[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 16-14428

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D.C. Docket No. 1:09-cv-02747-LMM

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA,
d.b.a. Mardi Gras,
FANTASTIC VISUALS, LLC,
d.b.a. Inserection,
6420 ROSWELL RD., INC.,
d.b.a. Flashers,

Plaintiffs - Appellants,

MARSHALL G. HENRY, et al.,

Intervenor Plaintiffs,

versus

CITY OF SANDY SPRINGS, GEORGIA,

Defendant - Appellee.

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Appeal from the United States District Court
for the Northern District of Georgia

(August 14, 2017)

Before ED CARNES, Chief Judge, and ROSENBAUM and DUBINA, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants Flanigan's Enterprises, Inc. of Georgia (d.b.a. "Mardi Gras") ("Mardi Gras") and 6420 Roswell Rd., Inc. (d.b.a. "Flashers") ("Flashers"), are strip clubs located in the once-unincorporated territory of Fulton County, Georgia (the "County"), now a part of the City of Sandy Springs, Georgia (the "City"). Plaintiff-Appellant Fantastic Visuals, LLC (d.b.a. "Inserection") ("Inserection"), is a sex shop also located in the City. Following a history of litigation with the County, Mardi Gras and Flashers believed, along with Inserection (collectively, "Plaintiffs"), that they were unfairly subjected to a number of the City's adult-entertainment ordinances, so they asserted a mélange of constitutional claims against the City.

The district court entered summary judgment against Plaintiffs on some claims. After a bench trial on a number of Plaintiffs' remaining claims, the court entered a final judgment against Plaintiffs on those claims. Plaintiffs appeal, asking us to announce three new and substantial changes in the law governing their right to free speech and expression under both the U.S. and Georgia Constitutions. For the reasons below, we decline Plaintiffs' invitation and affirm the district court's judgment.

## I.

### A.

This appeal is the latest iteration of a litigation saga that traces its origins to 1997, when the County amended its code to prohibit the sale and consumption of alcoholic beverages in adult-entertainment establishments featuring live nude or partially nude performances. *See Flanigan's Enters., Inc. of Ga. v.*

*Fulton County, Ga.* ("*Flanigan's I*"), 242 F.3d 976, 978-81 (11th Cir. 2001). The following year, Mardi Gras and Flashers, along with other plaintiffs, filed federal suits against the County, claiming that the alcohol ban violated their constitutional rights. *See id.* at 981.

The cases eventually made their way to us, and we found that, in light of well-established precedent, the alcohol ban was a content-neutral regulation of expressive conduct subject to the test established in *United States v. O'Brien*, 391 U.S. 367 (1968). *See Flanigan's I*, 242 F.3d at 982-84. We stated, "Under *O'Brien*, an ordinance is valid if: (1) it serves a substantial interest within the power of the government; (2) the ordinance furthers that interest; (3) the interest served is unrelated to the suppression of free expression; and (4) there is no less restrictive alternative." *Id.* at 984 (citing *O'Brien*, 391 U.S. at 377).

Though we concluded that the County easily satisfied the first, third, and fourth prongs of the test, *see id.* at 984-85, the plaintiffs ultimately prevailed because the County failed to establish the second prong. For that prong, we recognized that "[t]he avoidance of criminal activity, protection of property values, and avoidance of community blight are undeniably important" government interests. *Id.* at 985. But we also determined that the County failed to demonstrate that it reasonably relied on evidence showing that the alcohol ban furthered those interests because "the [C]ounty's own studies negated the very interests it purportedly sought to prevent." *Id.* at 985-87. We ruled that the County was not permitted to reject those studies and rely instead on "studies from different cities and different time periods." *Id.* at 987. So we declared the alcohol ban unconstitutional. *See id.*

Nine years later, the plaintiffs from *Flanigan's*

*I*, including Mardi Gras and Flashers, came back for another round, and our decision in *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Georgia* ("*Flanigan's II*"), 596 F.3d 1265 (11th Cir. 2010), resulted. In the wake of *Flanigan's I*, the County had passed essentially the same alcohol ban, except that it was supported by a stronger pre-enactment evidentiary record. *See id.* at 1270-74. Upon reviewing this record, we concluded, "This time around, the County relied on ample statistical, surveillance, and anecdotal evidence . . . [to] support the County's efforts to curb the negative secondary effects of alcohol and live nude dancing in its communities." *Id.* at 1269. So we found that the second prong of the *O'Brien* test was satisfied, but we still remanded the case to the district court for further proceedings with respect to other issues. *See id.* at 1276-83.

In December 2005, while the litigation that led

to our decision in *Flanigan's II* was ongoing, the City of Sandy Springs came into existence as a municipality within the County. That same month, the City promulgated a number of regulations covering adult-entertainment establishments, including a ban on alcoholic beverages in adult-entertainment establishments. In enacting these regulations, the City reviewed a robust legislative record detailing the adverse secondary effects of adult-entertainment establishments. Over time, the City enacted additional adult-entertainment regulations and amended some of its existing ones.

**B.**

Mardi Gras, Flashers, and Inserection are businesses located within the City. Mardi Gras and Flashers operate establishments where dancers perform in the nude and where alcohol is sold and served to patrons; they continue to serve alcohol,

despite the City's ban, pursuant to a consent agreement. Inserection is both a store that sells sexually explicit media, sexual devices, and other sex-related products, and an arcade at which patrons can pay to view sexually explicit videos. Plaintiffs filed the instant suit against the City in the U.S. District Court for the Northern District of Georgia, claiming that various provisions of the City's Alcohol Code, Adult Zoning Code, and Adult Licensing Code violated a number of their rights under the U.S. and Georgia Constitutions. After the parties conducted discovery, the City moved for summary judgment.

The district court granted summary judgment in favor of the City on various claims that Plaintiffs have not raised on appeal, but it denied the City's summary-judgment motion with respect to other claims.[1] As

[1] Prior to ruling on the motion for summary judgment, the court severed Plaintiffs' claims challenging the City's ordinance that prohibited the sale of sexual

relevant to this appeal, Plaintiffs argued in opposition to the City's motion that a number of the adult-entertainment ordinances challenged under the First Amendment to the U.S. Constitution failed strict scrutiny and that even if the ordinances were instead subject to intermediate scrutiny, they failed that standard as well. The district court by and large rejected this argument. But it nevertheless ruled that the relevant claims were not fit for adjudication by way of summary judgment because factual issues underlying the court's application of intermediate scrutiny remained.

Plaintiffs also challenged the ordinances under

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devices in the City. Those severed claims were litigated separately, and eventually they became the subject of this Court's decision in *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia*, 831 F.3d 1342 (11th Cir. 2016), which has been vacated in light of the Court's decision to review the case en banc, *see Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, --- F.3d ----, No. 14-15499, 2017 WL 975958 (Mem) (11th Cir. Mar. 14, 2017).

the Free Speech Clause of the Georgia Constitution on substantially the same grounds. On these claims, however, the court entered judgment for the City.

Later, the court conducted a four-day bench trial on a small group of remaining claims that Plaintiffs still wished to prosecute. Ultimately, the district court issued its findings of fact and conclusions of law and entered final judgment in favor of the City.

## II.

Plaintiffs appeal both the entry of summary judgment and the judgment entered after the bench trial. A district court's entry of summary judgment is subject to a *de novo* standard of review on appeal. *See Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1284 (11th Cir. 1997). Summary judgment is properly entered if the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.

P. 56(a), (c).

When a district court enters judgment after a bench trial, we generally review the district court's conclusions of law *de novo* and findings of fact for clear error. *See Tartell v. S. Fla. Sinus & Allergy Ctr., Inc.*, 790 F.3d 1253, 1257 (11th Cir. 2015). But while, in the typical case, "we review district court factfindings only for clear error, . . . First Amendment issues are not ordinary." *ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009). So in the context of First Amendment claims, we review findings of "constitutional facts," as opposed to "ordinary historical facts," *de novo*. *Id.* (citations and internal quotation marks omitted).

## III.

On appeal, Plaintiffs argue that the district court erred in granting judgment in favor of the City on various claims brought under the First Amendment to

the U.S. Constitution. According to Plaintiffs, these claims challenge ordinances that are content based. Plaintiffs acknowledge that if precedent predating *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015), applied, the district court may have been correct in subjecting these ordinances to intermediate scrutiny. But they contend that *Reed* changed the applicable law so that the ordinances should have been subjected to strict scrutiny. Mardi Gras and Flashers also argue that, even if the ordinances are not subject to strict scrutiny, they still fail the proportionality test set forth by Justice Kennedy in his concurrence in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)—a test that they claim constitutes binding law in this Circuit. We reject both of these arguments.

**A.**

We begin our discussion of Plaintiffs' *Reed* argument by reviewing the state of the law before *Reed*

was decided. The ordinances that Plaintiffs challenge regulate freedom of speech and expression in the adult-entertainment context. On their face, the ordinances may appear to be content based because they target adult entertainment; so if we were applying general principles of First Amendment law, the ordinances would be subjected to strict scrutiny. *See Wollschlaeger v. Governor, State of Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc) ("Content-based restrictions on speech normally trigger strict scrutiny.").

Yet under equally well-established Supreme Court and Eleventh Circuit precedent, adult-entertainment ordinances are not treated like other content-based regulations. *See Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla. ("Peek-A-Boo II")*, 630 F.3d 1346, 1353-54 (11th Cir. 2011). Two strands of case law, often intertwined, embody this exception: (1) the zoning strand, which deals with

ordinances that regulate land use for adult-entertainment businesses, such as stores that sell pornography and theatres that play pornography; and (2) the public-nudity strand, which deals with ordinances that ban public nudity as a general matter and thereby indirectly regulate nude dancing.[2]

These two strands of case law are part of the "secondary-effects doctrine," which we have summarized as follows:

> Zoning ordinances that regulate the conditions under which sexually oriented businesses may operate are evaluated as time, place, and manner regulations, following a three-part test set forth by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–50, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) and reaffirmed in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). Content-neutral public nudity ordinances, by contrast, involve

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[2] The City's ban on alcohol in nude-dancing establishments falls within this second strand of case law. *See Flanigan's I*, 242 F.3d at 983-84.

> expressive conduct and must therefore be measured against a four-part test set forth in *United States v. O'Brien*, 391 U.S. 367, 376–77, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), and applied in the context of adult entertainment in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), and in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).

*Peek-A-Boo II*, 630 F.3d at 1354 (footnote omitted).

The zoning line of precedent requires courts to engage in a three-step inquiry to evaluate the constitutionality of a provision under the First Amendment. First, a court determines whether a challenged zoning ordinance is an invalid total ban on any given type of adult-entertainment business activity or is instead a time, place, and manner regulation. Second, if the ordinance is a time, place, and manner regulation, the court determines whether the ordinance should be subjected to intermediate or strict scrutiny. And third, if intermediate scrutiny applies, then the

court assesses whether the ordinance serves a substantial government interest and allows for reasonable alternative channels of communication. *See Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla. ("Peek-A-Boo I")*, 337 F.3d 1251, 1264 (11th Cir. 2003).

At step two of this analysis, the court decides whether to apply intermediate or strict scrutiny based on the government's interest in enacting the challenged ordinance. If the government sought to restrict the adult-entertainment-related speech because of the speech's content, then the ordinance must be evaluated under strict scrutiny. *See id.* at 1264-65 & n.14. But if the government intended to combat the "secondary effects" of adult entertainment in the surrounding community—*i.e.*, increased crime, decreased property values, etc.—then the ordinance is held to intermediate scrutiny. *Id.* In other words, intermediate scrutiny

applies if the ordinance can be "*justified* without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (emphasis in original; internal quotation marks and citations omitted). It is this part of this test from which the term "secondary-effects doctrine" is derived.

The framework for analyzing public-nudity ordinances is similar. The first step is substantially the same as the second step of the zoning framework: the court asks whether the government's purpose in enacting the ban on public nudity is related to the suppression of the erotic message conveyed by nude dancing. *See Flanigan's I*, 242 F.3d at 983. If it is, then the ban is subject to strict scrutiny; but if the ban is motivated by some other purpose, then the *O'Brien* test, which is less restrictive than strict scrutiny, applies. *See id.* Under the *O'Brien* test, "an ordinance is valid if: (1) it serves a substantial interest within the

power of the government; (2) the ordinance furthers that interest; (3) the interest served is unrelated to the suppression of free expression; and (4) there is no less restrictive alternative." *Id.* at 984.[3]

Plaintiffs contend the Supreme Court's recent decision in *Reed* altered the landscape of First Amendment jurisprudence so radically that it uprooted the secondary-effects doctrine. The Supreme Court in *Reed* considered whether a municipal sign code improperly treated signs differently, depending on the category into which the sign fell, such as "ideological,"

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[3]The Supreme Court has articulated at least two reasons why sexually explicit speech (and expression) is treated differently under the First Amendment than other types of content-based speech are treated: (1) sexually explicit speech is associated with harmful secondary effects in a way that other protected speech typically is not, and (2) sexually explicit speech is less valuable to our society than other types of protected speech. *See Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 175-76 (3d Cir. 2016) (Rendell, J., dissenting).

"political," or "temporary directional." 135 S. Ct. at 2224-25. The Ninth Circuit had held that the code was content neutral because the town adopted the code not based on any disagreement the town had with the different types of regulated content, but rather based on interests unrelated to content. *See id.* at 2226. The Ninth Circuit thus subjected the code to a lower level of scrutiny. *See id.*

The Supreme Court reversed, concluding that the sign code was "content based on its face" because the code's restrictions applied to signs differently, "depend[ing] entirely on the communicative content of the sign." *Id.* at 2227. The Court made clear that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed," and the Court reiterated the long-standing principle that content-based laws are subject to strict scrutiny. *Id.* In

addition, the Court expressly rejected the Ninth Circuit's finding that a court could rely on the town's justification for enacting the sign code when conducting "content-neutrality analysis": "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (citation omitted); *see also id.* ("In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.").

There is no question that *Reed* has called into question the reasoning undergirding the secondary-effects doctrine. The secondary-effects doctrine allows a content-based, adult-entertainment-related law to be subjected to less than strict scrutiny as long as the law can be justified by a legitimate interest in combating the harmful secondary effects of adult entertainment.

The majority opinion in *Reed*, of course, rejected the lower court's reliance on the sign code's justification in conducting content-neutrality analysis; the Court also declared that content-based laws should be subjected to strict scrutiny.

But significantly, the majority opinion in *Reed* did not address the secondary-effects doctrine.[4] For this reason alone, we cannot read *Reed* as abrogating either the Supreme Court's or this Circuit's secondary-effects precedents. The rule is simple: "If a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

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[4] Plaintiffs read Justice Kagan's concurrence as advocating for a qualification of the majority's reasoning so that the secondary-effects doctrine could be left intact. *See Reed*, 135 S. Ct. at 2238 (Kagan, J., concurring). Regardless of whether certain aspects of Justice Kagan's concurrence may prove to be correct, however, today we must concern ourselves with only the holding of the majority in *Reed*.

case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (alterations added); *see also Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) ("[A] prediction [that the Supreme Court will overrule its own precedent] may be accurate, but we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." (alterations added)).

The Supreme Court's and our secondary-effects precedents are on all fours with the adult-entertainment regulations before us;[5] *Reed*, which

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[5] Plaintiffs argue that some of the ordinances they challenge are not zoning ordinances but rather content-based ordinances of other varieties that are therefore subject to strict scrutiny. We are unpersuaded that Plaintiffs' zoning/non-zoning dichotomy has legal force when the ordinances in question clearly were designed to combat the adverse secondary effects of adult

addressed a sign code, is not. We therefore follow the secondary-effects doctrine because it has "direct application" in this case, notwithstanding that it may "appear[] to rest on reasons rejected in [*Reed*]." *Rodriguez de Quijas*, 490 U.S. at 484 (alteration added).

