduct, any incidental impact on the expressive element of nude dancing is *de minimis* and the restriction leaves ample capacity to convey the message, the restriction is constitutionally valid).

Second, as the United States Supreme Court recently emphasized in Pap's, the means chosen by the governmental body do not have to be the "least restrictive means." Pap's, 120 S.Ct. at 1397. Rather, the restriction is valid if the government interest would be "achieved less effectively absent the regulation." Ward v. Rock Against Racism, 491 U.S. 781 (1989). In this regard, of course, courts are constrained to give deference to the legislative judgment. See Hill v. Colorado, 120 S.Ct. 2480, 2494 (2000) (noting that when a content neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal).

Finally, the studies included in the record from other jurisdictions clearly document the secondary effects that are generated by concentration of sexually oriented businesses and the negative impact such businesses have on surrounding properties. These studies recommended that distance provisions be included in a sexually oriented business ordinance designed to combat these secondary effects. The summary of the Los Angeles study included in the record recommended distances of "more than" 1,000 feet separating sexually oriented businesses from each other and a "minimum" of 500 feet separation from other uses. Other summaries likewise recommended distances of "at least" 500 to 1,000 feet. Obviously, the distance recommendations in these studies had to consider the particular situation of the localities involved and insure alternative avenues of communication were

available in those jurisdictions. That is no different than what County has done here. The 1,500 feet requirement is based upon evidence that County could reasonably have believed relevant to the problem it sought to address and leaves more than sufficient avenues of communication available. Thus, I find and conclude that the Ordinance satisfies the fourth prong of the O'Brien test as well.

Defendants' assertions regarding the alleged absence of secondary effects caused by their businesses likewise are of no import. In Renton, the Court held that Renton was not required to show that it conducted its own study concerning the adverse secondary effects of adult theaters. Instead, Renton was entitled to rely (as it did) on studies conducted by other cities. The South Carolina Supreme Court has reached the same conclusion. Restaurant Row, supra at 448 ("Adult businesses cannot exclude themselves from legitimate zoning regulation by providing expert testimony that they do not currently produce negative secondary effects. Local governments have the power to zone the location of adult businesses without any individualized showing the businesses produce negative secondary effects").

Defendants also emphasize the language in Harkins in which the Court noted that "[w]hether a sexually oriented business zoning regulation is designed to serve a substantial governmental interest and allows for reasonable avenues of communication is a question that must be answered in light of the particular situation of each locality that enacts such an ordinance." Harkins at 24-25. Based on the record before me, I find and conclude that Ordinance 2673 meets this standard and does not violate Defendants' constitutional rights. I find that the Ordinance is the result of consideration of local circumstances and issues in the area governed by County. It is the fruit of legal work that

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accords with due process, equal protection and the First Amendment. I further find and conclude that the Ordinance is not unreasonable in time, scope or duration and is not unduly restrictive of protected First Amendment activities. It therefore does not deny due process or equal protection. Renton, supra; Playtime Theatres, supra.

In addition to their First Amendment arguments, Defendants also contended that the amortization period in the Ordinance is unreasonable and is therefore a violation of their constitutional rights. I find and conclude, however, that the amortization period provided in the Ordinance is reasonable and constitutional. I note preliminarily, however, that the amortization period is not applicable to Platinum or Heartbreakers since they were not in business at the time the Ordinance was adopted. Further, it is not applicable to Platinum or Heartbreakers since the certificate of occupancy issued to Heartbreakers and the building permits and temporary certificate of occupancy issued to Platinum were issued erroneously, although in good faith, and County immediately sought to correct this when the Supreme Court issued the substituted opinion in Harkins. Both Platinum and Heartbreakers were notified, either by letter or by the institution of this action for injunctive relief, that they were in violation of the Ordinance shortly after the Court issued the second Harkins opinion.

As to Diamonds, which was in business at the time the Ordinance was adopted, the amortization period is reasonable under all circumstances. Diamonds was only entitled to receive a one-year amortization period under the Ordinance's terms. However, because of the Harkins litigation and orders enjoining County from enforcing the Ordinance, Diamonds has been operating for nearly five more years than the amortization period would have allowed. County is not required to give a separate amortization period

to each use defined as a sexually-oriented business under the Ordinance. This would subject County to endless litigation and undue burden. In any event, as previously noted, the period is reasonable and constitutional, and the law of this State permits a standard amortization period applicable to all like-kind enterprises.

I also reject the contentions made by Platinum and Heartbreakers that County is estopped from enforcing the Ordinance. "Generally, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy." Daniels v. City of Goose Creek, 314 S.C. 494, 431 S.E.2d 256, 259 (Ct. App. 1993). "The acts of government agents acting within the scope of their authority can give rise to estoppel against the government, but unauthorized conduct or statements do not." Id. In order to invoke estoppel in these circumstances, the claiming party must prove: "(1) lack of knowledge and the means of knowledge about the truth of the matter in question; (2) justifiable reliance on the government's conduct; and (3) a prejudicial change in position." Id.

The law is clear that Defendants had no right to rely upon any statements regarding the legal validity of the Ordinance and cannot base an estoppel claim on any alleged reliance as to matters of law. See AMA Mgt. Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868, 874 (Ct. App. 1992) ("There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence."); Harrington v. Mikell, 321 S.C. 518, 469 S.E.2d 627 (Ct. App. 1996) (same). See also, McDaniel v. South Carolina Dep't of Pub. Safety, 325 S.C. 405, 481 S.E.2d 155 (Ct. App. 1997) (estoppel found not to apply because plaintiff had no right to rely on statements made by probation officer as to legal effect of his

pleading guilty to DUI fourth). Furthermore, Defendants are charged with the knowledge of the limitations on the authority of County officials with whom they dealt, and cannot seek to invoke estoppel against the government even assuming a mistake by these officials was made. See Berkelev Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 417 S.E.2d 579 (1992) (restrictions on power of government are created to protect citizens and a person who deals with a government body that has gone beyond the law "does so at his own risk.").

Numerous decisions have addressed the issue of the application of estoppel to governmental bodies based upon actions and conduct of public officials. With a few exceptions under facts not applicable here, the courts have recognized that the doctrine does not apply. See e.g., DeStefano v. City of Charleston, 304 S.C. 250, 403 S.E.2d 648 (1991); Farrow v. City Council of Charleston, 169 S.C. 373, 168 S.E. 852, 855 (1933); South Carolina Coastal Council v. Vogel, 292 S.C. 449, 357 S.E.2d 187 (Ct. App. 1987); Goodwine v. Dorchester Dep't of Social Services, 336 S.C. 413, 519 S.E.2d 116 (Ct. App. 1999); Service Mgmt. Inc. v. State Health & Human Servs. Fin. Comm'n, 298 S.C. 234, 238, 379 S.E.2d 442, 444 (Ct. App. 1989); Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 432, 433-34, 110 S.Ct. 2465 (1990); Town of Sullivan's Island v. Bvrum, 306 S.C. 539, 413 S.E.2d 325 (Ct. App. 1992); Patterson v. Goldsmith, 288 S.C. 551, 343 S.E.2d 661 (Ct. App. 1986); South Carolina Pub. Serv. Authority v. Ocean Forest, Inc., 275 S.C. 552, 273 S.E.2d 773 (1978); South Carolina State Highway Dep't v. Metts, 270 S.C. 73, 240 S.E.2d 816 (1978).