**B.**

Mardi Gras and Flashers argue also that, even if the district court properly applied intermediate scrutiny, the court erred in not subjecting the alcohol ban to the proportionality test articulated by Justice Kennedy in his *Alameda Books* concurrence. Had the court applied this test, they assert, the court would have found that the alcohol ban would deprive Mardi Gras and Flashers of a vital source of income (that is, alcohol sales), rendering Mardi Gras and Flashers financially unable to continue operating. According to

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entertainment.

Mardi Gras and Flashers, that the alcohol ban would have put them out of business means that the ban would silence speech in an amount disproportionate to the amount of secondary effects that the ban would combat. And as Mardi Gras and Flashers see it, this would render the ban unconstitutional under the proportionality test.

Justice Kennedy's *Alameda Books* concurrence, which was not joined by another Justice, explored at length his theory that, for a government to advance a legitimate interest in combating harmful secondary effects, the government must establish not only "that its regulation has the purpose and effect of suppressing secondary effects" (a requirement that was, by then, governing law), but also that the regulation "leav[es] the quantity and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring). We refer to this latter requirement as the

"proportionality test" because the test assesses whether the challenged law disproportionately silences speech in order to reduce the adverse secondary effects of that speech. *See id.* at 451 ("It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice.") (Kennedy, J., concurring).

Justice Kennedy concurred with the *Alameda Books* plurality opinion penned by Justice O'Connor because he agreed about the quantum of evidence necessary for the government to prove that a challenged law was motivated by a desire to counteract adverse secondary effects. *See Peek-A-Boo I*, 337 F.3d at 1263-64 (explaining *Alameda Books*). But Justice Kennedy expressly recognized that the plurality's opinion did not account for his proportionality test. *See Alameda Books*, 535 U.S. at 450 ("The plurality's

analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech.") (Kennedy, J., concurring).

This Circuit has used broad language to characterize Justice Kennedy's concurrence as precedential. *See Peek-A-Boo I*, 337 F.3d at 1264; *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 874 n.20 (11th Cir. 2007). But, of course, his concurrence is binding only to the extent that it can be harmonized with the plurality's opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five

Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." (citation and internal quotation marks omitted)). Because Justice Kennedy's *Alameda Books* proportionality test cannot be harmonized with the plurality's opinion, it is not binding Supreme Court precedent.

Nevertheless, that does not mean that this Circuit has not adopted the proportionality test as Circuit law. Decisions of this Court arguably have spoken approvingly of the proportionality test. In *Peek-A-Boo I*, we stated in a footnote that "Justice Kennedy's controlling opinion [in *Alameda Books*] emphasized that secondary effects ordinances must accomplish their goal of combating secondary effects 'while leaving the quantity and accessibility of speech substantially intact.'" 337 F.3d at 1274 n.23 (alteration added;

citation omitted). Elsewhere in the opinion, we explained that "[t]he key issue" under Justice Kennedy's test "is 'how speech will fare' under the ordinance." *Id.* at 1263 (citation omitted). Later, in Peek-A-Boo II, we noted that the county defendant was not required "to produce empirical evidence or scientific studies as long as it 'advance[d] some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.'" 630 F.3d at 1355 (quoting *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring)).[6] All of these statements, however, are dicta. In these cases, we did not apply the proportionality test to reach a holding; we ruled on other grounds. Dicta lacks binding

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[6] Plaintiffs cite *Flanigan's II* and *Daytona Grand* as further support for their contention that this Circuit has spoken favorably of the proportionality test, but neither of those decisions mentions the test.

precedential value. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010).

We could nevertheless adopt the proportionality test for the first time today. Under the circumstances, though, we are not inclined to do so. That *Reed* has called into question the fundamental underpinnings of the secondary-effects doctrine, even suggesting that the doctrine may be abrogated, counsels against extending the doctrine based on the opinion of one Supreme Court Justice in one of his concurrences, which was based on a fact pattern not present in this case. In *Alameda Books*, the Court examined a dispersal ordinance, which provided in part that no more than one adult-entertainment establishment could operate within any given building and that adult-entertainment establishments could not be located within a certain distance of each other. *See Alameda Books*, 535 U.S. at 430-31.

Here, by contrast, we have a range of regulations to consider, and some have functions that are quite different from dispersal ordinances. The question of whether to apply the proportionality test would be a difficult one even if we were faced with the same type of ordinance as that at issue in *Alameda Books*. But today we encounter a variety of different ordinances, and we do so in a post-*Reed* jurisprudential landscape. We therefore decline to adopt Justice Kennedy's proportionality test.

Plaintiffs do not otherwise contest the district court's application of intermediate scrutiny to their federal claims. So we affirm the district court's judgment in favor of the City with respect to these claims.[7]

## IV.

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[7] Because we affirm the judgment as to the federal claims on these grounds, we decline to address the City's issue-preclusion defense.

Inserection separately challenges the district court's dismissal of its claims brought under the Free Speech Clause of the Georgia Constitution that take issue with the ordinances that apply to Inserection because of Inserection's status as an "adult bookstore." Inserection contends that these ordinances are content based and subject to strict scrutiny and that, under Georgia law, the strict-scrutiny analysis for an adult-entertainment regulation requires the City to prove that its ordinances are the "least restrictive means" of achieving the City's goals. Inserection argues that the City has not met this burden.

The City urges us not to reach the merits of Inserection's argument because Inserection failed to raise this argument before the district court.[8] Indeed, Inserection did. The only part of Plaintiffs' second amended complaint that refers to a "least restrictive

[8] The City also asserts that Inserection lacks standing.

means" analysis is Plaintiffs' claim relating to a lawsuit the City filed against Plaintiffs in state court—a claim that Plaintiffs have not raised as an issue on appeal. Inserection's claims that the ordinances premised on the "adult bookstore" definition fail the "least restrictive means" test have not been properly preserved because Plaintiffs did not raise the issue below.

As a general rule, this Court does not consider issues raised for the first time on appeal—these issues are not properly preserved for our review. *See CSX Transp., Inc. v. Gen. Mills, Inc.*, 846 F.3d 1333, 1336 (11th Cir. 2017). Rather, the party seeking to raise the issue must first present it to the district court in a manner that allows the court "an opportunity to recognize and rule on it," and then the party may properly present it to this Court on appeal. *Id.* at 1336-37 (citation and internal quotation marks omitted).

Inserection nevertheless asks us to excuse this mistake. We recently recited the circumstances under which a failure to properly preserve an issue may be excused on appeal, *see Blue Martini Kendall, LLC v. Miami Dade County, Fla.*, 816 F.3d 1343, 1349 (11th Cir. 2016), but we are unpersuaded that Inserection has made such a showing here.

Inserection does not otherwise contest that the district court properly dismissed its Georgia-law claims. We thus find no basis to reverse the district court's judgment in favor of the City on these claims.

## V.

For the foregoing reasons, we **AFFIRM** the district court's judgment.

AFFIRMED.

[Case 1:09-cv-02747-LMM Document 393
Filed 03/01/16]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| FLANIGAN'S ENTERPRISES, INC. OF GEORGIA d/b/a Mardi Gras, 6420 Roswell Road, Inc. d/b/a Flashers, and Fantastic Visuals, LLC d/b/a Inserection, | : | Civil Action No. 1:09-CV-2747-LMM |
| Plaintiffs, | : | |
| vs. | : | |
| CITY OF SANDY SPRINGS, GEORGIA, | : | |
| Defendant. | : | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ORDER**

Plaintiffs Flanigan's Enterprises, Inc. of Georgia, d/b/a Mardi Gras("Mardi Gras"), 6420 Roswell Road, Inc. d/b/a Flashers ("Flashers"), and Fantastic Visuals, LLC d/b/a Inserection ("Inserection") are three adult establishments that began operating in unincorporated Fulton County, Georgia. When Defendant City of

Sandy Springs ("the City" or "Sandy Springs") incorporated in late 2005, Plaintiffs became subject to the City's regulations. This case resolves Plaintiffs' legal challenges to the City's regulations on adult establishments.

### A. The Adult Clubs' First Case against Fulton County (1998-2001)

Plaintiff Mardi Gras opened in November 1991. Dkt. No. [374], Vol. 1 at58:10-13 (Phifer). Mardi Gras provides alcohol and nude dancing. SAC, Dkt. No.[219] ¶ 2. Mardi Gras is within 600 feet of homes that were built between 1981and 1986. Dkt. No. [375], Vol. 2 at 304:7-305:5 (Huff).

Plaintiff Flashers has operated since about 1991 with alcohol sales and nude dancing. Dkt. No. [375], Vol. 2 at 231:8-10, 236:11-14, 231:19-20 (Freese).The sale of alcohol is Flashers's primary source of income. Id. at 242:22-243:11(Freese). Flashers is located at the entry of a residential street. Dkt. No. [375],Vol. 2 at

295:4-5 (Huff).

Plaintiff Inserection is a limited liability company organized and existing under the laws of the State of Georgia. Inserection owns and operates an establishment which sells sexually explicit media (e.g., books, video tapes and DVDs) and other products (e.g., sexual devices, toys, lubricants, adult novelty items) on its premises at 7855 Roswell Road, Atlanta, Fulton County, Georgia30350.

In September 1990, the Fulton County Board of Commissioners approved an amendment to Section 33-5-10 of the Fulton County Code to add a new Subsection (b) as follows:

> No adult entertainment premises shall be licensed to sell alcoholic beverages if it shall be located within 1000 feet of the boundaries of any residential, apartment or townhouse, zoning district . . . . As used herein, the term "adult entertainment premises" shall be defined as premises which are used for commercial entertainment wherein live performers display any portion of the

> areola of the female breast or any portion of his or her pubic hair, cleft to the buttocks, anus, vulva or genitals.

Def. Exh. 51 at 3-4.

In July 1992, Fulton County amended its zoning resolution by adding Article 19.4.1.(1), which stated that the boundary line of an adult entertainment establishment had to be located at least 500 feet from the property line of any residential use. Def. Exh. 53 at 2, Art. 19.4.1(1)B.1.a. In 1997, Fulton County amended its code to prohibit the serving, offering, or consuming of any alcoholic beverages on the premises of an adult entertainment licensee. Flanigan's Enters. v. Fulton Cty. ("Flanigan's I"), 242 F.3d 976, 980 (11th Cir. 2001).

In 1998, adult establishments sued Fulton County seeking a declaration that the alcohol ban was unconstitutional. Mardi Gras and Flashers were plaintiffs in that litigation. Flanigan's I, 242 F.3d at

981; Pls. Exh. 7, Stipulated Fact 1.

In February 2001, the U.S. Court of Appeals for the Eleventh Circuit held that Fulton County's alcohol ban was unconstitutional because the County ignored the conclusions of its own local study that compared calls for police assistance between adult and non-adult drinking establishments. Flanigan's I,242 F.3d at 979, 986-87.

### B. Fulton County's July 2001 Report and Adult Establishments Legislation

Thereafter, Fulton County commissioned a study in July 2001 that "made a variety of findings, and reached a different result." Flanigan's Enters. v. Fulton Cty. ("Flanigan's II"), 596 F.3d 1265, 1270 (11th Cir. 2010). The July 2001 report described a fourteen-day sting operation in an industrial area where three strip clubs operated, which resulted in ninety-three charges for prostitution and othersex-related crimes and thirty-four charges for drug-related crimes. Of the 167arrests,

there were 166 convictions. Flanigan's II, 596 F.3d at 1270; Def. Exh. 39at 64-105 (Bates 015-056).

The July 2001 report compared incident data from six strip clubs (including Mardi Gras and Flashers), one of which did not serve alcohol butallowed customers to bring their own ("BYOB" – the "Coronet Club"). The report showed that from 1998 to 2000, the BYOB club accounted for only fifteen (or4.1%) of the 362 reported incidents at the clubs. Flanigan's II, 596 F.3d at 1270-71; Def. Exh. 39 at 159-160 (Bates 0110-0111). The report also detailed surveillance operations by Fulton County police in May and June 2001 at adult clubs which served alcohol (including Flashers and Mardi Gras). Def. Exh. 39 at194 (Bates 0145). Video tape revealed physical contact between dancers and patrons, including violations of the Georgia criminal law against masturbation for hire, O.C.G.A. § 16-6-16(a).

Flanigan's II, 596 F.3d at 1271 & n.1; Def. Exh. 39 at194 (Bates 0145).

The July 2001 report described surveillance of unlawful behavior. Def. Exh.39 at 200-247 (Bates 0151-0198); Flanigan's II, 596 F.3d at 1271 n.1. It also included testimony from the presiding juvenile court judge who spoke of girls who appeared before her in court who had worked in the adult clubs and had performed sexual acts in the club parking lots or at private parties. Flanigan's II, 596 F.3d at 1271; Def. Exh. 39 at 249-251 (Bates 0200-0202).

Several studies from a variety of American cities, including a summary produced by National Law Center for Children and Families concerning the negative secondary effects of sexually oriented businesses, were also included in the July 2001 Report. Flanigan's II, 596 F.3d at 1271; Def. Exh. at 302-386 (Bates0253-0337). "The studies tended to show that

sexually-oriented businesses, including strip clubs and adult book stores, had harmful secondary effects ontheir surrounding communities. Specifically, the foreign studies documented increased crime rates and reduced property values in the neighborhoods near strip clubs. In fact, of the twenty-eight studies discussed in the NLC report—studies that had not been presented to [the Eleventh Circuit] when [it] reviewed the County's earlier ordinance in [Flanigan's I]—thirteen of them suggested that there was a correlation between adult clubs and depressed property values." Flanigan's II, 596 F.3d at 1272.

In August 2001, Fulton County adopted an adult entertainment licensing ordinance that, among other things, prohibited the sale, possession, and consumption of alcoholic beverages on the premises of an adult entertainment establishment. Flanigan's Enters. v. Fulton Cty., No. 1:01-CV-3109, 2006

WL2927532 (N.D. Ga. Oct. 12, 2006), rev'd, 596 F.3d 1265, 1273-74 (11th Cir. 2010);Pls. Exh. 7, Stipulated Fact 2.

### C. The Adult Clubs' Second Case against Fulton County (2001-2010)

Mardi Gras and Flashers sued Fulton County over the 2001 adult business regulations, arguing, among other things, that the ordinance infringed on their right to free speech. Pls. Exh. 7, Stipulated Fact 3. After the district court struck the August 2001 ordinance, the Eleventh Circuit reversed. Flanigan's II, 596 F.3dat 1269 ("This time around, [Fulton] County relied on ample statistical, surveillance, and anecdotal evidence, the live testimony of the chief of police andthe chief judge of the juvenile court, among others, and dozens of foreign studies, all of which support the County's efforts to curb the negative secondary effects of alcohol and live nude dancing in its communities."). In 2010, the Eleventh Circuit rejected Mardi Gras's

and Flashers's First Amendment claims and upheld Fulton County's ban on alcoholic beverages in adult establishments. Flanigan's II, 596F.3d at 1279-80.

### D. City of Sandy Springs Incorporated and 2005 Legislation

Before the Eleventh Circuit's ruling in 2010, the City of Sandy Springs came into existence on December 1, 2005. Pls. Exh. 7, Stipulated Fact 4. Mardi Gras, Flashers, and Inserection, as well as Love Shack and Main Stage/Coronet Club, are adult establishments in Sandy Springs. Def. Exh. 6 at 20-21. A second Inserection store was located next to Flashers until it was destroyed by fire in March 2009. Def. Exh. 68 ¶¶ 5-6.

When the City of Sandy Springs began, it adopted Ordinance No. 2005-12-01, which provided for the continuation of Fulton County regulations during the transition period legislatively established for the City of Sandy Springs. Pls. Exh.7, Stipulated Fact 4;

Joint Exh. 56. Ordinance No. 2005-12-01 provided, among other things, that "until: (1) repealed by the City Council by specific reference to the law or Ordinance of the Code of Fulton County, or (2) the City Council adopts regulation by the valid passage and adoption of an ordinance by the City Council affirmatively replacing specific Fulton County ordinances in conformance with the Charter of the City of Sandy Springs, Georgia, and O.C.G.A. § 36-31-8, all existing laws and ordinances of Fulton County, in effect as of November 30, 2005 shall continue in full force and effect within the territorial limits of the City ofSandy Springs for the term of the Charter transition period, or until otherwise repealed or replaced as contemplated herein." Joint Exh. 56, at 2, Section 3.

When the City began, Fulton County ordinances already prohibited the sale, possession, and consumption of alcohol in adult establishments. Joint

Exh.5 at 1883-1904 (L.R. 10), 1889 (Fulton County Code § 18-79(17)). On December 27, 2005, Sandy Springs adopted its own regulations of adult establishments, including a prohibition against alcoholic beverages on the premises of adult establishments. Pls. Exh. 7, Stipulated Fact 5; Joint Exh. 58, Ord. No. 2005-12-20 at 9, Sec. 3(8).

The preamble of the legislation stated that the City adopted the adult establishments regulations to "promote the public welfare by furthering legitimate public and governmental interests, including but not limited to, reducing criminal activity and protecting against or eliminating undesirable activities impacting adversely the community conditions" and not to infringe upon the protected Constitutional rights of freedom of speech or expression. Joint Exh. 58, at 4, § 19.

**E. Sandy Springs 2005 Secondary Effects Evidence**

The 2005 legislative record supporting the City's adoption of its adult establishment regulations contained detailed testimony from undercover investigators who observed illicit sexual activity occurring in adult establishments in and around the City of Sandy Springs. Joint Exh. 5 at 414, 429-436, 1056-1088 (L.R. 2a-2c).

The 2005 legislative record contained certified documents evidencing the criminal prosecution of Captain Mark Timothy Lance, a former Fulton County Police Officer, who was convicted of extortion for receiving protection money from the management of Flashers. Joint Exh. 5 at 3730-3731 (Transcript of December 20, 2005, City Council meeting, at 72:15-73:11) & 1098-1133 (district court docket for Lance's criminal case).

The 2005 legislative record also contained minutes from the July 18, 2001, Fulton County public

hearing on the negative secondary effects of adult businesses, Joint Exh. 5 at 3351-3362, including the Fulton County Police Chief's summary of the July 2001 Fulton County study:

> As the summaries show, one new location, the Coronet Club, is the only club that does not sell or serve alcohol. It accounted for only four percent of the total reported crime. The other five locations, Fannie's, Riley's, Babe's, Mardi Gras and Flasher's, accounted for the remaining 96 percent of reported crime. One location, Riley's, showed double the percentage of reported crime over that at the Coronet Club. And the remaining locations more than quadrupled the percentage of reported crime over the Coronet Club. The Fulton County Police Department conducted such surveillance of the adult entertainment establishments as early as April of this year. Reports from the surveillance are included in the report and include undercover video from Mardi Gras, Flasher's and Babe's. Criminal activities were observed by police officers at several of these locations. No criminal activities were observed at the Coronet Club. Recently, officers arrested dancers at Mardi Gras, Flasher's, Riley's and Babe's for masturbation for hire. Those arrests are pending prosecution. These arrests

> are documented in the submitted report. Investigation conducted by the Fulton County Police Department have resulted in the documentation of various criminal activities occurring both inside and in the outer vicinity of the adult entertainment establishments located within unincorporated Fulton County.

Joint Exh. 5 at 3355-3356. Fulton County Juvenile Court Judge Nina Hickson's2001 testimony to the Fulton County board concerning minors who had worked and performed sexual acts in and around adult establishments was also included. Joint Exh. 5 at 3356-3357.

The 2005 legislative record contained studies and reports regarding negative secondary effects of sexually oriented businesses that have been documented in other American jurisdictions. Joint Exh. 5 at 481-482 (index),1202-1397 & 1438-1882. This included a summary of secondary effects studies by National Law Center for Children and Families ("NLC"), similar to the NLC summary in the July 2001

Fulton County report and discussed in the 2010 Flanigan's II decision. Joint Exh. 5 at 1379-1397; see Flanigan's II, 596 F.3d at1271-72 & nn.2-3.The NLC report relied on by the City since 2005 discusses many of the secondary effects reports that were summarized in the July 2001 Fulton County report:

| Study | City's 2005 record | July 2001 report |
|---|---|---|
| Tucson, AZ | Joint Exh. 5 at 1381 | Def. Exh. 39 at 304-305 |
| Garden Grove, CA | Joint Exh. 5 at 1382 | Def. Exh. 39 at 305-306 |
| Ellicottville, NY | Joint Exh. 5 at 1383 | Def. Exh. 39 at 315-316 |
| New York City, NY | Joint Exh. 5 at 1384 | Def. Exh. 39 at 318-319 |
| Times Square, NY | Joint Exh. 5 at 1385 | Def. Exh. 39 at 319-320 |
| Oklahoma City, OK II | Joint Exh. 5 at 1386 | Def. Exh. 39 at 322-323 |
| Cleburne, TX | Joint Exh. 5 at 1387 | Def. Exh. 39 at 325-326 |

| Study | City's 2005 record | July 2001 report |
|---|---|---|
| Dallas, TX | Joint Exh. 5 at 1388 | Def. Exh. 39 at 327-328 |
| Houston, TX II | Joint Exh. 5 at 1389 | Def. Exh. 39 at 330-331 |
| Newport News, VA | Joint Exh. 5 at 1390 | Def. Exh. 39 at 331-332 |
| St. Croix County, WI | Joint Exh. 5 at 1391 | Def. Exh. 39 at 335-336 |

The 2005 legislative record also contained several secondary effects reports from other jurisdictions in their entirety, and most of those were cited favorably in the 2010 Flanigan's II decision:

| Study | City's 2005 record | in Flanigan's II |
|---|---|---|
| Tucson, AZ | Joint Exh. 5 at 1205-1211 | 596 F.3d at 1271 n.2 |
| Adams County, CO | Joint Exh. 5 at 1212-1224 | 596 F.3d at 1272 |
| Oklahoma City, OK | Joint Exh. 5 at 1225-1236 | 596 F.3d at 1272 n.3 |
| Islip, NY | Joint Exh. 5 at 1237-1277 | 596 F.3d at 1273 n.4 |
| Garden Grove, CA | Joint Exh. 5 at 1438-1534 | 596 F.3d at 1272 n.3 |
| St. Mary's, GA | Joint Exh. 5 at 1535-1552 | |
| St. Croix County, WI | Joint Exh. 5 at 1553-1570 | 596 F.3d at 1271 n.2 |
| Manatee County, FL | Joint Exh. 5 at 1571-1603 | |
| Dallas, TX | Joint Exh. 5 at 1604-1627 | 596 F.3d at 1272 n.3 |
| New York City, NY | Joint Exh. 5 at 1679-1770 | 596 F.3d at 1272 & n.3 |
| Rome, GA | Joint Exh. 5 at 1771-1776 | |
| Bellevue, WA | Joint Exh. 5 at 1777-1870 | 596 F.3d at 1271 n.2 |

The 2005 legislative record contained materials

submitted to the City Council by attorneys for adult establishments and in opposition to the City's regulation of adult establishments. Joint Exh. 5 at 483-484, 2136-3371. Sandy Springs residents also offered testimony regarding litter, loitering, night activity, and transient traffic near and around adult establishments in the City of Sandy Springs. Joint Exh. 5 at 3781-3792 (Transcript of December 20, 2005 City Council meeting, at 123:2-134:5), 3836-3837 (Transcript of December 27, 2005 City Council meeting, at 23:18-24:21), and 1134-1135.

The 2005 legislative record also contained testimony that explained, rebutted, and criticized the reports prepared for Fulton County based on calls for police service data. Joint Exh. 5 at 3855-3875 (Transcript of December 27, 2005 City Council meeting, at 42:5-62:5).

### F. Nonconforming Adult Establishments Amortized in 2005 Legislation

In December 2005, the City enacted an adult entertainment licensing ordinance, Ordinance No. 2005-12-20. This ordinance required adult establishments to be separated from residential districts and other specified land uses. Joint Exh. 58, Ord. No. 2005-12-20, at 8-9, Section 2. Plaintiffs' establishments do not conform to the City's location regulations. See Plaintiffs' Pretrial Brief on Issue 1, Dkt. No. [343] at 5.

Ordinance No. 2005-12-20 provided an amortization period to allow a "nonconforming" adult establishment to operate for up to five years (fromJanuary 1, 2006 to December 31, 2010) in its nonconforming location before having to relocate. Joint Exh. 58, Ord. No. 2005-12-20, at 17-18, Section 16(b). To be a "nonconforming" adult establishment under the 2005 amortization provision, an adult establishment had to have been a lawful and valid use "when

established, as evidenced by a certificate of occupancy as provided in Article 23, Section 23.1 of the Sandy Springs Zoning Ordinance." Joint Exh. 58, Ord. No.2005-12-20, at 18, Section 16(b)(6).

Likewise, under the current amortization provision, Sec. 26-37 of the City Code, a "Nonconforming adult establishment use" must have been "lawful and valid when established, as evidenced by a certificate of occupancy as provided in article 23, section 23.1 of the city zoning ordinance." Joint Exh. 2 at 16-17, Sec.26-37(a).

No plaintiff produced a certificate of occupancy—from either Fulton County or Sandy Springs—showing that their business was lawfully commenced as an adult establishment. However, Mardi Gras's Fulton County adult entertainment and alcoholic beverage licenses were renewed annually until the City assumed jurisdiction. Dkt. No. [374], Vol.

1 at 57:25-58:10. Flashers's alcoholic beverage license was at least renewed in the early 1990s but it is unclear whether Flashers was ever issued an adult entertainment license by Fulton County. Trial Tr., Dkt. No. [375], Vol. 2 at 233:10-234:7, 244:9-11, 251:22-252:11.

In pretrial briefing, Plaintiffs conceded that "under the plain text of § 26-37, [they] are not 'nonconforming adult establishment uses' as defined by the City." Dkt. No. [343] at 6. Plaintiffs have operated in their nonconforming locations since the City's adult establishment location regulations took effect on January 1, 2006.

### G. Sandy Springs 2008 Amendment

In August 2008, the City adopted Ordinance No. 2008-08-41, which"amended by replacing in its entirety Article II of Chapter 26 [Adult Establishment Licensing Code] to read as" set forth in that ordinance.

Pls. Exh. 7, Stipulated Fact 8; Joint Exh. 60, Ord. 2008-08-41. Ordinance No. 2008-08-41 restated the five-year amortization provision for nonconforming adult establishments which was originally enacted in Ordinance 2015-12-22, without changing the original wording which said the amortization period ran "within five years from the date of the ordinance from which this section is derived." Joint Exh. 60, Ord. No. 2008-08-41 at 18-19, § 26-37.

In its April 2014 Summary Judgment Order, the Court concluded that that the 2008 legislation, Joint Exh. 60, Ord. No. 2008-08-41, restarted the amortization period and that it "ran for five years, i.e., from August 19, 2008, to August 19, 2013." Dkt. No. [301] at 19.[1] The 2008 ordinance provided that a

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[1] Ordinance 2009-04-25 later specified that the amortization period for a nonconforming adult establishment would end more than a year and a half later, on December 31, 2010. Joint Exh. 63, Ord. No. 2009-04-25, at 16, Sec. 26-37(c).But because the

nonconforming adult establishment could apply for a hardship extension of the five-year amortization period "at least 120 days after the date on which such establishment became nonconforming." Joint Exh. 60, Ord. 2008-08-41, at 19, §26-37(c)(1). Accordingly, a nonconforming adult establishment could have applied for a hardship extension after December 17, 2008 (the 120th day after August 19, 2008).

None of the Plaintiffs applied for a hardship extension of the five-year amortization period. Def. Exh. 79 at 16, Dep. Tr. 73:14-20 (Inserection); Def. Exh. 80 at 11, Dep. Tr. 47:11-12 ("Flashers did not apply for an amortization extension."); Def. Exh. 81 at 39-40, Dep. Tr. 118:25-119:4 ("Mardi Gras will stipulate that it did not apply for an extension of the amortization period that was provided in the ordinances, any of the

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amortization period has expired under every interpretation of the City's code, this issue is moot

ordinances.").

## H. Sandy Springs 2009 Amendments and Secondary Effects Evidence

In April 2009, the Sandy Springs City Council amended some of its adult establishment regulations. Pls. Exh. 7, Stipulated Fact 9. Relevant to this litigation, the 2009 amendment defined an "adult entertainment establishment"as "any establishment or facility in Sandy Springs where adult entertainment is regularly sponsored, allowed, presented, sold, or offered to the public." Joint Exh. 63, Ord. 2009-04-25, at 5, § 26-22. "Adult entertainment" was further defined in relevant part as "live conduct characterized by the display of specified anatomical areas,"[2] and

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[2] The term "specified anatomical areas" included any of the following:

> (1) Human genitals or pubic region, buttock, or female breast below apoint immediately above the top of the areola; or

"regularly" was defined as "the consistent and repeated doing of an act on an ongoing basis." Id.; see also id. ("Adult entertainer means any person employed by an adult entertainment establishment who exposes his or her specified anatomical areas, as defined herein, on the premises of the establishment. For purposes of this article, adult entertainers include employees as well as independent contractors.").

An "adult bookstore" was defined in part as "a commercial establishment or facility in the city that maintains 25 percent or more of its floor area for the display, sale, and/or rental of the following items (aisles and walkways used to access these items shall be included in 'floor area' maintained for the display, sale, and/or rental of the items): (1)Books, magazines,

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(2) Human male genitalia in a discernibly turgid state, even if the completely and opaquely covered.

Joint Exh. 63, Ord. 2009-04-25, at 5, § 26-22.

periodicals, or other printed matter, or photographs, films, motion pictures, videocassettes, CDs, DVDs or other video reproductions, or slides or other visual representations which are characterized by their emphasis upon the display of specified sexual activities or specified anatomical areas, as defined herein . . . ." Id. All of these definitions were maintained in subsequent amendments and remain the operative provisions in this litigation. See Joint Exh. 2, Ord. 2015-03-05 at 4-5, §26-22.

During the April 21, 2009, meeting at which the City amended its adult establishment regulations, the City Council heard a presentation concerning secondary effects of adult businesses and summarizing evidence of secondary effects (including judicial decisions, municipal studies, and a report by the City's retained expert, Dr. Richard McCleary) in the legislative record for the ordinances. Joint Exh. 5 at

337-340, 393-397.

Dr. McCleary's 2008 report explained to the City Council "that [sexually oriented businesses], as a class, pose large, statistically significant ambient public safety hazards." Joint Exh. 5 at 59. The report identifies and discusses eighteen empirical studies, conducted across the United States (*e.g.*, Los Angeles, New York, Minneapolis, *etc.*), which McCleary relied upon to support that conclusion. Id. at 69-94. The McCleary report also discusses the routine activity theory of "hotspots," which explains why adult establishments are associated with ambient public safety hazards, such as victimless crimes (prostitution, drug use, *etc.*), serious crimes (assault, robbery, *etc.*), and opportunistic crimes (vandalism, trespass, *etc.*). Id. at 59-61. In short, McCleary found that the characteristics of many adult establishment patrons (*e.g.*, males who carry cash, do not live in the adult

establishment's immediate vicinity, and are reluctant to report crimes to police) tend to make them easy targets. Id. Alcohol, by lowering inhibitions, makes these already soft targets even softer. Id. at 63.

The City's 2009 legislative record also contains the voluminous secondary effects documents that were before the City Council in late 2005 when the City previously adopted adult establishment regulations. Joint Exh. 5 at 1, 3-7, 412-4006.

## I. 2009 Sexual Activity in Inserection Booths

In April and May 2009, Sandy Springs police issued citations for people in the viewing booth area in Inserection engaged in sexual activity. Def. Exh. 42 at 5,6, and 7. Between October 2009 and August 2012, Inserection's regional manager (its 30(b)(6) deponent) was aware that individuals had fondled each other and left semen in the store's viewing booths. Def. Exh. 79 at 15, Olsafsky Dep. Tr.72:13-23; id. at 2, 5, Dep. Tr. 6:12-

14.