Platinum Plus and Heartbreakers argue that the issuance of building permits and a certificate of occupancy, along with statements made by County officials to Platinum,

estops County from enforcing the Ordinance against them. I find and conclude, however, that at the time the certificate of occupancy was issued to Heartbreakers on May 26, 2000 and at time the statements allegedly were made to Platinum during the last week of April or first week of May 2000 and the building permits were issued shortly thereafter, both the County and the permittees were under a mutual mistake of fact as to the then-applicable law. Whether Defendants were in compliance with the distance provisions in the Ordinance was not an issue until the Court issued the second Harkins opinion in June, 2000. All parties were subject to the ongoing Ordinance, part of which the Supreme Court found unconstitutional, and part of which the Court found to be constitutional. Ultimately, the Court decided that the distance provisions in the Ordinance are constitutional. When the Court issued its substitute opinion in Harkins, this informed everyone that this had been the law throughout the entire period of time. Further, the actions taken by County are a proper exercise of its police power under Section 4-9-25. As a matter of law, therefore, the doctrine of estoppel does not apply.

I further find with respect to Platinum that any errors by the agents of the government in dealing with Platinum were mere administrative errors, and do not constitute gross negligence, may not be grounds to estop enforcement of an otherwise valid law, and were properly corrected by the subsequent administrative action such as issuance of the letter to Platinum on July 27, 2000 following the Supreme Court's issuance of the substituted opinion in Harkins. Further, these administrative actions could also be corrected by an action for an injunction such as that brought by County here under Section 4-9-30(14).

I likewise reject the counterclaims asserted by Platinum seeking monetary relief. These claims are barred by the doctrine of illegality as well as the provisions of the South Carolina Tort Claims Act. To the extent Platinum's claims are based upon any alleged gross negligence, I find that there is no evidence to support this contention and that, in any event, Platinum has not shown the existence of any duty of care owed by County that would support any negligence-based claim against County. Moreover, I find that Platinum's claims are barred by its affirmative misrepresentations regarding the intended use of the premises and by the doctrine of unclean hands. It was in reliance upon these misrepresentations that the County issued the temporary certificate of occupancy and permanent certificate of occupancy that were received by Platinum.

I further find and conclude that there was no unlawful taking or violation of due process. The Ordinance provides an avenue of judicial review to either party by application for injunctive relief in this Court or as a defense to any claim of criminal activity. Any party aggrieved by the County's enforcement of the Ordinance could bring an action, as could the government bring an action against the party in violation. Judicial review is available in a prompt fashion.

Regarding any additional arguments asserted by Heartbreakers, the applicable portions of my order set forth herein are incorporated by reference. I further find that the phrase "lot devoted primarily to residential use," as included in the Ordinance, is not unconstitutionally vague. Although not specifically pled by Heartbreakers in its complaint, I have also considered Heartbreakers' argument that Section 12(e) of the Ordinance is vague because it refers to Section 12(c). I find and conclude that this is a harmless scrivener's error, and does not render the Ordinance unconstitutionally vague. I

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further find and conclude that any person attempting to discern the meaning of the Ordinance would know that Section 12(e) is intended to refer to Section 12(b), and that the scrivener's error is readily apparent and does not render the Ordinance unconstitutionally vague. Toussaint v. State Bd. of Medical Examiners, 303 S.C. 316, 400 S.E.2d 488, 491 (1991) ("The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies").

Heartbreakers also challenges the Court's jurisdiction over this matter. I find that the Court has jurisdiction over this matter because the application for injunctive relief is a method by which Greenville County may enforce compliance with its ordinances pursuant to Section 4-9-30(14). I further find that the Court has personal jurisdiction over Defendants by means of the service of the summons and complaint upon Defendants.

I also find and conclude that the counterclaim asserted by Heartbreakers should be dismissed and that County is entitled to summary judgment on the counterclaim. There has been no violation of due process. Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995) ("a legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of his property."). Additionally, the law is clear that "[j]ust compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power." South Carolina State Highway Department v. Wilson, 254 S.C. 360, 175 S.E.2d 391, 394 (1970); Myers v. Real Property at 1518 Holmes Street, 306 S.C. 232, 411 S.E.2d 209 (1991).

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In a number of recent decisions, the South Carolina Supreme Court and Court of Appeals have emphasized that no taking will be found and compensation is not owed unless the regulation at issue deprives the owner of "all" economically viable use of the land. Westside Quik Shop v. Stewart, Op. No. 25158 (S.C. S.Ct. filed June 21, 2000); McQueen v. South Carolina Coastal Council, 340 S.C. 65, 530 S.E.2d 638 (2000); Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000). Even where the owner is deprived of all economically viable use, however, "an owner must still have reasonable investment-backed expectations to establish a taking." Id. "Where, as here, the regulatory climate renders an owner's investment-back expectations unreasonable, no taking will be found." Id. See also, Sea Cabins v. City of North Myrtle Beach, 337 S.C. 380, 523 S.E.2d 193 (Ct. App. 1999) (City's denial of permit to rebuild pier did not violate takings clause since condominium units were not deprived of all economically viable use).

Finally, mere diminution in the value of property by virtue of the adoption of a zoning ordinance does not constitute a taking requiring compensation. Brabham v. City of Sumter, 275 S.C. 597, 274 S.E.2d 297 (1981). Also, a zoning classification is not an unconstitutional compensable taking simply because it denies to the landowner the highest and best use of his or her property. Moore v. Sumter County Council, 300 S.C. 270, 387 S.E.2d 455 (1990). Although as noted above I find that Ordinance 2673 was not adopted as part of the County Zoning Ordinance, these same principles apply with equal force in these cases since a takings claim cannot be maintained where the County acts pursuant to its police power.

Last, with respect to any additional arguments made by Diamonds, the applicable parts of my order set out herein are incorporated by reference. I deny the request for declaratory relief and injunctive relief asserted by Diamonds. As set out more fully above, I find that Ordinance 2673 is constitutional in all respects and is a permitted exercise of the County's police powers under Section 4-9-25. Diamonds concedes that it is not in compliance with the location provisions in the Ordinance. I find and conclude that because the Ordinance is valid and constitutional, Diamonds, like Platinum and Heartbreakers, must comply with the Ordinance and its counterclaims must be dismissed.

CONCLUSION

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. Diamonds has received the amortization period set forth in the Ordinance and is not entitled to continue operation in violation of the Ordinance for any additional period of time. The counterclaims asserted by Defendants are dismissed with prejudice and judgment is also entered in Greenville County's favor on the counterclaims. Each party is to pay its own attorneys' fees.

IT IS SO ORDERED.


Wyatt T. Saunders, Jr.
Circuit Judge

Dated this 19th day of January, 2001
Greenville, S.C.