**J. Dismissal and Re-Filing of Plaintiffs' Case against Sandy Springs(2009)**

In June 2009, the Court allowed Plaintiffs to voluntarily dismiss Case No.1:06-cv-1562, subject to certain conditions. Pls. Exh. 7, Stipulated Fact 10; see also Dkt. No. [366-2], Dismissal Order (R. 147, 1:06-CV01562-RLV). On October1, 2009, the parties filed a Joint Status Report that set forth agreements between the parties, including:

> 4. The City will allow the plaintiffs to operate as they were before September 16, as is Maxim Cabaret, provided that the plaintiffs continue to comply with Ordinance 2009-04-25, Section 26-24(b)(1),(2), (4), and (8); Section 26-25; Section 26-27; and Sections 26-29(a),(b), (c), and (d). Section 26-29(e)(3) shall be applicable to bookstores only during this agreement.
>
> . . .
>
> 7. Additionally, it is understood that this agreement between the parties shall not serve to authorize the plaintiffs to otherwise operate or conduct business in any other illegal manner or to violate any state or federal law or other city ordinances. Plaintiffs also agree to comply with

> all other conditions contained in the Court's June 4, 2009 dismissal order.

Pls. Exh. 7, Stipulated Fact 11; see also Dkt. No. [366-1], Joint Status Report,1:06-CV01562-RLV) at 2, 4.

On October 5, 2009, Plaintiffs refiled their action against the City, which is the current Case No. 1:09-cv-2747. Pls. Exh. 7, Stipulated Fact 12.

**K. Sandy Springs 2012 Amendments**

In February 2012, the City amended some of its regulations for adult establishments. Pls. Exh. 7, Stipulated Fact 14. Each of the February 2012 amended ordinances incorporated the City Council's previous findings and legislative record materials concerning the negative secondary effects of adult establishments, which the City Council had identified and documented on several previous occasions. Joint Exh. 87, Ord. 2012-02-04 at 1; Joint Exh. 85, Ord.2012-02-03, at 1; Joint Exh. 83, Ord. 2012-02-02, at 1.

The 2012 amendments did not impose new

regulations, but only (a) eliminated provisions about which Plaintiffs had previously complained, and (b) added language which the City contends protected adult establishments and maximized the available sites for them. Joint Exhs. 84, 86, and 88, redlines of 2012 ordinances. In response to a "heckler's veto" prior restraint argument that Plaintiffs made in a December 2011 summary judgment brief, the City adopted Ordinance No. 2012-02-03, which added § 26-23(d). Joint Exh. 85 at 3. It clarified that "an adult establishment in a location that satisfies the standards in this Section 26-23 [*i.e.*, the locational requirements for adult establishments] shall not be deemed noncompliant with this Section by virtue of a subsequent establishment of a land use or zoning district specified in this section." Joint Exh.2 at 7, § 26-23(d).

**L. The July 21, 2015, Zoning Text Amendment.**

On July 21, 2015, the City again amended its zoning ordinance, this time to provide that adult establishments which satisfy the requirements of § 19.3.1 of the zoning ordinance "shall be permitted in all overlay districts" within the City. Def. Ex. 55.

**M. Plaintiffs' Pursuit of Alternative Sites.**

Around 2010, a real estate agent working for Mardi Gras found an alternative location for its business on Interstate North Parkway. Def. Exh. 81 at 41-45, Dep. Tr. 124:21-125:11, 127:14-22, 128:7-10. In April 2011, Mardi Gras's attorney sought—and the City approved—a zoning permit to use 5525 Interstate North Parkway as an adult establishment. Def. Exh. 66 at 1-3. Nevertheless, Mardi Gras did not purchase that property. Def. Exh. 81 at 45, Dep. Tr. 128:11-15. Flashers and Inserection have not sought alternative sites. Def. Exh. 80 at 12,Dep. Tr. 59:14-19; Def. Exh. 79 at 19, Dep. Tr. 84:8-23. Any alternative site in Sandy

Springs would be subject to the restrictions eliminating alcohol sales with nude dancing.

## N. Trial

This Court held a trial on this matter August 18-21, 2015. Plaintiffs called(1) Greg Phifer, the President of Mardi Gras; (2) Harry "Mario" Freese, the owner and operator of Flashers; (3) Brian White, the Chief Operating Officer for Inserection; (4) Dr. Leslie Reid, a criminologist and sociologist who authored a study to determine whether adult nightclubs serving alcohol had an effect on generating crime in the vicinity of those clubs, and (5) Mr. Dale Hayter, a commercial real estate appraiser. The City called (1) Dr. Richard McCleary, the author of the study which the City had relied upon; (2) Kimberly Davis, the City's permits clerk from August 2008-March 2014; (3) Robert Stevens, a Captain with the City's police department; and (4) Cameron Reeves, a private investigator who

was contacted by the City's attorney to conduct an investigation into Plaintiffs' businesses.

1. Mardi Gras.

Greg Phifer is the President of Mardi Gras. Dkt. No. [374], Vol. I at 53:10-13. Phifer has worked in the restaurant and nightclub business for about 40 years. Id. at 53:14-16.

Mardi Gras operates in a free-standing building which is about 10,000 square feet, and is located in a commercial shopping center. Id. at 60:17-25; id. at 69:9-11 (Mardi Gras operates in a C-1 zone). Mardi Gras or its parent company, Flanigan's, have operated continuously at 6300 Powers Ferry Road since 1976. Id. at 54-5.

Phifer was the manager in 1986 when the location was operated as a teen club. Id. at 55:18-24. For the next five years, the teen club experienced a number of problems. Id. at 56. There were knifings,

shootings, fights, and all kinds of problems, even though the teen club did not serve alcohol. Id. at 56:13-20.

In 1991, Phifer consulted an attorney to explore the possibility of turning the teen club into an adult, nude dance club. Id. at 57:1-11. The club began operating as a nude dance club in November 1991. Id. at 58:11-13. Along with serving alcohol, Mardi Gras has maintained a full kitchen and serves food. Id. at 66:18-21. The club renewed its alcoholic beverage license for 1992. Id. at 57:25-58:1-4.

At the time Mardi Gras began operating the adult club in 1991, it was not situated near any churches, schools, libraries, or parks. Id. at 61:19-25, 62:1-3. Later, other businesses located near Mardi Gras, including a CVS Pharmacy, a Wachovia bank, and a number of office buildings and residential developments. Id. at 62: 9-63:3.

The performances offered at Mardi Gras are commonly characterized as "striptease." Though the performers have various skill levels, no one in this case has seriously disputed that their performances have artistic value. Id. at 65:18-20; see also id. at 64:16-21. These performances also occur at table-side, where a dancer will direct her performance to an individual patron as opposed to the whole audience. Id. at 65:23-66:5. When a patron enters Mardi Gras, the stage is not visible from the lobby. Id. at 67:17-68:3.

According to Mr. Phifer, once Mardi Gras began operating as an adult club, the problems it experienced as a teen club went away. Id. 66:6-17; see also id. at 68:8-20.

Other Atlanta-area nude dance clubs operate with alcoholic beverage service. Id. at 69:15-19; id. at 70:10-12 (in the greater Atlanta there is not an adult nightclub which does not serve alcohol). They also have

patrons tipping the performers, for example, by placing money in a garter. Id. at 69:20-25; id. at70:1-4. Table-side dances are also common in the Atlanta-area nude dance clubs. Id. at 70:5-9.

In 2009, the City enforced the alcohol ban on Mardi Gras for about two weeks. Id. at 71:6-12. During that time, Mardi Gras lost entertainers, customers, and income. Id. at 71:11-14 & 23-25. If enforced, the alcohol ban on Mardi Gras's adult club would likely force a shut down because the club would no longer be profitable. Id. at 72:5-18.

2. Flashers.

Harry "Mario" Freese is the owner and operator of Flashers. See Dkt. No.[375], Vol. II at 232:6-8, 233:16-20. After serving in the U.S. Army for over 20 years, id. at 226:21-24, Freese decided to work in the adult entertainment industry in the early 1980s. Id. at 227:2-6.

He first worked as a manager at Scarlet Lady on Stewart Avenue in the City of Atlanta which operated a nude dance club serving alcoholic beverages. Id. at 228:2-10. After a couple of years, Freese then managed Centerfolds, another City of Atlanta nude dancing club that sold alcoholic beverages. Id. at 228:16-229:1. Later in the 1980s, he managed the She Too club, in the same format. Id. at230:7-18.

Freese opened Flashers in 1990. Id. at 231:3-232:2. He has been integrally involved in the club since that time. Id. at 236:1-14. Freese's testimony regarding Flashers's licensing was unclear. First, during direct, Freese testified that Flashers (1) operated as an adult entertainment establishment with an alcohol license from unincorporated Fulton County during 1992, 1993 and 1994, id. at 233:16-25, and (2) received an adult entertainment license from Fulton County and renewed it every year. Id. at 252:3-11. Then, during

cross, Freese testified that he didn't "believe" Fulton County ever denied him an alcohol or "county" license, but that he was "not sure" and the County "may have." Id. at 243:22-244:2. He also testified that he wasn't "certain" that Fulton County ever issued Flashers an adult entertainment license. Id. at 244:3-11.

Freese does not allow anyone to work in Flashers without an adult entertainment permit. Id. at 251:3-10. When you walk into Flashers, you enter a foyer that is closed off from the rest of the club by two swinging doors. Id. at 235:20-236:2.

The primary way Flashers makes its money is through alcohol sales. Id. at 243:7-11. Many Atlanta area clubs offer nude dancing to music and with serving alcoholic beverages. Id. at 237:17-25. The clubs in the Atlanta area which have tried to operate without alcohol have gone out of business. Id. at 237:23-238:24. In fact, Flashers would likely go out of business if it

could not serve alcohol: (1) in 2009, when the City ordered Flashers to stop serving alcohol for almost three weeks, Flashers lost performers and customers, just like Mardi Gras, and (2) other metro-Atlanta clubs operate with alcohol close to Flashers. Id. at 241;242:1-4.

3. Inserection.

Brian White is the Chief Operating Officer for Fantastic Visuals, which does business as Inserection. Id. at 253: 13-17; 255:23-25. He oversees the day-to-day retail operations of the store. Id. at 254:1-5. He has been in the adult industry for 27 years, has worked in different parts of the country, and currently oversees 28 retail stores. Id. at 255:3-4, 7-16.

Inserection is located across the street from the police department, city hall, and administrative buildings of Sandy Springs. Id. at 256:3-8. The store has been there since around 1996. Id. at 258:2-4. A

Lamborghini dealership is located just to the west of the store. Id. at 256:11-257:2.

The store sells sexually explicit media. Id. at 258:14-259:12. It also sells "rubber" and "hard goods." Id. at 260:24-25. The store has video booths which are located in a back room and are not visible from the store's main area. Id. at 270:22-271:3. However, Inserection removed the doors on the video booths because the City requested it to do so. Id. at 263:10-16. On average one customer visits the booths about every 45 to 50 minutes. Id. at 276:6-13.

The store's customers represent a variety of demographics, including gender and age. Id. at 263:20-264:1, 264:11-12. The majority of customers come from the Sandy Springs area. Id. at 265:10-15. There was no evidence that customers have been victimized. Id. at 268:7-10.

The majority of customer purchases use debit

and credit cards. Id. at 265:16-21. The store operates from 10:00 a.m. to midnight. Id. at 256:1-9.

4. Dr. Lesley Reid.

Lesley Reid is the Department Chair of Criminal Justice and a professor at the University of Alabama. Dkt. No. [374], Vol. I at 131:8-17; Dkt. No. [370-2]. She holds a bachelor's degree from Wake Forest University, and both a masters and Ph.D. from Tulane University. Id. at 131:19-20. All of her degrees are in Sociology. Id. at 131:21-22. She is a criminologist and urban sociologist. Id. at133:1-2. She has never published a study relating to the negative secondary effects of sexually oriented businesses. Id. at 169:9-12. However, the Court (and even Defendant's expert Dr. McCleary) found her to be very knowledgeable. See Dkt. No. [375], Vol. II at 392:25-393:1 (Dr. McCleary: "Yeah, well, first, Dr. Reid was very impressive, impressive intellect, And I just want to make that clear, very impressive.").

In this case, Dr. Reid and her colleague Georgia Tech professor Amy D'Unger were asked to identify whether adult nightclubs serving alcohol had an effect on generating crime in the vicinity of those clubs. Dkt. No. [374], Vol. I at137:9-24.

As a methodology to study the adult nightclubs, Dr. Reid used Geo Spacial Data Analysis. Id. at 138:21-23. Under this method, Reid collected crime data from three sources: online from the City of Sandy Springs, the Fulton County Police Department, and from the City of Sandy Springs Police Department. Id. at139:8-15. This crime data was coded to the address at which the crime occurred. Id. at 138:25-139:3. Reid and D'Unger broke down the 25,076 crime incident reports into 45 different categories of crime, which included aggregating five of those categories into violent crimes to correspond with the Uniform Crime Report coding scheme. Id. at 145: 1-21.

The first step of Reid's and D'Unger's analysis was exploratory spacial data analysis. Id. at 147:10-11. Here, Reid generated a map that pinpointed where all of the crimes occurred in the City. Id. at 147:11-13. She generated this map before choosing her control locations to measure against the adult establishments. Id. at188:5-11. Reid did not retain this map. Id. at 188:1-4.

From her "hot spot" analysis, she determined that the three adult nightclubs were not hot spots for crime. Id. at 150:2-7. However, Dr. Reid admitted that Dr. McCleary's ESDA map "looked very similar" to her map—and showed a crime cluster, or hot spot, around Love Shack, one of the adult establishments in Sandy Springs that Dr. Reid did not study. Id. at 197:10-22.

Next, Reid and D'Unger went on to conduct buffer zone analysis. Id. at 150:14-15. Under this analysis, a location is selected and then the spread of

crime around that location is looked at. Id. at 150:17-18. In this case, Reid selected a 50-foot, a 400-foot, and a 1,000-foot circumference to work as buffer zones around the adult nightclubs. Id. at 150:22-24. Reid compared the number of crimes in the buffer zones for the three adult nightclubs to other alcohol-serving establishments that did not offer adult entertainment. Id. at 152:19-153:4. Reid opted to compare the adult nightclubs to other establishments that were in similar types of census blocks. Id. at 153:7-12. She chose this method, even though the same two census blocks could not be matched on multiple factors, id. at 206:18-207:2, 210:9-13, and even though both offenders and victims come from outside (sometimes as far as 30 miles outside) of the census block. Id. at 183:16-184:1.

Within all census blocks, Reid attempted to determine what factors might influence crime. Id. at 153:12-16. Ultimately Reid determined that the census

blocks must contain an alcohol-serving establishment that matched on comparison variables at the census block level. Id. Among the comparison variables she used are: (a) population, (b) number of establishments selling alcohol, (c) percentage of population that is non-white, and (d) percentage of female heads of households. Id. at 153:19-24. Reid concluded that, among the comparisons, the buffer zones of the control establishments tended to have more crime than the buffer zones the adult nightclubs, although there was a lot of variation. Id. at 160:2-5. Reid did not find a pattern in the data that would indicate there was greater crime in the buffer zones around the adult nightclubs than there was around the match control establishments. Id. at 160:5-8, 24-25 (adult nightclubs do not cause increased crime.). But, Dr. Reid's analysis consistently showed substantial crime-related secondary effects around Flashers. Id. 156:19-22,

158:10-14, 205:4-13.

The third part of Reid's and D'Unger's analysis involved looking at the types of crime occurring within the City. Id. at 161:4-11. To do this, Reid separated violent from non-violent crimes. Id. at 161:18-21. Reid then studied the rates. A main driver of rates is the "number of potential victims that are available to be victimized." Id. at 164:8-9. Using the "ambient population" as determined by Oakridge National Laboratory's Land Scan Grids, Reid estimated the number of people on average one could expect to find in the areas. Id. at 164-5. Reid first matched the census block data, then, once that was matched, she and Dr. D'Unger chose the control area that had an alcohol licensed establishment in it. Id. at 215:5-8. Then, when doing the buffer zone analysis, Reid matched on the business.

Based on all of these analyses, Dr. Reid

concluded that:

> there was little evidence that sexually-oriented businesses were located in higher-crime census block or were surrounded by higher numbers of crimes relative to non-SOB clubs in demographic ally-matched census blocks. Whether crime counts or crime rates were used, the findings were the same; the areas with the highest crime in Sandy Springs are NOT the areas in which the three sexually oriented businesses of interest are located, despite their longstanding operation in these locations. Mardi Gras, in particular, is located in a very low crime area. In addition, in 2/3 of the concentric buffer zones that we tested, comparison clubs had higher numbers of crimes in the surrounding areas, relative to the sexually-oriented businesses.

Dkt. No. [370-1] at 44.

Defendants highlighted limitations of Dr. Reid's study. First, Dr. Reid did not discuss, much less critique, the City's legislative record. She did not review the legislative record. Dkt. No. [374], Vol. I. at 172:12-19. And Dr. Reid's own analysis failed to consider almost half of the City's five adult

establishments, as the study only focused on the City's nightclubs which offered nude dancing and served alcoholic beverages. Id. at 171:23-172:8; Def. Exh. 68 at ¶ 5 (identifying five adult establishments in City).

Dr. Reid's analysis did not take into consideration any crimes that were not reported to the police, for the obvious reason that she only considered reported crime data. Dkt. No. [374], Vol. I. at 173:3-5. Dr. Reid conceded that crimes in adult businesses (*e.g.*, solicitation of prostitution, prostitution, drug use, drug trafficking, *etc.*) often go unreported and that considering such crimes would have made a difference in her opinion regarding the secondary effect of crime. Id. at 182:6-10, 186:9-11, 218:21-219:15.

Dr. Reid admitted that to get her data set, she merged categories of police incident reports from two different law enforcement jurisdictions, Fulton County and the City of Sandy Springs. She could not tell how

many categories of reports either jurisdiction had. Id. at 192:24-193:12. She did not read the underlying police reports from either jurisdiction, and she could not remember at the time of trial how she "constructed" the categories or labels for "crimes" cited in her report—meaning, which crimes from which jurisdictions she combined to create one code. Id. at 193:13-195:11.

Dr. Reid's incident report data set was also challenged because it contained non-crime, administrative police tasks (*e.g.*, lost/found property reports, missing child reports, *etc.*) and was compiled from the disparate incident report labels of two police departments. Dkt. No. [375], Vol. II at 393:21-395:5. Moreover, Dr. Reid excluded about 5,000 incident reports (15%) from her data set because the addresses were at intersections. Id. at 396:2-17.

5. Dale Hayter.

Dale Hayter has been a commercial real estate appraiser since 1998. Dkt. No. [374], Vol. I. at 82:3-4, 84:3-5. He graduated from the University of Texas with a bachelor's degree in architecture and later earned a masters degree in environmental design from the University of Georgia. Id. at 82:15-18. He holds a certified general appraiser license in Georgia and holds the M.A.I. designation from the Appraisal Institute. Id. at 82:6-8; Dkt. No. [370-5].

Hayter was hired to measure and analyze the change in tax-assessed property values within the immediate vicinity of five adult entertainment establishments in the City. Dkt. No. [370-3] at 2. He also used control locations that were not near those adult establishments. Dkt. No. [374], Vol. I. at 85:9-13. Hayter selected the control locations based the mix of land uses around them. Id. at 85:20-22. He tried to match the control locations to the adult locations

insofar as types of commercial properties, types of residential properties, maintenance characteristics, occupancy, regional access, and overall visual impression. Id. at85:21-86:1.

For each parcel, Hayter then obtained the county tax values from the County Tax Assessor Web site for the years 2000 through 2008. Id. at 88:12-21. These values were inserted a spreadsheet, where Hayter calculated the change in value for each parcel for each year from 2000 through 2008. Id. at 88:22-89:4.

Hayter concluded that all the adult entertainment areas increased in value over the eight-year period, with an average total increase of 123.7%. Id. at 95:9-14. The control locations also increased in value, but with an average of 94.4%over the same time span. Id. at 95:14-17.

Based on his study, Hayter concluded the City's adult establishments did not have an adverse impact

on the tax values in the neighborhoods surrounding them. Id. at 95:18-22. Hayter reached this conclusion despite his finding that the tax values of residential properties in areas near Sandy Springs' adult establishments grew at a rate of only 5.5% per year between 2000 and 2008, which was lower than the 6.9% per year growth rate observed in non-adult establishment control areas. Id. at 120:1-121:24. Hayter admitted that the difference, over eight years, was considerable. Id. at 121:15-19.

Hayter's analysis relied solely on tax assessor values from the Fulton County Tax Assessor's website. Id. at 105:19-106:6. Hayter used these values despite admitting that he "would not base an appraised value on the tax assessor's value," nor "feel comfortable professionally" using the tax assessor's analysis. Id. at 106:10-107:2, 114:14-17. This is because the work of the tax assessor is not always credible, as the

difference between a property's tax value and actual value can be off by as much as 60 percent. Id. at 106:7-9, 110:21-111:2,113:13-114:1. Even knowing this, Hayter undertook no effort to determine whether the tax values that he relied on were accurate. Id. at 107:22-24.

6. Dr. Richard McCleary

Richard McCleary is a professor at the University of California, Irvine with appointments in criminology, law and society, environmental health sciences, and planning and policy. Dkt. No. [375], Vol. II at 352:21-23. He has a B.S. in Mathematics from the University Wisconsin, an M.A. from Northwestern University in Mathematics, and a Ph.D. in Sociology from Northwestern University. Id. at 352:25-353:3.

Soon after the City of Sandy Springs formed, Dr. McCleary met with City officials about adopting legislation to regulate sexually oriented businesses. Id.

at 428:19-24. He even met with at least one city council person in a private meeting. Id. at 429:3-12. McCleary ultimately authored the "Report," Joint Ex. 5 at 52-122, and many of its underlying publications which the City relied upon in enacting its legislation.

McCleary testified that sexually oriented businesses ("SOBs") create adverse secondary effects. Id. at 366:14-15. He relies on a "Soft Targets" theory, which itself relies on a number of factors. Dkt. No. [376], Vol. III at 466:10-467:4. He contends that SOBs are "attractors"; they bring customers from a very wide catchment area, 20 or 30 miles away. Id., at 366:17-20. These customers are disproportionally male; they are open to vice overtures, meaning that these young men would not be offended by someone offering to sell them marijuana or sex; they have cash; and most important, if they are victimized, they are less likely to involve the police. Id. at 366:18-367:2. These attributes, McCleary

opines, makes these men "perfect victims." Id. at 367:2-3. And with perfect victims, come criminals. Id. at 367:3-7.

In cases such as this, McCleary always testifies for the government. Id. at 378:13-14; see also Dkt. No. [376], Vol. III at 465-66. Here, he also disagrees with Reid's conclusions. Dkt. No. [375], Vol. II at 393:1-2.

First, McCleary complains that the Reid study included crime categories that were not actually crimes. Id. at 393-395. For example, one of the crime categories is "missing person." Id. at 394:15-20. McCleary testified that a runaway child could be a missing person because the incident might be reported to Children and Family Services, and then that agency might notify the City of Sandy Springs Police Department that they are going to pick up a child. Id. at 394:21-395:2. Citing such hypotheticals, McCleary says that Reid should have read the narrative reports

themselves, as opposed to relying on the coding placed on them by the local jurisdictions, although noting reading the 25,000+ reports "would have economically a disaster." Id. at 395:5-21.

Dr. McCleary also relies on a number of studies to support his belief that adult businesses create adverse secondary effects. Plaintiffs criticized these studies as follows:

St. Paul, Minnesota 1978 study. The authors of this study expressly state that no relationship is found between the neighborhood deterioration and the presence of adult businesses. Id. at 486:2-487:10.

Garden Grove, California 1991 study. The authors of this study (including Dr. McCleary) compared three major expansions of two adult businesses in one area, to another area with one adult business that did not expand. There was no control group which did not have an adult business on it; in

other words, there was no effort to learn whether any other types of business that expanded would generate more crime. Id. at 493:1-494:1; Id. at 499:22-500:6. And it was only a two-year study (one year before and one after). McCleary says ideally a study would occur over a 20-year period (or, 10 years before, and 10 years after). Id. at 494:6-22.

Centralia City, Washington 2004 study. The author (Dr. McCleary) studied an adult business that opened in December 2000. McCleary studied crime for 677 days before the store opened, and 677 after the store opened. Id. at 509:10-17.There was an increase of 1 assault after the store opened. Id. at 511:4-11. The number of robberies near the store went from 1 to 0, while the number of robberies in the control area went from 60 to 72 after the store opened. Id. at 511:2-25. The store had 1 auto theft in the 2 years before it opened, and it had 0 in the 2 years after opening. Id. at

513:7-10. In the control area of the city, the number of auto thefts went from 136 before the store opened to 190 afterwards. Id. at 513:14-16. But Dr. McCleary then included burglaries in the study—a type of UCR Part 1 Crime that he told the City of Harvey, Illinois, was not a relevant consideration, id. at 506:2-18—to show that crime overall increased by 84% in the adult areas Id. at 514:4-17. Without including the crimes that Dr. McCleary told the City of Harvey were not relevant (i.e., thefts, burglary and auto burglary), his crime study for Centralia would have actually shown crime going down rather than going up (by 84%). Id.

Sioux City, Iowa 2006 study. In this study, McCleary focused on a brand new, retail-only adult bookstore. Id. at 516:18-23. Before the bookstore opened in the new stand-alone building there was nothing there but a parking lot. Id. at 518:10-17. McCleary decided to study crime for the 793 days

before, and the 668 days after, based on the data he was able to collect. Id. at 519:2-5. In this study, McCleary did not have a comparable store (for example, a new convenience store) that opened which he could measure whether crime rose at a higher rate surrounding the control store before it opened and after it opened. Id. at 519:14-25. He instead used a motel as the center of a control circle, but he did not have data on "before and after" on the motel and therefore was not able to determine how many crimes were within 500 feet of the motel after it opened. Id. at 521:11-23. Dr. McCleary showed in this study that the control area actually had more crimes in the nearly 2-year post-period than did the adult bookstore. Id. at 520:11-21. But, as Defendant notes, the crime rate rose in the adult bookstore circle as compared with the motel circle (the adult bookstore circle went from 17 events before to 41 events after and the motel circle remained

relatively constant with 44 events before and 46 after). Id. at 520:7-17, 521:22-23.

Montrose, Illinois, 2003 study. Here, Dr. McCleary studied what happened when an adult bookstore opened in the Village of Montrose. Id. at 522:13-16. He broke down crime incidents into an 881-day segment when the store was open, and a 761-day segment when the store was closed. Id. at 523:5-11. In this study, McCleary used crime incidents from the entire village of Montrose. Id. at 523:20-23. The number of property crimes that occurred when the store was open (23) went down in the period when the store was closed (15), although the closed period was about four months shorter. Id. at 524:4-17. On the other hand, the number of personal crimes that occurred when the store was open (3) went up after the store closed (5). Id. at 524:18-24. Plaintiffs do not dispute that the total crime was higher when the adult

bookstore was open, however, and that the first two armed robberies in the town's known history occurred during that time. Id. at 547:3-6, 548:6-13.

Phoenix, Arizona 1997 study. This study does not address the question of whether the consumption of alcoholic beverages on the premises of an adult nightclub aggravates the problem of adverse secondary effects. Id. at 526:4-8. Similarly, neither the Minneapolis, Minnesota 1980 study nor the Indianapolis, Indiana 1984 study studies address this question. See id. at 526:25-527:12.

Although the Court also agrees that there were many flaws in Dr. McCleary's logic and conclusions, as explained in later sections, the legal precedent applicable to Plaintiffs' claims places much more emphasis on whether the City was reasonable in relying on the record before it and less upon whether the Court believes such studies are ultimately

persuasive or scientific.

7. Bill Huff.

Bill Huff has lived out of state for the last year or so, but had lived in the City of Sandy Springs for just over 35 years before moving. Dkt. No. [375], Vol. II at 283:14-24. Huff was a long-time resident of Sandy Springs and attended public hearings quite often. Id. at 314:12-25. In 2006, Huff was appointed to the City's Planning Commission. Id. at 316:3-23. Huff was chairperson of Fulton County Board of Tax Assessors. Id. at 285:1-15. He was also a founding member of the Sandy Springs Revitalization, which he served on for several years. Id. at 285:19-26. He served, at the request of Mayor Eva Galambos, on the Planning Commission for Sandy Springs. Id. at 286:1-7. However, he only attended one Planning Commission meeting before resigning to become the City's assessor. Id. at 317:7-8.

Huff's purpose in the trial was to critique Plaintiff's expert Dale Hayter's report and testimony. Huff contends that the tax values identified by Hayter, particularly those for the 2008 and perhaps 2007, are not reliable because they are subject to appeals. Id. at 350:3-9. Yet Huff concedes that any appeals for at least six of the eight years would be resolved, id. at 332:18-23, and that there is no other database where one can access the annual appraised value of real property in the City. Id. at 337:11-24.

In contrast to Hayter, Huff's report showed that Sandy Springs' adult establishments have negative impacts on the surrounding residential and commercial areas. Id. at 292:3-23. Huff visited each of the adult establishment and control areas referenced in Hayter's report. Id. at 292:3-14. His study was merely a visual inspection of the areas around the adult establishments.

Although the City has little undeveloped land, Huff observed that numerous structures and lots near the City's adult establishments are vacant and rundown. Id. at 293:12-295:2 (recurring vacancies in Inserection's multi-unit building); id. at 298:3-24 (vacancy of at least 10 years for restaurant building beside Flashers); id. at 301:7-12 (vacant lot beside Flashers left unused since store burned down); id. at 301:24-302:23 (major commercial vacancies near Love Shack); id. at 303:21-304:5 (large, vacant lot behind Coronet Club/Maxim); id. at 305:4-8 (long-term restaurant building vacancy at corner near Mardi Gras).)

Huff also opined that, unlike other residential areas throughout the City, residential properties near adult establishments have not experienced the "teardown phenomenon," where older homes are purchased and torn down to be replaced by a new

home. Id. at 302:25-303:18, 291:17-24. Moreover, residential values decrease the closer the residence is to an adult establishment. Id. at 306:1-3. The Court determined that this visual analysis was of limited value.

8. Kimberly Davis.

Kimberly Davis served as the permits clerk for the City from August 2008 until March 2014. Dkt. No. [376], Vol. III at 569:13-19. In that role she processed city permits, including adult entertainment work permits for individuals. Id. at 569:20-25.

To obtain an adult entertainment work permit, an applicant must submit to fingerprinting, background check, photograph, and completing a permit application. Id. at 570:13-17. In a typical year, over 500 permit are issued. Id. at 571:10-18. These permits are good for one year from date of issue and must be renewed. Joint Ex. 2, § 26-25(e); Dkt. No. [370-

48]. The fee is $55. Id. at 572:17-19. Until permits are finalized, the City gives applicants temporary work permits, which allow them to work in adult establishments while their applications are being processed. Id. at 570:2-571:1.

Over the years 2008 to 2014, very few work permits were denied. Id. at 574:11-17. Permits are typically denied to applicants who are recently convicted of "specified criminal activities." Id. at 575:15-16; Joint Exh. 2 at 6 (definition); id. at 9, § 26-25(c)(4). A person convicted of prostitution is temporarily ineligible for an adult establishment employee work permit. Id. at 6; id. at 9, § 26-25(c)(4).

Mardi Gras and Flashers do not want anyone convicted of prostitution working at their establishments. Dkt. No. [374], Vol. 1 at 79:18-20 (Mardi Gras); Dkt. No. [375], Vol. 2 at 249:15-19 (Flashers). Employee work permit requirements have

never hindered Inserection from hiring enough workers to operate its store. See id. at 274:1-3.