P26921
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State of Michigan)
 County of Hillsdale)

AFFIDAVIT

Exhibit 3

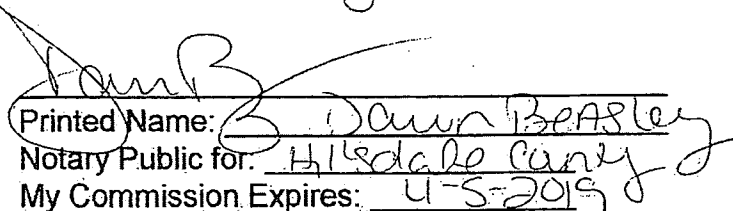
Personally appeared before me, Jason C. Mohny, who being duly sworn states as follows:

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 _____



County Attorney's Office

Mark W. Tollison
County Attorney
mtollison@greenvillecounty.org
(864) 467-7110
www.greenvillecounty.org

Exhibit 4

January 13, 2017

Bill Bannister, Esquire
Bannister, Wyatt & Stalvey LLC
401 Pettigru St.
Greenville, SC 29601

HAND-DELIVERED

Re: 805 Frontage Road Property

Dear Mr. Bannister:

The Thirteenth Circuit Solicitor has passed along your November 18, 2016 letter to the County Attorney's Office. After our phone conversation last month and with the approaching January 2017 date concluding the current Contempt Order and closure of the 805 Frontage Road building, I believe it would be useful to provide some information on the property from Greenville County ("County"). To that end, there are a number of issues concerning the 805 Frontage Road property that will fall under the County's jurisdiction in the areas of building codes, permitting, zoning, and adult entertainment business operations.

As to the issues you have raised concerning your client's entanglements with the 2015 Public Nuisance Action and Consent Order, and subsequent 2016 contempt Order, those issues may be best directed to the court or the Solicitor's Office. The focus of this letter is to outline the history of the uses on the property and summarize County requirements affecting the future use of the 805 Frontage Road property.

In your November 18 letter you indicate that "Elephant, Inc. and Gaines are no longer tenants" on the property and "[t]hat lease is now ended." As I indicated in our phone conversation after the November 18 letter, the subject property has been operating as an adult entertainment establishment and nightclub in contravention of the County Zoning Ordinance. 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.

The prior tenants, Elephant, Inc. (d/b/a Platinum Plus), entered into a Consent Order with the County in 2002 that outlined the guidelines allowing them (Elephant, Inc.) to continue adult entertainment operations on the property. For your convenience, I have enclosed a copy of that 2002 Order with this letter.

The 2002 Order specified the level of body coverage and limits to exposure of "specified anatomical areas," and prohibitions on "specified sexual activities." It is significant that Elephant, Inc. was the only party to the 2002 court approved agreement setting conditions for operating a nonconforming adult entertainment establishment on the 805 Frontage Road property. Your client as landlord was not a party to the 2001 litigation and final 2002 Order. The result of the termination of Elephant, Inc.'s presence on the 805 Frontage Road property will conclude the conditions and operations agreed to by the County in 2002 per the Order as those agreements were between Elephant, Inc. and the County. They do not extend to the landlord, your clients, or to any successor tenant on the property.

I understand that your client may have new tenants and there may be some renovations to the building. Please be advised that any change in tenant or building renovations will require permitting from the County Planning and Code Enforcement Division, 301 University Ridge, Suite 4100, Greenville County Square, Greenville, SC 29601.

Additionally, please be advised that the property is presently zoned S-1 which does not allow for nightclubs. The former use of the property as a nightclub and adult entertainment establishment is now prohibited by the discontinuation of the business by Elephant, Inc., (per your letter) and the non-use of the property in excess of six months, which makes a nightclub operation at 805 Frontage Road a nonconforming use under the Greenville County Zoning Ordinance. The County Zoning Ordinance specifies that when a nonconforming use is discontinued, the use cannot be resumed.

The County has also received a Business Registration Application from a Jason C. H. Mohny out of Durand Michigan for a Greenville Bistro, LLC for 805 Frontage Road. Please be advised that a tenant replacing Elephant, Inc., 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. 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.

January 13, 2017
Bannister, Wyatt & Stalvey LLC
Page 3 of 3

I would recommend that any new tenant at 805 Frontage Road seeking to operate a business beyond the allowed uses in the current S-1 zoning or Ordinances Nos. 2673 and 4869, check with the County Zoning Administrator, Kris Kurjiaka, and make sure the proposed uses are permitted in that location.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Mark W. Tollison

MWT/js

Enclosures: *2002 Consent Order*
Greenville County Ordinances Nos. 2673 and 4869

ELECTRONICALLY FILED - 2017 Jun 14 10:33 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303372

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

Exhibit 6

County Attorney's Office

Mark W. Tollison
County Attorney
mtollison@greenvillecounty.org
(864) 467-7110
www.greenvillecounty.org

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.

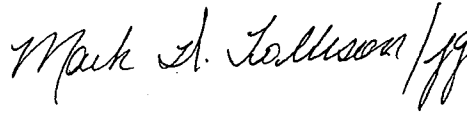
First, there are two main Greenville County ("County") regulations that will guide all future land uses on the 805 Frontage Road property: the Greenville County Zoning Ordinance ("GCZO") and County Ordinance Nos. 2673 and 4869 ("Adult Entertainment Ordinance"). As a zoning matter, the 805 Frontage Road 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.

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 cursive script, reading "Mark W. Tollison /jj".

Mark W. Tollison

Greenville County

Greenville County Square
301 University Ridge, Suite 4100, Greenville SC 29601-3686
Phone (864) 467-7060 Fax (864) 467-7407
permits@greenvillecounty.org

COMMERCIAL ZONING APPLICATION

APPLICATION MUST BE COMPLETED PRIOR TO REQUESTING PERMIT

Proposed Business Name: Greenville Bistro LLC Phone No: 989-288-2643
Property Owner's Name: Frontage Road Associates, Inc Phone No: 844-420-2225
Exact Address of Property: 805 Frontage Rd City: Greenville State/Zip: SC 29615
Tax Map No: 0543.01.01.001.08 Business Park Name: N/A Lot No: N/A
Email: Cashmohney@yahoo.com

This application is for: New; Addition; Interior Alteration Up-Fit; ☒ Change of Tenant; Other

Proposed Use: Restaurant

Exact Directions to Job Site: 385 South from Greenville to Roper Mt Rd
Turn Left, go to Frontage Rd turn Left, 1 mile on Right
is Job Site

IF PROPERTY IS IN A ZONED AREA OF THE COUNTY,
ZONING WILL BE VERIFIED AND ALL REQUIREMENTS MUST COMPLY WITH THE ZONING ORDINANCE.

NO OCCUPANCY SHALL OCCUR PRIOR TO ISSUANCE OF THE CERTIFICATE OF OCCUPANCY

The applicant hereby certifies and agrees as follows: 1) That he/she is authorized to make this application; 2) That he/she has read the above information and it is true and correct; 3) That he/she will comply with all County of Greenville ordinances, laws and regulations, all State and Federal Laws and regulations regulating the use of land and structures and the construction of structures; 4) That he/she will perform only the work outlined above at the property indicated above; 5) That he/she grants the right of entry to the property to the Building Official or employees of the County of Greenville for the purpose of inspections, and posting of notices. If any of the information supplied by the owner and/or owner's agent is incorrect, the Permit/Certificate may be revoked.