9. Robert Stevens.

At trial, Captain Robert Stevens of the Sandy Springs Police Department, who formerly worked for the Fulton County Police Department, testified regarding undercover police investigations conducted in and around adult establishments in Sandy Springs. Id. at 578-609.

Before Sandy Springs incorporated in 2005, the Fulton County Police Department conducted undercover investigations in Mardi Gras and Flashers. Id. at 579:2-15. These investigations concerned prostitution, drug usage, and drug trafficking, and resulted in numerous arrests—with one of those arrests being for prostitution. Id. at 580:3-6, 581:9-582:5. During these investigations, undercover police officers received full-contact lap dances. Id. at 580:24-

581:8.

In late 2010, a customer called the City's police department to complain about dancers who worked at Mardi Gras using cocaine. Id. at 583:3-10. The Sandy Springs Police Department was able to use that informant to establish a relationship with Sherrell Allen, a Mardi Gras dancer, who was the actual cocaine dealer. Id. at 583:12-24.

This investigation revealed marijuana, cocaine, and ecstasy sales by Mardi Gras dancers and resulted in the arrest of six dancers on prostitution and drug charges. Id. at 583:1-585:11. Sherell Allen was sentenced to ten years in prison. Id. at 584:9-18. Of the approximately dozen controlled drug buys the City police made from Ms. Allen, seven of those were at sports bars, restaurants, and business other than Mardi Gras. Id. at 622:13-623:15. Captain Stevens testified that seven of the twelve drug buys occurred at

Mardi Gras. Id. at 624:1-5.

Over 2006 through 2008, Captain Stevens inspected Flashers about a dozen times. Id. at 617:7-9. Sometime in 2007, the City police department made an arrest of a dancer who worked at Flashers for prostitution. Id. at 594:20-21. The City does not know the disposition of that charge. Id. at 617:17-19.

In 2011 and early 2012, Captain Stevens and Detective Huffschmidt visited Flashers about five times over the course of a month. Id. at 600:11-23, 602:20-22, 609:3-4. They typically saw "fully nude dancers dancing for patrons, making contact with them, sitting on them, grinding." Id. at 603:13-14. Patrons would pay the dancers to engage in such activity. Id. at 604:13-605:15, 605:19-606:21,609:3-17. During one visit, a dancer who offered to give Stevens oral sex for money in the VIP room gave Stevens her phone number to meet outside the club. Id. at 607:9-

609:2.

10. Cameron Reeves.

Cameron Reeves is a private investigator. Id. at 631:14-15. In late 2011 he was contacted by the City's attorney to go in the City's adult businesses and observe. Id. at 632:15-24, 662:24-663:3. In order to conduct his investigation, the City's attorney sent him money to spend on tips and cover fees and a black light. Id. at 671:2-12, 682:14-15. The City paid Reeves to engage in illicit activity with dancers at Plaintiffs' establishments. Reeves was accompanied during his "official" investigations with his friend from high school, who is not an investigator. Id. at 661:7-13.

Reeves testified that on his visit to Main Stage, Flashers, and Mardi Gras on October 7, Reeves did not observe what he would define as "criminal activity," such as drug sales. Id. at 662:12-18, 665:3-5, 666:15-19. However, at Flashers and Mardi Gras, Reeves saw

fully nude dancers touch and caress patrons, place their bare breasts in patrons' faces, and grind their bare buttocks in patrons' groin area for money. Id. at 636:19-637:11, 651:5-22 (Flashers); id. at 644:5-22, 651:23-652:4, 654:17-655:1 (Mardi Gras). Such activity occurred in the main floor area and in the presence of managers. Id. at 637:18-638:7, 651:15-22 (Flashers); id. at644:25-645:10, 653:14-16 (Mardi Gras).

During his December 6, 2011 visit to Flashers, Reeves paid $270 to go in the VIP Room with a dancer. Id. at 653:17-654:8. In there, the dancer became fully nude, caressed Reeves' penis with her hands, grinded her vagina on his lap, and allowed Reeves to touch and massage her breasts. Id. at 654:10-16.

During his December 1 and 6, 2011 visits to Mardi Gras, Reeves paid ($40, $150) to enter an upstairs area with a dancer. Id. at 652:12-653:7, 655:2-17. The dancer became fully nude, caressed Reeves'

penis with her hands and had other physical contact with his body like other lap dances Reeves described. Id. at 653:6-16, 655:18-656:1.

At Main Stage, another strip club in Sandy Springs, id. at 638:8-14, Reeves paid $25 to go to the Gold Room (in a corner of the main room) with a dancer, who became fully nude, placed her bare breasts in his face, and rubbed her vagina on his groin area. Id. at 640:4-20.

For $240, a dancer took Reeves to the VIP Room, which was not visible from the main floor area. Id. at 641:3-13. There, the dancer became fully nude, touched Reeves' penis with her hand, rubbed her bare bottom on his crotch, put her breasts in his face, and straddled his face and touched it with her vagina. Id. at 641:12-24.

Reeves went to Inserection on October 20 and November 30, 2011. Id. at 646:4-8, 650:17-18. On both

visits, Reeves purchased a ticket to enter the viewing booth room. Id. at 647:1-4. From the viewing booth room, which was dark, Reeves could not see the clerk or cash register. Id. at 647:18-21, 649:9. Reeves observed the viewing booths, entering several of them. Id. at 648:3-6. Reeves found that the floor and inner walls of the booths were sticky and covered in a white substance. Id. at 648:17-22. Reeves also saw "glory holes" in about half of the booths. Id. at 648:20-649:6. On one visit, Reeves saw two male patrons in the viewing booth room. Id. at 649:7-650:6. These men walked by his booth looking at him. Id. Reeves felt uncomfortable and reported the men to the clerk. Id.

**R. Plaintiffs' Admissions Regarding Conduct at their Establishments**

Flashers admits that, while not allowed under its policies, nude dancers have physical contact with customers during lap dances and in the VIP rooms. Def. Exh. 75 at 21-25, 27-28, 30-31, 34-35, Corazalla

Dep. Tr. 73:12-74:21, 76:15-78:3,115:24-116:14, 133:7-134:21, 145:24-146:15; Def. Exh. 80 at 5-8, Freese Dep. Tr. 35:4-36:18, 42:22-43:4, 43:11-18; 43:19-23; Dkt. No. [375], Vol. II at 246:15-24. Patrons at Flashers also occasionally touch dancers' bare breasts and buttocks. Def. Exh. 75 at 29, Corazalla Dep. Tr. 132:6-9; Def. Exh. 80 at 8-9, Freese Dep. Tr. 43:19-23, 44:5-8; Dkt. No. [375], Vol. II at 247:23-248:17. And dancers—including those under 21—occasionally consume alcohol and become intoxicated at Flashers. Def. Exh. 75 at 7-8, Corazalla Dep. Tr. 17:15-18:3, 19:12-20:4.

A person has been shot in Flashers' parking lot as a result of events that transpired inside Flashers. Dkt. No. [375], Vol. II at 239:8-12 (Freese).

At Flashers, patrons pay additional money to enter the VIP areas for privacy with dancers. Id. at 247:1-11. In VIP rooms, patrons sometimes expose

their genitals to dancers, Def. Exh. 75 at 14, 17-18, Corazalla Dep. Tr. 66:17-19, 69:12-18, 70:5-7, attempt to solicit sex, id. at 70:15-20, and use drugs. Id. at 66:17-19,70:21-25. They have been seen "[e]xposing themselves, fighting, selling drugs, doing drugs, . . . soliciting prostitution . . . [and] trying to recruit girls [into prostitution]." Def. Exh. 75 at 36, Corazalla Dep. Tr. 150:13-20; see also Dkt. No.[375], Vol. II at 239:25-240:3 (Freese). Dancers have occasionally engaged in drug use, id. at 72:11-18, 73:6-11, 143:7-20, 144:18-24; Def. Exh. 80 at 10, Freese Dep. Tr. 46:3-11, and sexual acts with patrons inside Flashers' VIP rooms. Def. Exh. 75 at 21-22, 33-35, Corazalla Dep. Tr. 73:12-74:5, 144:14-16, 144:25-146:16; Def. Exh. 80 at 10, Freese Dep. Tr. 46:12-17.

Mardi Gras admits that nude dancers occasionally have physical contact with customers during lap dances and on the premises, although

touching is against its official policy. Def. Exh. 76 at 11, 13-14, 16, 22, Fulton Dep. Tr. 32:19-23, 34:13-24, 35:13-25, 49:5-15, 41:8-23; Def. Exh. 81 at 33, 19, Phifer Dep. Tr.108:12-23, 82:1-8 & Def. Exh. 47 at 1-2 (Dep. Exh. D-3C); Def. Exh. 78 at 8-10,14, Peffer Dep. Tr. 36:11-22, 38:14-18, 40:20-24, 47:3-13; Dkt. No. [374], Vol. I at 78:17-79:6.

Dancers—including those under 21—occasionally consume alcohol and become intoxicated at Mardi Gras. Def. Exh. 76 at 19-20, Fulton Dep. Tr. 45:18-46:8; Def. Exh. 81 at 35, Phifer Dep. Tr. 111:1-5; Dkt. No. [374], Vol. 1, at 79:21-24, 80:2-5. Patrons also become intoxicated at Mardi Gras sometimes. Def. Exh. 81 at 36, Phifer Dep. Tr. 112:1-12. Alcohol can lead to inappropriate conduct among customers and dancers at Mardi Gras. Def. Exh. 76 at 9-10, 16-17, 19-20, Fulton Dep. Tr. 30:18-24, 31:2-6, 31:16-19, 41:8-23, 42:13-43:10, 45:22-46:11.

Fully nude dancers at Mardi Gras have been known to touch patrons, sit on patrons' laps, place their breasts in patrons' faces, and grind their bodies on patrons' laps. Def. Exh. 76 at 14, Fulton Dep. Tr. 35:6-25; Def. Exh. 78 at 9, Peffer Dep. Tr. 38:14-18; Def. Exh. 81 at 18, 21, 33, Phifer Dep. Tr. 79:4-7, 87:3-10,108:12-23. Dancers may engage in physical contact with patrons to elicit larger tips, Def. Exh. 76 at 14, Fulton Dep. Tr. 35:2-12, or touch other dancers and their genitals for patrons. Id. at 48:10-13, 48:24-49:1. Patrons at Mardi Gras sometimes touch dancers' bare breasts and buttocks. Def. Exh. 76 at 11, 14, Fulton Dep. Tr. 32:19-25, 35:8-16; Def. Exh. 78 at 14, Peffer Dep. Tr. 47:8-13. This activity occurs in the main floor area and in the presence of Mardi Gras's managers and operators. Def. Exh. 76 at 14, 21, Fulton Dep. Tr. 35:6-25, 48:10-49:1.

Patrons and dancers have engaged in illicit

sexual acts in Mardi Gras's VIP rooms. Def. Exh. 76 at 16, Fulton Dep. Tr. 41:8-23. Dancers sometimes perform oral sex on patrons, Def. Exh. 41 at 1, masturbate patrons, id. at 2, and hustle customers to go outside the club. Def. Exh. 47 at 1-3.

Dancers have used drugs in Mardi Gras. Dkt. No. [374], Vol. 1, at 79:25-80:3 (Phifer); Def. Exh. 81 at 34, Phifer Dep. Tr. 110:20-22; Def. Exh. 41 at 2 ("done cocaine in the dressing room").

Inserection admits that its customers attempt to enter viewing booths together, have kissed and fondled each other underneath clothing in the viewing booths, and that litter including tissues and semen is sometimes left in the booths by patrons. Def. Exh. 79 at 8-10, 13-15, Olsafsky Dep. Tr. 49:23-51:7, 55:3-56:13, 56:17-19, 72:8-17, 72:18-23.

## Conclusions of Law

In the pre-trial order, the parties listed four

issues to be tried: (1) whether the City's amortization period in Section 26-37(c) of the 1009 Adult Licensing Code is arbitrary and capricious; (2) whether the City's location regulations provided reasonable alternative avenues of communication; (3) whether "the 2009 Alcohol Code, the 2009 Adult Licensing Code (§§ 26-23(a), 26-24(b)(6), 26-25(e), 26-26(c) and 26-38)), the 2009 Adult Zoning Code (§ 19.3.20(B)(5)), Ordinance 2012-02-02, and Ordinance 2012-02-03," taken together are unconstitutional; and, (4) whether Section 26-29(d) is unconstitutionally overbroad. Dkt. No. [338] at 8-9. Prior to trial, the Plaintiffs withdrew Issue (2). See Dkt. No. [364]; see also Dkt. No. [374], Vol. I, at 8:7-16. Therefore, the Court will consider each of the remaining issues in turn.

## I. Plaintiffs do not have standing to bring a due process challengeagainst § 26-37(c), and even if they did, Plaintiffs' claim fails as amatter of law.

### A. Plaintiffs lack standing to challenge § 26-

37(c).

Plaintiffs do not have standing to challenge the lack of a hardship extension provision of the five-year amortization period in the 2009 Ordinance.

To establish standing, a plaintiff must demonstrate: (1) an injury in fact (that is concrete and particularized and either actual or imminent), (2) a causal connection between the injury and the conduct complained of, and (3) that it is likely that the injury will be redressed by a favorable decision. Lujan v. Defendersof Wildlife, 504 U.S. 555, 560-61 (1992). "[S]tanding cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.'" FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990). Thus, plaintiffs must "allege . . . facts to show jurisdiction. If [they] fail to make the necessary allegations, [they have] no standing." McNutt v. General

MotorsAcceptance Corp., 298 U.S. 178, 189 (1936).

"It is well established that land use rights, as property rights generally, are state-created rights." DeKalb Stone, Inc. v. Cty. of DeKalb, 106 F.3d 956, 959 (11th Cir. 1997). "The Constitution does not require a 'grandfathering' provision for existing nonconforming adult businesses, and any vested rights to continue operating as a lawful nonconforming use derives from state law." Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860, 872 n.17 (11th Cir. 2007) (citing David Vincent, Inc. v. Broward Cty., 200 F.3d 1325, 1332 (11th Cir. 2000), Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1333 (11th Cir. 2004)).

Under Georgia law, a protected lawful, nonconforming use is a "use which lawfully existed prior to the enactment" of the zoning regulation to which it does not conform. Rockdale Cty. v. Burdette, 604 S.E.2d 820, 822 (Ga. 2004); see also BBC Land &

Dev., Inc. v. Butts Cty., 640 S.E.2d 33, 34 (Ga. 2007). Thus, a business that commences *unlawfully* does *not* possess a right "to continue operating as a lawful nonconforming use." Daytona Grand, 490 F.3d at 872-73. The party claiming lawful, nonconforming use status bears the burden of proof. Flippen Alliance for Cmty. Empowerment, Inc. v. Brannan, 601 S.E.2d 106, 110 (Ga. Ct. App. 2004).

Section 26-37(c)'s amortization period applies only to "nonconforming adult establishment uses"—*i.e.*, uses that were "lawful and valid when established, as evidenced by a certificate of occupancy as provided in [§ 23.1] of the city zoning ordinance." Joint Exh. 2 at 17, § 26-37(a). But no plaintiff has produced a certificate of occupancy—from either Fulton County or Sandy Springs—or otherwise shown that it lawfully commenced as an *adult* establishment. Indeed, Plaintiffs concede that "under the plain text of § 26-37,

[they] are not 'nonconforming adult establishment uses' as defined by the City." Dkt. No. [343] at 5-6 (internal footnote omitted). Moreover, Freese, the owner of Flashers, admitted that he was "not certain" whether Fulton County ever issued Flashers an adult entertainment license. Dkt. No. [375], Vol. 2, at 244:3-11. Thus, no Plaintiff has met its burden of establishing itself as a nonconforming adult establishment use. Flippen, 601 S.E.2d at 110.