This Application is permission to proceed with the project in accordance with the Zoning Ordinance and shall not be construed as authority to violate, alter or set aside any of the provisions of the Building Code and any other applicable laws or ordinances, nor shall the issuance of this permit prevent the Building Official or Zoning Administrator from requiring correction of errors in project documents or of violations of the Building Code or Zoning Ordinance of the County of Greenville, South Carolina.

Any information and documents submitted to the County of Greenville, for the purpose of Construction Document review and approval, becomes subject to the South Carolina Freedom of Information Act (SC Code of Laws, 1976 as amended, Title 30, Chapter 4) and may be subject to public inspection and review.

DATE: 2-10-17 BY OWNER OR AUTHORIZED AGENT: Jason Mohney

PRINT NAME: JASON MOHNEY

DATE: 2/22/17 APPROVAL OF ZONING OFFICIAL: [Signature]

Zoning Classification: S-1

Permit No: 17-1651

NOTES: RESTAURANT

COUNTY OF GREENVILLE
BUILDING SAFETY DIVISION
301 UNIVERSITY RIDGE STE 4100
GREENVILLE SC 29601

Exhibit 8

CERTIFICATE OF USE AND OCCUPANCY
P E R M A N E N T

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
Christopher Kurjaleka

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 R. p. 232

ELECTRONICALLY FILED - 2017 May 23 10:38 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303372

AFFIDAVIT OF JOHN REDMAN

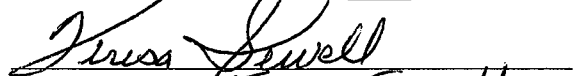
1. My name is John Redman. I am over 18 years of age. I am a competent adult resident of the State of South Carolina.
2. I am a Deputy in the Greenville County Sheriff's Office and have served in this position since 2003.
3. On May 11, 2017, I went to Buck's Racks & Ribs at 805 Frontage Road in Greenville County. Upon entering the establishment, I walked down a hall to the main floor area.
4. In the main floor area, I saw a large stage in the front of the room, with a pole on it. There were two smaller stages with poles in the middle of the room. The tables in the establishment were very small and appeared to be the same as were used when the building was a strip club called Platinum Plus.
5. On the large stage, I saw a woman dancing on a pole. 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.
6. On that visit to Buck's, I saw several other women who were wearing bottoms that exposed their buttocks.
7. On May 24, 2017, I returned to Buck's Racks & Ribs. As before, when I entered the main floor area I saw on woman dancing on the large stage. The bottoms she was wearing exposed the majority of her buttocks.
8. On that date, I saw two additional female dancers at Buck's who were wearing attire that exposed their buttocks.
9. On both of my visits to Buck's in May 2017, I saw alcoholic beverage advertisements, but no menus or advertising for food.

Further, affiant sayeth not.



John Redman

SWORN to before me this 15 day of June, 2017.



Printed name: TERESA Sewell

Notary Public for: State of S.C.

My Commission Expires: 5/04/2020

AFFIDAVIT OF BARBARA HUNNICUTT

1. My name is Barbara Hunnicutt. I am over 18 years of age. I am a competent adult resident of the State of South Carolina.
2. I am a Deputy in the Greenville County Sheriff's Office and have served in this position since Jan 2012.
3. On May 11, 2017, I went to Buck's Racks & Ribs at 805 Frontage Road in Greenville County. Upon entering the establishment, I walked down a hall and followed the sound of loud music to the main floor area.
4. In the main floor area, I saw a large stage in the front of the room, with a pole on it. There were two smaller stages with poles in the middle of the room. The tables were short and small, like coffee tables, and each table was grouped with about four low, club chairs.
5. On the large stage, I saw a woman dancing. The woman was wearing Brazilian-cut bikini bottoms that exposed her buttocks. The dancer's breasts were also exposed except that pasties (like stickers) covered her nipples and areolas.
6. I saw several other women in Buck's who were wearing pasties (and thus exposing the lower portion of their breasts) and who were wearing bottoms that exposed their buttocks.
7. The managers at Buck's told me that the establishment was a "sister club" to Buck's Cabaret (in Dallas, Texas) and Buck's Gone Wild (also in Texas). One of the managers told me that he was the floor manager of Buck's Cabaret.
8. On May 24, 2017, I returned to Buck's Racks & Ribs. As before, when I entered the main floor area I saw on woman dancing on the large stage. She was wearing a bra, and her panties exposed the majority of her buttocks. She was dancing around the pole on the stage in a sexual manner.
9. On that date at Buck's, I saw three female dancers who were wearing scant attire that exposed their buttocks.
10. On both of my visits to Buck's in May 2017, I saw alcoholic beverage advertisements, but no menus or advertising for food.

Further, affiant sayeth not.

BC Hunnicutt #1336
Barbara Hunnicutt

SWORN to before me this 15 day of June, 2017.

Teresa Sewell
Printed name: Teresa Sewell
Notary Public for: State of SC
My Commission Expires: 5/04/2020

AFFIDAVIT OF JONATHAN HAYDEN

1. My name is Jonathan Hayden. I am over 18 years of age. I am a competent adult resident of the State of South Carolina.
2. I am a Deputy in the Greenville County Sheriff's Office and have served in this position since 2008.
3. On May 18, 2017, I went to Buck's Racks & Ribs at 805 Frontage Road in Greenville County. In the lobby, my companion and I each paid a \$5 cover charge to enter the establishment, and from there we walked down a hall to the main floor area.
4. In the main area, a manager greeted us and invited to sit where we pleased. We sat at a table near the stage. A waitress asked if we wanted bottled beers for one dollar, but she did not mention food. We each ordered a beer at that time, which she brought to us soon after.
5. When we arrived, a woman on stage was dancing in a sexually suggestive way around a pole. The bikini-style bottoms she wore exposed the majority of her buttocks.
6. From our table, we watched a series of women take turns dancing on the stage. When one dancer would finish, the announcer would call out the name of the next one to dance on the stage. Each dancer wore bottoms that exposed the majority of her buttocks.
7. Several dancers sat with us at our table during our visit. The announcer repeatedly mentioned a VIP room, and a dancer told me that that was where she would give me a lap dance for \$20 that would include touching.
8. On May 24, 2017, I returned to Buck's Racks & Ribs. As before, I paid a \$5 cover charge to enter. After sitting down at a table in the main area, I ordered and received a beer.
9. From the table, I saw one woman dancing around the pole on the stage. The bottoms she was wearing exposed the majority of her buttocks.
10. A dancer in a bikini that exposed the majority of her buttocks approached the table where my companions and I were sitting, and when we said she could join us, she sat in one of their laps (instead of the available chair at the table). Soon after, this dancer brought up the topic of a private dance. My companions paid her \$20 to give me a dance, so she led me away by the hand.
11. When the dancer and I reached the secluded, upper part of the club, she told me to sit on the couch. To begin the dance, which lasted about 3 minutes, the dancer bent over in front of me, exposing the majority of her buttocks to me at face level. She then sat on my lap, leaned back against me, and grinded her exposed buttocks against my covered crotch. Throughout the private dance, her buttocks were in constant contact with my body. Several times during the dance, she leaned back against me, placed her hands inside her bikini top, and rubbed her breasts. She also put her hand inside her bikini bottoms and rubbed her vaginal area a few times during the dance. When the dance was over, she pressed her

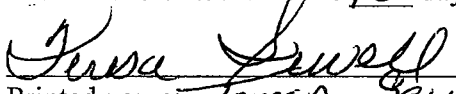
breasts against my face and asked if I wanted to continue the dance for another \$20. I declined at that time, and then rejoined my companions at the table.

12. Back at the table, we watched the dancers take turns dancing on the stage. Some of them sat with us at our table, and then would go dance on the stage when the announcer called their names. The dancers wore revealing bikinis that exposed the majority of their buttocks.

Further, affiant sayeth not.


Jonathan Hayden

SWORN to before me this 15 day of June, 2017.


Printed name: Teresa Sewell
Notary Public for: State of SC
My Commission Expires: 5/04/2026

AFFIDAVIT OF WESLEY ARFLIN

1. My name is Wesley Arflin. I am over 18 years of age. I am a competent adult resident of the State of South Carolina.
2. I am a Deputy in the Greenville County Sheriff's Office and have served in this position since 2011.
3. On June 14, 2017, I went to Buck's Racks & Ribs at 805 Frontage Road in Greenville County with Deputy Whitmire. Upon entering the establishment, we each purchased an alcoholic beverage and sat at the end of the bar.
4. Two bikini-clad black females approached us and told us that they could not expose any private parts due to an upcoming court hearing, but that after the hearing they could go topless. I was wearing a device that was recording this conversation, which is contained in an electronic file titled "06-14-17 #1.wav."
5. Female #1 proceeded to the stage and started dancing. She was simulating intercourse by grinding her vaginal area against the railing on the stage and was erotically rubbing her breast. She laid on her back multiple times, spreading her legs and fondling her crotch area. An announcer made a verbal loud announcement offering \$20 VIP dances.
6. A second black female (Female #2) got on the stage and made sexual moves similar to those that Female #1 had made. She was grinding her vaginal area on the poles of the stair railing, spreading her legs and masturbating herself by rubbing her crotch.
7. Thereafter, Female #1 made her way back to the stage and danced in a manner similar to her first dance. She was grinding her vaginal area on the poles lining the stage, getting on all fours and sticking her butt up, reaching through her legs and fondling her covered vaginal area, and smacking her butt.
8. After ordering another beer, Female #2 solicited me for a lap dancer and had me follow her to the VIP room. After I paid \$20, she mounted me by sitting her butt on my covered crotch and grinding on me in a very sexual way, simulating intercourse. She then turned around and mounted me and started grinding her covered genital area on top of my covered genital area. She was also fondling her breast. At the end of the lap dance, I returned to my table.
9. Female #1 was back on stage, grinding the pole on the stairway, smacking her butt, and spreading her butt cheeks apart, making her butt jiggle. During this time, she exposed the edge skin of her vagina. She also got on all fours and began to "twerk" (simulating intercourse) in front of me, pulling her bikini to expose her butt cheek.
10. After this, Female #2 told me she would do a second lap dance for only \$10. She led me back to the VIP area once more, and performed a second lap dance like the first (grinding both her butt and her covered vaginal area on my covered genital area, fondling her breast, and smacking her butt.
11. Shortly after this lap dance, Deputy Whitmire and I exited the premises.

Further, affiant sayeth not.

W. Arlin \$1331 7730
Wesley Arlin

SWORN to before me this ___ day of June, 2017.

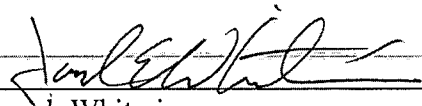
Terrell Seay
Printed name: Terrell Seay
Notary Public for: State of F.C.
My Commission Expires 5/04/2026

**Exhibit 17a is an audio file filed
manually with the court.**

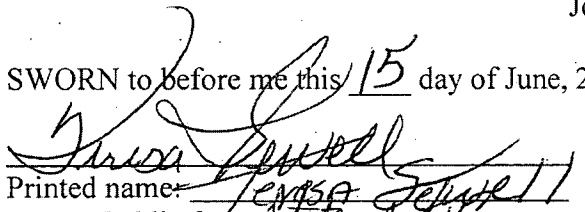
AFFIDAVIT OF JOSEPH WHITMIRE

1. My name is Joseph Whitmire. I am over 18 years of age. I am a competent adult resident of the State of South Carolina.
2. I am a Deputy in the Greenville County Sheriff's Office and have served in this position since 2003.
3. On June 14, 2017, I went to Buck's Racks & Ribs at 805 Frontage Road in Greenville County with Deputy Arflin. Upon entering the establishment, we each purchased an alcoholic beverage and sat at the end of the bar.
4. Two bikini-clad black females approached us and engaged us in conversation. One of the females, "Siren," sat down with us. The other went to dance on the stage. While on stage, she was mimicking sexual intercourse by moving her hips up and down around a brass pole. She also rubbed her genital area, rubbed her breast, and slapped her buttocks.
5. Siren then went to the stage and danced in a similar manner. She also mimicked sexual intercourse by moving her hips up and down on the pole. Siren also rubbed her genital area and slapped her buttocks.
6. When the other dancer went back on stage, I approached the stage with two one-dollar bills. The dancer came to where I was standing and started mimicking sexual intercourse. She also allowed me to put the dollar bills into her costume.
7. I went back to my table and Siren approached and solicited me for a \$10 "table" dance. Again she simulated sexual intercourse, erotically touched her genitals, and rubbed her breasts.
8. Deputy Arflin and I exited the establishment at approximately 11:00 p.m.

Further, affiant sayeth not.


Joseph Whitmire

SWORN to before me this 15 day of June, 2017.


Printed name: James A. [illegible]

Notary Public for: State of South Carolina

My Commission Expires: 05/04/2026

AFFIDAVIT OF RICHARD HANNING

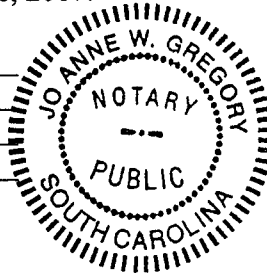
1. My name is Richard Hanning. I am over 18 years of age. I am a competent adult resident of the State of South Carolina.
2. I am the GIS Division Manager for Greenville County and have served in this position since 12/1997. I use mapping data and geographic information software to analyze land use, 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.