Because Plaintiffs failed to establish that they are nonconforming adult establishment uses, Plaintiffs were never entitled to § 26-37(c)'s amortization period, let alone an opportunity to extend it. Daytona Grand, 490 F.3d at 872-73 (explaining that when plaintiff "began operating as an adult theater, it violated the zoning ordinances as then written," and thus "failed to establish a vested right to continue operating as a lawful nonconforming use"). Thus, Plaintiffs do not

have standing to challenge § 26-37, because that Section is not causing them an injury by "forcing them to move." Lujan, 504 U.S. at 560-61. Rather, the buffers in § 26-23(b) prohibit their current locations, and Plaintiffs' conceded their challenge to § 26-23(b).

**B. Plaintiffs' due process claim fails as a matter of law.**

Even if Plaintiffs' due process claim were justiciable, that claim fails because the Eleventh Circuit in David Vincent upheld a five-year amortization period, *without* any opportunity for extending that period. 200 F.3d at 1332.

"When courts analyze a procedural due process claim or its analytically related cousin—substantive due process (it arises when a government egregiously or arbitrarily deprives one of his property)—they variously examine three things: (1) whether there is enough of a property interest at stake to be deemed 'protectable'; (2) the amount of process that should be

due for that protectable right; and (3) the process actually provided, be it before or after the deprivation." Greenbriar Village, L.L.C. v. Mountain Brook, City, 345 F.3d 1258, 1264 (11th Cir.2003) (footnote omitted). "[N]o procedural due process claim exists until a sufficiently certain property right under state law is first shown." Id. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Such a right must be created by state law. Id.

Plaintiffs have not shown that they have any protectable property interest in an extension of the amortization period. Plaintiffs have not shown that they qualified for an amortization period in the first place, or that they meet the initial threshold for

seeking an extension. Even if Plaintiffs had a "need or desire" for an extension of time to operate in their current locations, that does not suffice. Plaintiffs never alleged that they met the standards for a hardship extension, so they presented no legitimate claim of entitlement to it. Because they fail to show a sufficient property interest for due process to protect, Plaintiffs' due process claim against § 26-37(c) fails.

Moreover, the Eleventh Circuit's case law shows that communities are not required to provide an opportunity to lengthen amortization periods for nonconforming adult businesses. In David Vincent, the Eleventh Circuit upheld a five-year amortization period—*without* any opportunity for an extension of that period—as constitutional. 200 F.3d at 1332. The Eleventh Circuit also affirmed the district court's holding in David Vincent that the shortening of the amortization period did not state a constitutional

claim. David Vincent, Inc. v. Broward County, No. 97-7164-CIV, 1998 WL 35156026, *5 (S.D. Fla. 1998) ("[T]he fact that the other ordinances (95-50 and 85-19) in combination with the International Eateries case, 941 F.2d 1157 (11th Cir. 1991) reduce the amortization period to 2 1/2 years, do not present constitutional impediments particularly when none of the 3 bookstores has ever applied to move to a new site."), aff'd, 200 F.3d 1325 (11th Cir. 2000); see also id. at 1332 n.11 (citing SDJ v. City of Houston, 636 F. Supp. 1359, 1370 (S.D. Tex. 1986), aff'd, 837 F.2d 1268, 1278 (5th Cir. 1988) (upholding 6-month amortization period)). David Vincent demonstrates that an opportunity to *extend* a five-year amortization period is *not* constitutionally required.

Thus, Plaintiffs' due process claim fails as a matter of law, because Plaintiffs cannot claim entitlement to a protected property or liberty interest

that the City deprived them without due process of law. Roth, 408 U.S. at 577.

**C. Plaintiffs' due process claim is moot because, under the Court's prior ruling, the amortization period has expired.**

Even if Plaintiffs were eligible for amortization, their claim against § 26-37 is moot because Plaintiffs have continued to operate past August 19, 2013, the date Judge Vining previously determined as the relevant amortization period under the 2009 Ordinance, without applying for an extension. See Dkt. No. [301] at 19; BBC Land & Dev., Inc., 640 S.E.2d at 34 ("A nonconforming use, however, is not so indefeasible since [a] governing authority can require a nonconforming use to be terminated in a reasonable time.") (quoting Flippen, 601 S.E.2d at 110).

**D. Section 26-37 and § 26-23(d) are complementary.**

Plaintiffs contend that the interplay between § 26-37 and § 26-23(d) is inconsistent and bolsters their

due process claim, see Dkt. No. [329] at 50 (Attachment H-1 at 5), but their argument is untenable for two reasons.

First, Plaintiffs' argument is an equal protection argument that the Court already rejected at summary judgment. Dkt. No. [301] at 65-67 (granting judgment on Count III, sections (a) and (b) of Second Amended Complaint [219] ¶¶ 143(a), (b)). Thus, this issue is no longer before the Court.

Second, § 26-37 and § 26-23(d) are not contradictory. Section 26-37 provided a five-year amortization period to adult establishments that were lawfully *nonconforming* when the City passed its original Adult Establishment Licensing Code in 2005. In contrast, § 26-23(d) protects adult establishments operating in *lawful* locations from being forced to relocate in the event that their property is subsequently re-zoned or a sensitive use subsequently

opens near them. Section 26-23(d) shields adult establishments from the threat of a "heckler's veto." Thus, § 26-23(d) protects nonconforming adult establishments, by ensuring that they cannot be forced to relocate more than once. Clearly, the interplay between § 26-37 and § 26-23(d) does not violate due process or equal protection.

**II. Plaintiffs have Conceded their Alternative Sites Challenge.**

Prior to the start of trial, Plaintiffs conceded Issue Two, their alternative sites challenge to § 26-23(b). See Dkt. No. [364]; see also Dkt. No. [374], Vol. I, at 8:7-16.

**III. Plaintiffs' First Amendment Claim.**

The First Amendment, applicable to the States via the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. amend. I. Plaintiffs argued at trial that Sandy Springs's prohibition on alcohol in adult

establishments[3] is an impermissible, content-based

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[3] The Pre-Trial Order states Issue 3 concerns whether "the 2009 Alcohol Code, the 2009 Adult Licensing Code (§§ 26-23(a), 26-24(b)(6), 26-25(e), 26-26(c) and 26-38)), the 2009 Adult Zoning Code (§ 19.3.20(B)(5)), Ordinance 2012-02-02, and Ordinance 2012-02-03," taken together are unconstitutional. Dkt. No. [338] at 8-9; see also SJ Order, Dkt. No. [301] at 34-50. Plaintiffs previously included a claim that the City forced Plaintiffs to relocate "without offering them viable relocations," but Plaintiffs dropped their inadequate sites claim before trial. Dkt. No. [364]. Because there are viable relocation opportunities for the Plaintiffs as they themselves admit, the Court does not find that the location regulations are burdensome even in concert with the other regulations.

Regarding the remaining provisions, no evidence was submitted at trial regarding § 19.3.20, perhaps because it now applies to veterinary clinics, not adult establishments. See Joint Exh. 4 at 98.

Plaintiffs' claim also referenced the annual employee work permit rule, but the trial testimony from both the Plaintiffs and the City supported that rule. Dkt. No. [376] at 571:10-22, 577:10-11 (Davis); Dkt. No. [374] at 79:18-20 (Mardi Gras); Dkt. No. [375] at 249:15-19 (Flashers). The Court also does not find that Plaintiffs produced any evidence that the work permit rule was burdensome in any way, and the licensing regulation did not cause an additional burden when considered in concert with the alcohol prohibitions. Further, Plaintiffs' proposed findings of facts and conclusions of law do not address the annual employee work permit

restriction that cannot survive strict scrutiny, or alternatively, that the ordinance fails under the intermediate scrutiny test laid out in United States v. O'Brien, 391 U.S. 397 (1968) and its progeny.

Sandy Springs countered that Plaintiffs have failed to meet their burden because (1) Plaintiffs Flashers and Mardi Gras are collaterally estopped from bringing this challenge based on prior litigation between these Plaintiffs and Sandy Springs's predecessor, Fulton County; (2) strict scrutiny does not apply; and (3) intermediate scrutiny is easily satisfied by Sandy Springs's legislative record at the time of

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rule, except to include general facts about the provisions themselves; no proposed conclusions were included that the provisions violated the First Amendment or were burdensome an anyway. See Dkt. No. [381-2]. Thus, the alcohol prohibition is the gravamen of the Plaintiffs' complaint in this case. See also Dkt. No. [373] at 25 (Mr. Wiggins: "We have a situation where these collection of ordinances as applied to these Plaintiffs ban alcohol in adult nightclubs.").

enactment. The Court will address each of the parties' argument in turn.

### A. Plaintiffs are not collaterally estopped from challenging the alcohol separation rule under the First Amendment.

The Court first finds that Mardi Gras and Flashers's previous challenge to Fulton County's prohibition of alcohol sales within adult entertainment establishments does not collaterally estop them from challenging the Sandy Springs alcohol prohibition.[4]

The decision to apply collateral estoppel—or issue preclusion—is a question of law for the Court. Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1288 (11th Cir. 2009). Issue preclusion prevents the burden of relitigating an issue with a party that has already fully litigated the issue, and

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[4] Sandy Springs does not challenge Plaintiff Flanigan's (Mardi Gras) and Plaintiff 6420 Roswell Road (Flashers) *standing* to challenge this regulation, as they both currently serve alcohol and seek to continue doing so. See Def. Prop. Concl., Dkt. No. [380] at 48-49.

promotes judicial economy by preventing needless litigation. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979). Issue preclusion does not require that the subsequent suit involve both parties involved in the prior suit. Id. at 326-33.

The Eleventh Circuit has explained the doctrine as follows:

> Collateral estoppel or issue preclusion forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit. There are several prerequisites to the application of collateral estoppel: (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior suit must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

I.A. Durbin v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir. 1986). The Court finds that collateral estoppel is not warranted here because—while similar—the issues are not identical to the prior

Flanigan's II suit. The Sandy Springs ordinance addresses a different geographic scope—and thus clubs and potential problems— and legislative record than the Fulton County ordinance, and the Eleventh Circuit has frequently stated that evaluating whether the First Amendment was violated is inherently a fact-based inquiry. See Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County ("Peek-a-Boo II"), 630 F.3d 1346, 1360 (11th Cir. 2011) ("Cases involving the regulation of sexually oriented businesses are of necessity fact-specific, and the answer in each one is largely driven by the nature of the record."). It is for this reason, for example, that the Eleventh Circuit upheld Fulton County's alcohol prohibition in 2010 after previously striking it down in 2001. See Peek-a-Boo, 630 F.3d at 1361 ("The facts addressed in Daytona Grand and Flanigan's II were significantly different than those found in Krueger and Flanigan's I, so not surprisingly,

the outcomes in these cases were different, although the legal principles were the same."). Therefore, the Court does not find as a matter of law that Mardi Gras and Flasher's are barred from bringing their First Amendment claim.

**B. Intermediate scrutiny applies to Plaintiffs' claims and is satisfied in this case.**

1. **Intermediate scrutiny applies to Plaintiffs' claims.**

Nude dancing is protected by the First Amendment. Flanigan's II, 596 F.3d at 1276. The Eleventh Circuit has previously held that "[t]o determine what level of scrutiny applies, [the court] must decide whether the State's regulation is related to the suppression of expression. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy intermediate scrutiny under O'Brien." Flanigan's II, 596 F.3d at 1276. In Flanigan's II, the

Eleventh Circuit held that a "city ordinance prohibiting nude dancing in establishments licensed to sell liquor is content-neutral and therefore, subject to review under the O'Brien test" as the ordinance does not prohibit nude dancing but rather the "sale, possession and consumption of alcoholic beverages on the premises of an adult entertainment establishment." Id. at 1276-77; see also Curves, LLC v. Spalding County, 685 F.3d 1284 (11th Cir.2012) (upholding required separation of alcohol and nudity and finding that intermediate scrutiny applied under O'Brien); Peek-A-Boo II, 630 F.3d at 1346 (upholding required separation of alcohol and both nudity *and* semi-nudity); Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860 (11th Cir. 2007)(same).

Notwithstanding the Eleventh Circuit's repeated holding that alcohol restrictions in adult entertainment establishments are content-neutral regulations which

are subject to O'Brien intermediate scrutiny, Plaintiffs argue that following the Supreme Court's recent decision in Reed v. Town of Gilbert, __U.S. __, 135 S. Ct. 2218 (2015), the alcohol prohibition is now subject to strict scrutiny as the ordinance is content based. Essentially, then, Plaintiffs argue that Reed supplanted prior Eleventh Circuit precedent which had previously subjected adult entertainment ordinances to only intermediate scrutiny under O'Brien.

In Reed, the Supreme Court was asked to determine whether a city sign ordinance which identified "various categories of signs based on the type of information they convey [and then] subject[ed] each category to restrictions" violated the First Amendment. Id. at 2224. In finding that the sign ordinance did violate the First Amendment, the Supreme Court held the following:

> [A] government, including a municipal government vested with state authority, 'has no

power to restrict expression because of its message, its ideas, its subject matter, or its content.' Police Dep't of Chicago v. Mosley, 408 U. S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. R. A. V. v. St. Paul, 505 U. S. 377, 395, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U. S.105, 115, 118, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. E.g., Sorrell v. IMS Health, Inc., 564 U. S. ___,___-___, 131 S. Ct. 2653, 2663-2664, 180 L. Ed. 2d 544 555-556 (2011); Carey v. Brown, 447 U. S. 455, 462, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); Mosley, supra, at 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Sorrell, supra, at ___, 131 S. Ct. 2653, 2663, 180 L. Ed. 2d 544 555. Some facial distinctions based on a message are obvious, defining regulated by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'"or that were adopted by the government "because of disagreement with the message [the speech] conveys," Ward v. Rock Against Racism, 491 U. S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Reed, 135 S. Ct. at 2226-27.

Plaintiffs claim that because alcohol is specifically banned in adult establishments, Sandy Springs is making a content-based distinction—meaning, the alcohol regulations only apply to them because they are involved in nude dancing. But the Court does not find that Reed has supplanted the Eleventh Circuit's prior holdings that the prohibition of alcohol sales in adult cabarets is a content-neutral regulation. Reed does not mention, let alone overrule, the Supreme Court's alcohol, adult

business, or nude conduct cases. Therefore, Plaintiffs' argument that Reed requires strict scrutiny in this case contravenes the prior precedent rule established by the Supreme Court and this Court.

The Court also declines to apply strict scrutiny because Reed, which dealt with actual speech (information conveyed on signs), is inapposite. The regulation at issue (alcohol consumption) does not restrict speech, and the City's definition of "adult entertainment" is based on nude conduct that the Supreme Court has held is not inherently expressive.

*a. The prior precedent rule bars Plaintiffs' claim for strict scrutiny.*

The "prior precedent rule," as applied by the Supreme Court and the Eleventh Circuit, is fatal to Plaintiffs' suggestion that Reed—which did not overrule the on-point Supreme Court or Eleventh Circuit cases—controls the outcome of this case.

The Supreme Court's prior precedent rule is

clear: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S.477, 484 (1989). The Eleventh Circuit applies this rule rigidly, holding that even when changes in analogous cases predict a forthcoming change in the law, "we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." Florida League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir.1996) (citing Rodriguez de Quijas, 490 U.S. at 484). The Eleventh Circuit deems itself bound even by "old pronouncements of the Supreme Court; and we lack the power to overrule these

pronouncements, even if more recent cases suggest that the Supreme Court might someday reach a result contrary to the one we reach today." Id. at 458.

This is because while "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007). Even when the Eleventh Circuit concludes that it was previously in error, it is bound by its prior decision absent "definitive," governing on-point authority. United States v. Chubbuck, 252 F.3d 1300, 1305 (11th Cir. 2001) ("It has become increasingly clear that perhaps our interpretation of Florida law was either in error or has since changed," but "without any definitive authority from the Florida Supreme Court that contradicts our precedent, we decline to, and in fact

cannot, find that the district court committed plain error.") (footnote omitted).