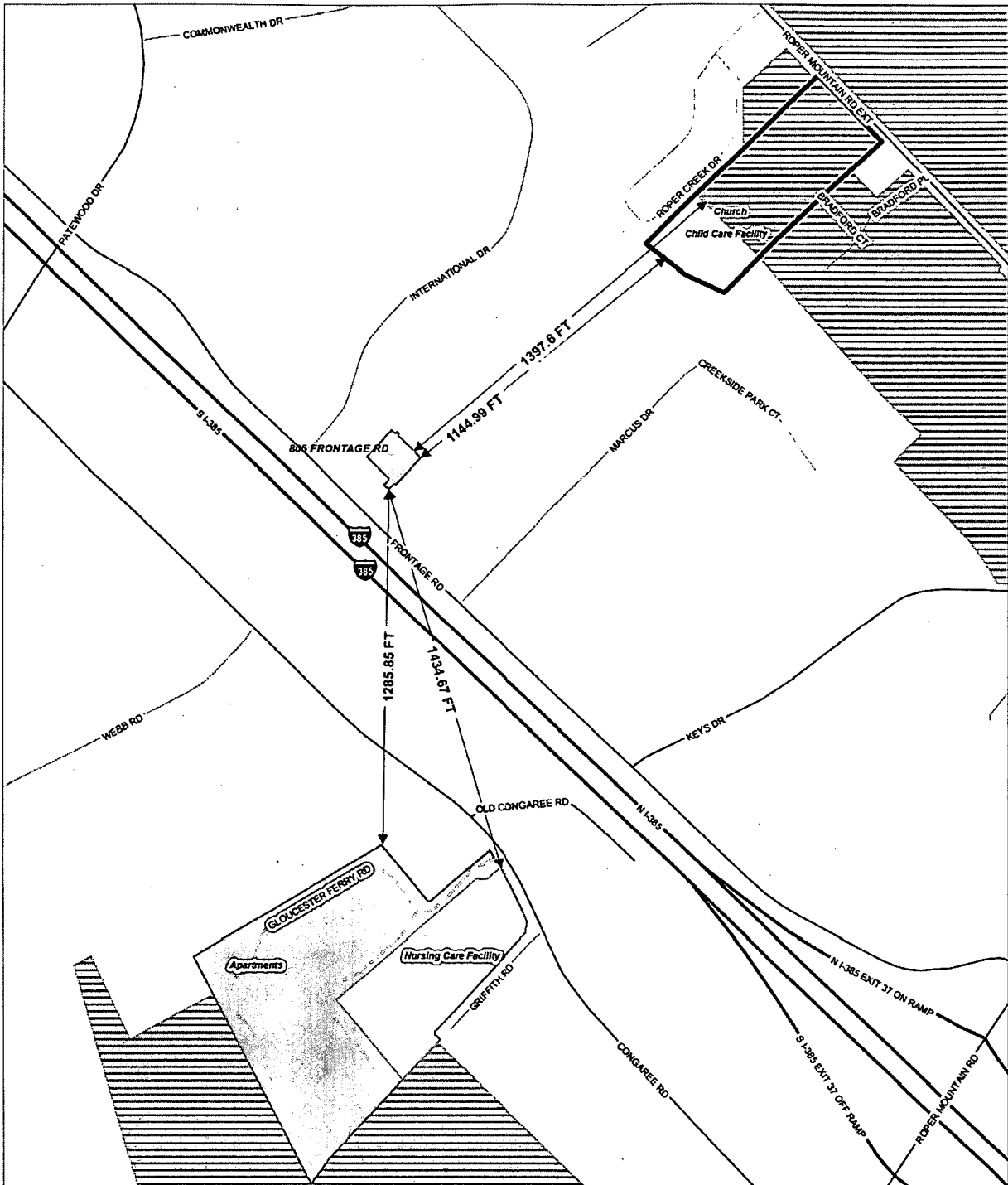
Jo Anne W. Gregory
Printed name: Jo Anne W. Gregory
Notary Public for: South Carolina
My Commission Expires: 12/3/25



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.

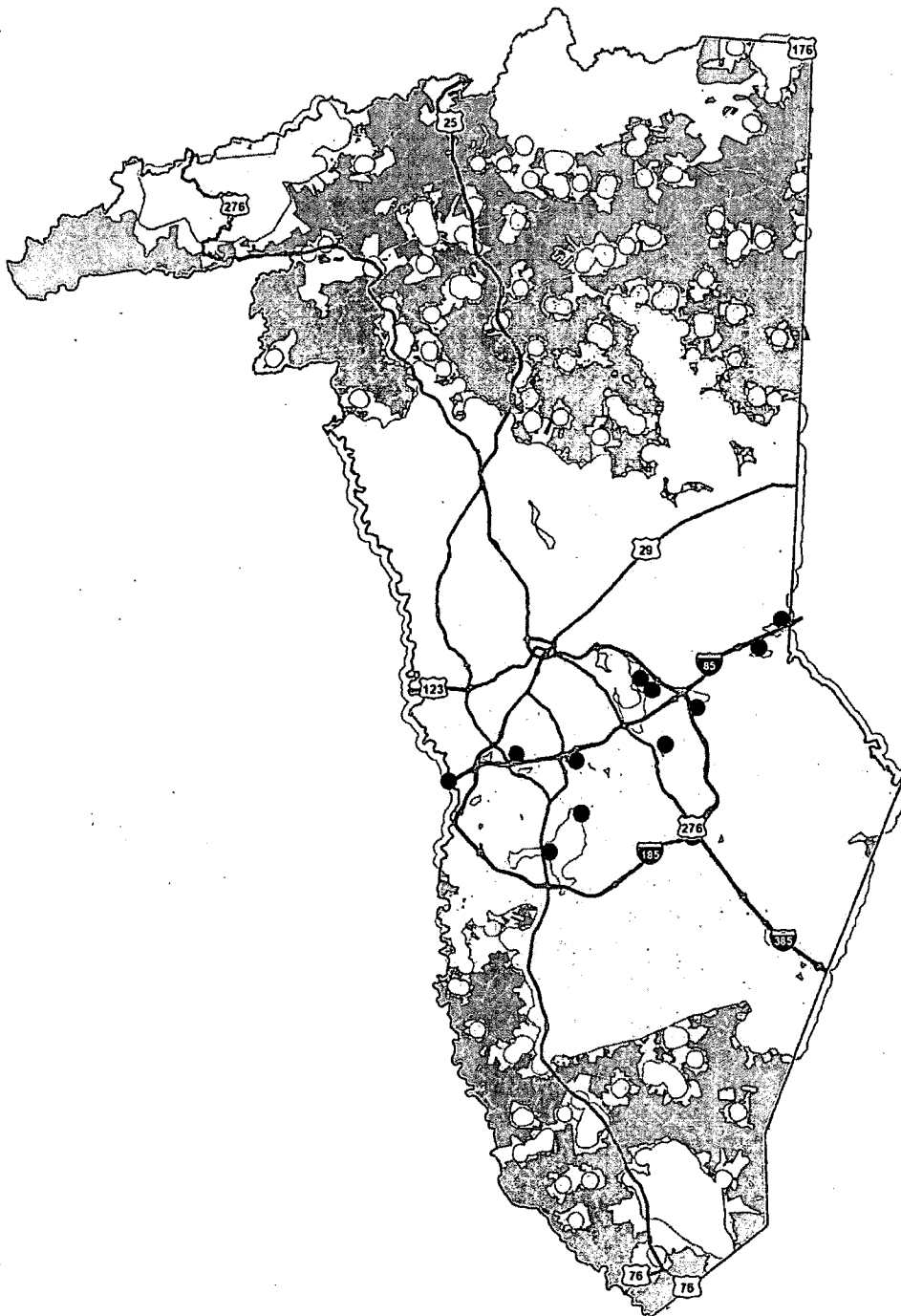


Greenville County
Geographic Information Systems
(C) 2017
June 14, 2017

Available S-1 Site Clusters and Available Unzoned Sites for Sexually Oriented Businesses

Hanning Aff. Map 2

Exhibit 19b



Legend

- S-1 Available Site Cluster
- Required Buffer - 1500 FT
- ▨ Unzoned Complete Parcel - Available Site
- ▨ Unzoned "Partial" Parcel - Available Site



0 5 10 15 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.

G
Greenville County
Greenville County
Geographic Information Systems
(C) 2017
June 14, 2017

S-1 Zoned Available Sites

Exhibit 19c

	PIN		STREET	SHAPE_Area (sq ft)	(acres)
1	M008040100207	100	BI-LO	220666.52	5.0658
2	M008040100209	200	BI-LO	41925.98534	0.9625
3	M014010100200		MAULDIN	87013.51503	1.9976
4	M015070100100	674	PARKINS MILL	115543.0453	2.6525
5	WG01050100202		WHITE HORSE	21338.65309	0.4899
6	WG02010100600	0	BRUCE	3321.4927	0.0763
7	WG02010100700		WHITMIRE	27322.19523	0.6272
8	WG02010101300	24	BAKER	32283.54467	0.7411
9	WG02010101400	22	BAKER	19863.20351	0.4560
10	WG02010101500	18	BAKER	20115.4353	0.4618
11	WG02010101600	16	BAKER	19401.88113	0.4454
12	WG02010101800	14	BAKER	39377.48898	0.9040
13	WG02010101900	10	BAKER	18661.58061	0.4284
14	WG02010102000	8	BAKER	6573.258511	0.1509
15	WG02010102901	111	WHITE HORSE	62146.06187	1.4267
16	WG02010102902	131	WHITE HORSE	111119.9694	2.5510
17	WG02010102903	128	WHITE HORSE	228113.9335	5.2368
18	WG02010102904	108	WHITE HORSE	127744.6723	2.9326
19	WG02010102905	130	WHITE HORSE	150580.0666	3.4568
20	WG02010102906	132	WHITE HORSE	189656.0589	4.3539
21	WG02010102907	133	WHITE HORSE	163136.1157	3.7451
22	WG02010103100	209	WHITMIRE	75347.9884	1.7298
23	WG02010103600	214	WHITMIRE	2772.481895	0.0636
24	WG02010103601	9999	WHITMIRE	22682.10188	0.5207
25	WG02030101406	52	BRUCE	107359.4376	2.4646
26	WG02030101601	226	WHITMIRE	14123.32894	0.3242
27	WG02030101701	0	WHITMIRE	236437.2458	5.4279
28	WG10060100205	910	FRONTAGE	12967.49813	0.2977
29	0260000100202		WOODS CROSSING	92731.08559	2.1288
30	0260000100204	75	MALL CONNECTOR	86224.933	1.9795
31	0260000100205	85	MALL CONNECTOR	125651.0454	2.8846
32	0260000100601	526	CONGAREE	263576.0132	6.0509
33	0260000100700	10	HALTON	164287.9617	3.7715
34	0260000101409	0	STENHOUSE	20633.21297	0.4737
35	0260000101411	301	STENHOUSE	17945.4327	0.4120
36	0260000101502	0	OFF WOODRUFF	18442.79456	0.4234
37	0260000101600	535	WOODRUFF	62182.02625	1.4275
38	0260000101602	575	WOODRUFF	172707.4714	3.9648
39	0260000101604	561	WOODRUFF	18946.04226	0.4349
40	0260000101606	533	WOODRUFF	6179.967444	0.1419
41	0260000101607		WOODRUFF	47918.25232	1.1001
42	0260000101609	561-A	WOODRUFF	135709.3783	3.1155
43	0260000104000	19	GLADYS	66332.53712	1.5228
44	0260000104900	8	GLADYS	75438.96034	1.7318
45	0260000105400	12-A	GLADYS	25084.69069	0.5759

	PIN		STREET	SHAPE_Area (sq ft)	(acres)
46	0260000106000	14	GLADYS	50305.91037	1.1549
47	0260000106100		GLADYS	94031.45542	2.1587
48	0260000107509	149	HALTON VILLAGE	549.5295039	0.0126
49	0260000107510	155	HALTON VILLAGE	7041.084944	0.1616
50	0261000103700	100	QUESTOVER	155159.4245	3.5620
51	0293000100800	700	STANDING SPRINGS	20297.37846	0.4660
52	0293000100900	713	STANDING SPRINGS	145446.4978	3.3390
53	0400010111200	2003A	PERIMETER	60801.21689	1.3958
54	0408000100402	7108	AUGUSTA	191379.3228	4.3935
55	0410000100100	211	OLD FORK SHOALS	148434.7629	3.4076
56	0410000100101	209	OLD FORK SHOALS	19381.46194	0.4449
57	0410000100102	212	OLD FORK SHOALS	158994.8973	3.6500
58	0410000100200	208	OLD FORK SHOALS	207901.259	4.7728
59	0410000100901	110	DELAWARE	7384.414221	0.1695
60	0530050101400	300	PHILLIPS	198462.2712	4.5561
61	0530050102308	250	INTERSTATE	103233.4908	2.3699
62	0533060100100	5216	PELHAM	72724.79864	1.6695
63	0533060100101	40	COMMERCE	27752.31308	0.6371
64	0533060100200	5200	PELHAM	73908.67703	1.6967
65	0533060100700	6000	PELHAM	56025.74804	1.2862
66	0545010102401	141	OLD SULPHUR SPRINGS	1239.367744	0.0285
67	0545010102500	25	KETRON	23.01021047	0.0005
68	M009010100903		BI-LO	1540.932851	0.0354
69	M009010100905	101	BI-LO	16647.72882	0.3822
70	0260000102101	3	GLADYS	18113.88142	0.4158
71	0260000102200	1016	WOODS CROSSING	106545.2842	2.4459
72	0260000102600	5	GLADYS	22311.74336	0.5122
73	0260000101400		STENHOUSE	11865.59355	0.2724
74	0260000101402		STENHOUSE	19746.31876	0.4533
75	0260000101403	142	STENHOUSE	29836.12376	0.6849
76	0260000101405		STENHOUSE	13247.5199	0.3041
77	0260000101406		STENHOUSE	17163.62579	0.3940
78	0260000101407	41	STENHOUSE	41153.60734	0.9448
79	0260000101408	301	STENHOUSE	63706.99782	1.4625
80	0260000101610	533	WOODRUFF	6944.567402	0.1594
81	0260000101611	549	WOODRUFF	25199.13318	0.5785
82	0260000101613	565	WOODRUFF	53582.81696	1.2301
83	0260000101614	563	WOODRUFF	33724.67548	0.7742
84	0260000107500	0	HALTON	52184.10876	1.1980
85	0410000101100	201	DELAWARE	16619.81418	0.3815
86	0545020100201	161	OLD SULPHUR SPRINGS	3297.527837	0.0757
87	0547030103703	1282	WOODRUFF	607546.1986	13.9473
88	0260000100806	120	HALTON	68829.43491	1.5801
89	0533020101200	5159	PELHAM	40020.40981	0.9187
				total acres:	152.61

Hanning Aff. Table 2

Exhibit 19d

R. p. 247

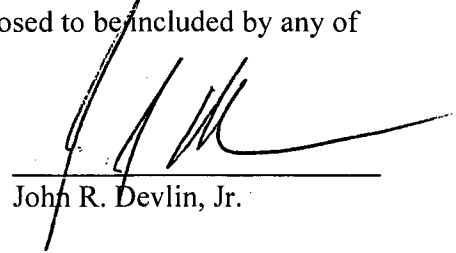
Unzoned Available Sites

	PIN		STREET	SHAPE_Area (sq ft)	(acres)
1	0350000100101	1012	MCCARTER	226587.7382	5.2017
2	0350000100106		NELSON	17648.57996	0.4052
3	0350000100107		NELSON	17751.61353	0.4075
4	0494000100800	875	HAWKINS	11768.44376	0.2702
5	0494000100802		HAWKINS	92571.31039	2.1251
6	0494000100803	867	HAWKINS	20590.46165	0.4727
7	0494000100805	831	HAWKINS	28088.06447	0.6448
8	0498010100208		DARBY	19326.72454	0.4437
9	0498010102801	380	OLD BATSON	7635.52883	0.1753
10	0498010102802	300	OLD BATSON	8401.436724	0.1929
11	0498010102803	350	OLD BATSON	38029.02873	0.8730
12	0498010102818		OLD BATSON	17891.8755	0.4107
13	0498010102841	260	OLD BATSON	10622.55698	0.2439
14	0499010100102	821	ROBERTSON	120549.8725	2.7674
15	0499010100103	811	ROBERTSON	201902.2349	4.6350
16	0499010100104		ROBINSON	919785.8024	21.1154
17	0499010100106		ROBERTSON	1073639.955	24.6474
18	0499010100107	807	ROBERTSON	96229.44921	2.2091
19	0499010100202		JACKSON GROVE	34378.24102	0.7892
20	0499010100203		ROBERTSON	186185.8373	4.2742
21	0499010100204	510	JACKSON GROVE	2077.42129	0.0477
22	0499010100205		ROBERTSON	324018.7764	7.4384
23	0499010100300		ROBERTSON	925596.2537	21.2488
24	0499010100302	600	ROBERTSON	105660.2616	2.4256
25	0499010100303	640	JACKSON GROVE	197380.2109	4.5312
26	0499010100304	680	JACKSON GROVE	212041.1373	4.8678
27	0499010100305	688	JACKSON GROVE	23961.00138	0.5501
28	0499010100307	874	JACKSON GROVE	271344.3113	6.2292
29	0499010100309		ROBERTSON	213536.0166	4.9021
30	0499010100310		OFF HINDMAN	659219.2243	15.1336
31	0499010100311		JACKSON GROVE	1333906.796	30.6223
32	0499010100312	8	MOSTELLER	112861.6198	2.5909
33	0499010100313	424	ROBERTSON	215988.7307	4.9584
34	0499010100314	10	MOSTELLER	125184.6264	2.8738
35	0499010100315	16	MOSTELLER	97363.61448	2.2352
36	0499010100316	20	MOSTELLER	103048.0857	2.3657
37	0499010100317	24	MOSTELLER	64636.15099	1.4838
38	0499010100318	22	MOSTELLER	63015.66913	1.4466
39	0499010100319	9	MOSTELLER	109338.4672	2.5101
40	0499010100320	9	MOSTELLER	866269.8852	19.8868
41	0499010100322		ROBERTSON	2595.367192	0.0596
42	0499010100323	4	MOSTELLER	87572.54147	2.0104
43	0499010100400	880	JACKSON GROVE	956520.1625	21.9587
44	0499010100601	30	TAMMY	45453.05406	1.0435
45	0499010100602		TAMMY	49151.54784	1.1284
46	0499010100606	103	MOSTELLER	35520.33834	0.8154

	PIN		STREET	SHAPE_Area (sq ft)	(acres)
47	0499010100700	99	MOSTELLER	31324.80902	0.7191
48	0499010100900	203	MOSTELLER	253527.7478	5.8202
49	0499010101000		MOSTELLER	1955060.031	44.8820
50	0499010101101		MOSTELLER	478068.7049	10.9749
51	0499010101104	369	MOSTELLER	41561.23555	0.9541
52	0499010101106	990	JACKSON GROVE	24030.02568	0.5517
53	0499010101107	443	MOSTELLER	28700.66604	0.6589
54	0499010101108	435	MOSTELLER	29630.04511	0.6802
55	0499010101109	421	MOSTELLER	28844.47829	0.6622
56	0499010101110	417	MOSTELLER	27673.92501	0.6353
57	0499010101111	401	MOSTELLER	27554.03492	0.6326
58	0499010101112	373	MOSTELLER	28618.13736	0.6570
59	0499010101113	475	MOSTELLER	25181.95604	0.5781
60	0499010101200	910	JACKSON GROVE	92502.06258	2.1236
61	0499010101201	904	JACKSON GROVE	217459.2064	4.9922
62	0499010101203	904	JACKSON GROVE	575918.5245	13.2213
63	0499010101400		JACKSON GROVE	1718030.734	39.4406
64	0499010101401		JACKSON GROVE	1865470.903	42.8253
65	0499010101402	1090	JACKSON GROVE	1707811.325	39.2060
66	0499010101500	1100	JACKSON GROVE	3682871.948	84.5471
67	0499010101501	1280	JACKSON GROVE	106007.3623	2.4336
68	0499010101502	1140	JACKSON GROVE	77468.90969	1.7784
69	0499010101600		JACKSON GROVE	2126159.369	48.8099
70	0499010101601		JACKSON GROVE	2156729.082	49.5117
71	0499010101602	1300	JACKSON GROVE	345981.1338	7.9426
72	0499010101700		SANDY FLAT	256292.1722	5.8837
73	0499010101702		SANDY FLAT	96071.85158	2.2055
74	0499010101703		SANDY FLAT	361590.3332	8.3010
75	0499010101706	4265	SANDY FLAT	41531.4491	0.9534
76	0499010101707	4251	SANDY FLAT	195053.7651	4.4778
77	0499010101709	4267	SANDY FLAT	32495.40946	0.7460
78	0499010102102	158	LITER	8365.8786	0.1921
79	0499010102200	1309	JACKSON GROVE	121217.0722	2.7828
80	0499010102201	0	JACKSON GROVE	19777.3189	0.4540
81	0499010102203	26	WALKER	50537.96522	1.1602
82	0499010102204	70	WALKER	43534.22924	0.9994
83	0499010102205		WALKER	613622.2629	14.0868
84	0499010102206	20	WALKER	3694.527195	0.0848
85	0499010102208	56	WALKER	32759.64677	0.7521
86	0499010102209	60	WALKER	18914.63568	0.4342
87	0499010102210	64	WALKER	34657.56521	0.7956
88	0499010102300	21	WALKER	1728397.223	39.6785
89	0499010102301	193	WALKER	129731.5776	2.9782
90	0499010102303	189	WALKER	74447.05922	1.7091
91	0499010102305	191	WALKER	69020.65203	1.5845
92	0499010102400	201	WALKER	3284731.792	75.4071

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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