The Eleventh Circuit's prior precedent rule is more rigid than that applied by other circuits. United States v. Vega-Castillo, 540 F.3d 1235, 1236 n.3 (11th Cir. 2008) ("Thus, unlike the First Circuit, even if the reasoning of [the Supreme Court's decision in] Kimbrough is at odds with the reasoning of our prior holdings, we must follow our prior precedents unless Kimbrough overruled them."). The fact "that the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from ourprior decision." Atl. Sounding Co. v. Townsend, 496 F.3d 1282, 1284 (11th Cir.2007) aff'd and remanded, 557 U.S. 404 (2009); see also id. ("Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on

point.'" (quoting Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees, 344 F.3d 1288, 1290-92(11th Cir.2003)).

These rules show that Plaintiffs' claim based on Reed must fail. Plaintiffs cannot argue that Reed directly overrules any of the Supreme Court's nudity, alcohol, or adult entertainment cases. Reed does not even mention them. Thus, the Supreme Court's instruction is that "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas, 490 U.S. at 484.

Plaintiffs argue that this Court should look to Justice Kagan's concurrence in Reed for evidence that the majority *did* overrule its prior precedent in the adult entertainment area. Specifically, Plaintiffs note that Justice Kagan cited Renton for the proposition that the Supreme Court has been "far less rigid than

the majority admits in applying strict scrutiny to facially based content laws" and noted that it applied "intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was 'designed to prevent crime, protect the city's retail trade, [and] maintain property values . . . , not to suppress the expression of unpopular views." Reed, 135 S.Ct. at 2238 (Kagan, J., concurring) (quoting Renton, 475 U.S. at 48). But a fair reading of Justice Kagan's concurrence makes clear that she does not claim Reed has overruled Renton and its progeny. Rather, she referenced Renton to demonstrate that the majority overstated the Court's prior precedence. Moreover, Justice Kagan's concern in writing her concurrence was to note that many "entirely reasonable" content-based distinctions found in current sign ordinances may be in "jeopardy" following Reed. Id. The Court does not find Justice Kagan's citation to

Renton following a "see also" signal overruled the Supreme Court and Eleventh Circuit's long line of cases in the adult entertainment arena when it was not even a focus of her concurrence, much less the controlling majority opinion.

Ultimately, Plaintiffs urge the court "to disregard binding case law," such as Flanigan's, Peek-A-Boo Lounge, and Daytona Grand—as well as the Supreme Court cases that they are based on—even though none of those cases have been directly overruled. Meggs, 87 F.3d at 462. Plaintiffs' Reed argument involves "extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law," and must be rejected. Main Drug, Inc., 475 F.3d at 1230.

***b. Reed does not mandate the application of strict scrutiny in this case.***

Reed imposed differential regulations based on the actual words used to convey messages on signs,

which inherently are protected speech. In contrast, drinking alcohol is not protected speech. Nor is being in a state of nudity "inherently expressive." City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000). Even assuming that Reed was relevant to this Court's analysis, Reed does not require strict scrutiny in this case.

First, the Eleventh Circuit has repeatedly held that "'any artistic or communicative elements present in [nude] conduct are not of a kind whose content or effectiveness is dependent upon being conveyed where alcoholic beverages are served.'" Daytona Grand, 490 F.3d at 886 (quoting Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943, 948 (11th Cir. 1982)). On its face, the alcohol separation rule regulates service and consumption of alcohol, not protected speech.

To be sure, the rule applies to Mardi Gras and Flashers because they are "adult entertainment establishments," *i.e.*, places that regularly offer adult

entertainment. But "*adult entertainment*" is defined not with regard to dancing or protected speech; rather it is defined as "live conduct characterized by the display of specified anatomical areas." Joint Exh. 2 at 5, § 26-22.

Thus, Mardi Gras and Flashers are regulated because they regularly offer "live conduct" characterized by the display of genitals, buttocks, and female breasts. This nudity "is not an inherently expressive condition," City of Erie, 529 U.S. at 289, and comes within the regulation regardless of whether "dancing" is involved. Thus, the alcohol regulation at issue receives only intermediate scrutiny. Id. at 289; Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991) (Souter, J., concurring in judgment) (holding that nudity is not inherently expressive as it is a condition not an activity and applying intermediate scrutiny).

Second, Plaintiffs merely assume that the

Supreme Court would apply Reed to a sexually oriented business ordinance if the ordinance refers to the regulated establishments based on the content of speech. But this assumption ignores the distinction between conduct (such as live nudity) and speech, and the corollary rule that the "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." City of Erie, 529 U.S. at 299 (internal citations and quotation marks omitted).

Plaintiffs' assumption also ignores the fact that the Supreme Court has repeatedly held that sexually explicit speech—as well some other kinds of protected speech—deserve less protection under the First Amendment. For example, the Supreme Court has held that even nude *dancing* designed to convey an erotic message "falls only within the outer ambit of the First Amendment's protection," such that the nudity itself

may be prohibited. City of Erie, 529 U.S. at 289; see also BBL, Inc. v. City of Angola, No. 14-1199, __ F.3d __, 2015 WL8021983, at *8 n.1 (7th Cir. Dec. 7, 2015) ("We don't think Reed upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection."). The Supreme Court in City of Erie quoted Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976)—which dealt with zoning regulations for "adult theaters"—when it reiterated that:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .

City of Erie, 529 U.S. at 294 (quoting Young, 427 U.S. at 70); see also id. (quoting Young, 427 U.S. at 70, for the proposition that "'few of us would march our sons

and daughters off to war to preserve the citizen's right to see' specified anatomical areas exhibited" in an adult establishment).

In a similar vein, the Supreme Court has expressly held that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562-63 (1980). And the Eleventh Circuit has extended that lesser protection to professional speech. Dana's R.R. Supply v. Attorney Gen., Florida, 807 F.3d 1235, 1246 (11th Cir. 2015) ("Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of the robustness of the speech and the greater need for regulatory flexibility in those areas."). This is true even though the determination of whether

speech is commercial or professional speech turns directly on its content.

But in the wake of Reed, the Eleventh Circuit has at least suggested (while not deciding) that Reed did not change the professional speech landscape, which has historically received only intermediate scrutiny. Wollschlaeger v. Governor of the State of Florida, No. 12-14009, __ F.3d ___, 2015 WL 8639875, at *19 (11th Cir. Dec. 14, 2015) ("there was ample evidence before Reed that professional speech also received, at most, intermediate scrutiny and it is hardly clear that anything has changed.")

And numerous courts have outright rejected the notion that commercial speech regulations—which have historically received only intermediate scrutiny—should now be subjected to strict scrutiny. See, e.g., CTIA-The Wireless Ass'n v.City of Berkeley, No. C-15-2529 EMC, __ F. Supp. 3d. __, 2015 WL

5569072, at *10 & n.9 (N.D. Cal. Sept. 21, 2015) (observing that "the classification of speech between commercial and noncommercial is itself a content-based distinction," but holding that "nothing in [the Supreme Court's] recent opinions, including Reed, even comes close to suggesting that that well-established distinction is no longer valid"); Chiropractors United for Research and Educ., LLC, No. 3:15-CV-556-GNS, 2015 WL 5822721, at *4 (W.D. Ky. Oct. 1, 2015) ("Because the New Solicitation Statute constrains only commercial speech, the strict scrutiny analysis of Reed is inapposite."); Cal. Outdoor Equity Partners v. City of Corona, No. CV 15-03172-MMM, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("Reed does not concern commercial speech, let alone bans on off-site billboards. The fact that Reed has no bearing on this case is abundantly clear from the fact that Reed does not even cite Central Hudson, let alone apply it."); Citizens for

Free Speech, LLC v. Cnty. of Alameda, No. C14-02513 CRB, 2015 WL 4365439, at *13 (N.D. Cal. July 16, 2015) ("Plaintiffs have not identified any distinct temporal or geographic restrictions on different categories of permitted signs in Section 17.52.520 based on those signs' content [as opposed to commercial speech].Consequently, Reed does not apply here.").

Plaintiffs' argument ultimately rests on ignoring the on-point precedents from the Supreme Court in favor of their own predictions about how the Supreme Court might address different regulations in light of Reed. But the Court in Reed dealt with one problem found in regulations of inherently expressive materials—signs—and did not address other categories of expression such as live, expressive conduct, sexual speech, commercial speech, etc. Thus, Reed does not mandate strict scrutiny in this case.

**2. The alcohol prohibition satisfies intermediate scrutiny.**

Sandy Springs's ordinances do not prohibit nude dancing but regulate alcohol on or near adult establishments and aim to redress secondary effects. Thus, these ordinances are content neutral and are subjected to intermediate scrutiny under United States v. O'Brien, 391 U.S. 367 (1968). Flanigan's II, 596 F.3d at 1277 ("The ordinance is content neutral and its enactment is unrelated to the suppression of free expression. We, therefore, subject it to intermediate review under United States v. O'Brien, 391 U.S. 367 (1968).").

Under O'Brien, an ordinance is valid:

> [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial governmental interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. The Court concluded at summary judgment that each challenged regulation is

constitutional under O'Brien's four factors, Dkt. No.[301] at 40-50, and following a trial on the matter, reiterates that conclusion here.

Sandy Springs's regulations, which are aimed at protecting public health, safety, and welfare, satisfy O'Brien's first prong because they are within the constitutional power of the government. Dkt. No. [301] at 40 (citing Flanigan's II, 596 F.3d at 1277 ("The first prong—a substantial interest within the power of government—is easily met here. It has been by now clearly established that reducing the secondary effects associated with adult businesses is a substantial government interest 'that must be accorded high respect."); see also Preamble, Joint Ex. 2 at 2-4 (stating the purpose of the regulations).

The second prong of O'Brien analysis focuses on the City's "undeniably important" governmental interest in reducing secondary effects. Pap's A.M., 529

U.S. at 296. The Supreme Court implements this prong of intermediate scrutiny via a burden-shifting process:

> [A] municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. [Renton,] 475 U.S. at 51-52. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438-39 (2002).

The secondary effects issue entails two questions: (1) "what proposition does a city need to advance in order to sustain a secondary effects ordinance?" and (2) "how much evidence is required to

support the proposition?" Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1263 (11th Cir. 2003) ("Peek-A-Boo I") (citing Alameda, 535 U.S. at 449 (Kennedy, J., concurring)).

With regard to the first issue, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." Peek-A-Boo I, 337 F.3d at 1263 (citing Alameda, 535 U.S. at 449-50 (Kennedy, J.,concurring)); see also Flanigan's II, 596 F. 3d at 1278 ("To meet the furtherance prong, a municipality 'must have 'some factual basis for the claim that [adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity' and other undesirable community conditions.'") (quoting Flaningan's I, 242 F.3d at 985).

> The key issue, in other words, is "how speech will fare" under the ordinance: "[T]he necessary

> rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects . . . . It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.

Peek-A-Boo I, 337 F.3d at 1263 (citing Alameda, 535 U.S. at 449-50 (Kennedy, J.,concurring)).

Likewise, a municipality does not bear the burden of providing evidence that scientifically rules out alternative theories of what causes secondary effects or scientifically proves via empirical data that its proposed ordinance "will successfully lower crime." Alameda Books, 535 U.S. at 437-39 (plurality); Peek-A-Boo II, 630 F.3d at 1359 ("[W]e have rejected the argument that a municipality may only rely on studies employing the scientific method.") (citing Daytona Grand, 490 F.3d at 881)). The city's evidence need only

"fairly support the municipality's rationale for its ordinance." Alameda Books, 535 U.S. at 438 (plurality); id. at 451 (Kennedy, J., concurring).

Regarding the "how much evidence" question, "very little" is required to support the secondary effects proposition as the Supreme Court has "consistently held that a city must have latitude to experiment." Alameda, 535 U.S. at 451 (Kennedy, J., concurring); Peek-A-Boo I, 337 F.3d at 1261 (describing evidentiary requirement as "a weak one").

"To satisfy Renton, any evidence 'reasonably believed to be relevant'—including a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion—may form an adequate predicate to the adoption of a secondary effects ordinance, but the government must rely on *some* pre-enactment evidence." Peek-A-Boo I, 337 F.3d at 1268 (emphasis in original); see also Alameda, 535

U.S. at 439. "Governments are also empowered to rely on 'their own wisdom and common sense, and common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." Flanigan's II, 596 F.3d at 1278-79 (quoting Sammy's of Mobile, Ltd. v.City of Mobile, 140 F.3d 993, 997 (11th Cir. 1998)).

In sum, intermediate scrutiny requires "some" evidence supporting the legislative judgment, but concomitantly "requires deference to the reasoned judgment of a governmental entity." Flanigan's II, 596 F.3d at 1279. As the Eleventh Circuit has explained, the courts "cannot simply survey the vast field of literature and declare unconstitutional any ordinance which fails to conform with our own sense of that course which is most prudent." Id. at 1280. Thus, judgment for the city is appropriate if its legislation is supported by any evidence"reasonably believed to be

relevant to the problem that the city addresses" that"fairly support[s]" its rationale. Id. at 1278-79. This Court's "review is designed to determine whether *the City's* rationale was a reasonable one, and even if [the plaintiffs] demonstrates that another conclusion was also reasonable, [it] cannot simply substitute [its] own judgment for the City's." Flanigan's II, 596 F.3d at1279 (quoting Daytona Grand, 490 F.3d at 882).

***c. The City reasonably relied on judicial opinions, land use and crime impact reports, and witness observations to meet its burden of supporting its rationale that the Ordinances may reduce the costs of secondary effects.***

From its beginning, the City has relied on a variety of types of evidence to support its conclusion that regulating adult establishments will enable the City to control the negative secondary effects of sexually oriented businesses. Beginning in 2005, the City Council conducted a legislative fact-finding process that included an extensive review of the

secondary effects literature, review of judicial decisions detailing secondary effects, testimony from the community, testimony from representatives of the Sandy Springs adult businesses, and reports on activities observed inside Sandy Springs adult businesses by undercover investigators. The record that the City relied on satisfies the City's burden set forth in Renton and Alameda Books.

First, undercover investigators observed illicit sexual contact occurring in Sandy Springs adult businesses as well as violations of state law. They saw fully nude dancers sitting on patrons' laps, rubbing patrons' crotches with their hands, grinding on patrons' crotches with their pubic areas and rear ends, and letting patrons run their hands all over the dancers' unclothed bodies. Joint Exh. 5 at 3744-3754 - Transcript of December 20, 2005 City Council meeting; id. at 1062-1066; id. at 1063. Dancers also put their

mouths and hands on patrons' crotches, simulating oral sex and masturbation. Id. at 3747:16-21. The undercover investigators were invited to join dancers in private rooms, where they could participate in oral sex and sexual intercourse for money. Id. at 3752:11-25; id. at 3774:10-22; id. at 1065-66; id. at 1082; id. at 3768:4-19.

The investigators also observed fights and rough physical treatment of intoxicated patrons by adult establishment bouncers. Id. at 3748:16-22; id. at 1064; id. at 3749:13-18; id. at 1064. Authorities were not called to respond when these physical altercations occurred. Id. at 3769:13-22; id. at 1080.

The investigators likewise observed negative secondary effects in area adult bookstores. In one booth the investigator found a condom wrapper and observed a fluid that appeared to be semen. Id. at 3849:1-12; id. at 1086-1088 (condom wrapper); id. at 1060. He also

observed two men apparently engaging in oral sex, and later one of the men exposed his penis and stuck it through a hole into the booth the investigator was occupying. Id. at 3850:14-3851:5; id. at 1060-61.

Second, the City also relied on studies and reports of adverse secondary effects prepared by a variety of jurisdictions. Id. at 3727-3730; id. at 1202-1204 (partial list of studies submitted); id. at 1205-1882 (copies of studies and 3 cases). One study, "An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas" indicates the following:

> The second major influence is the hours of operation and the type of people which [sexually oriented businesses] attract. This appears to lead to higher crime in the area, loitering by unsavory people, including prostitutes, and parking problems . . . . Additionally there is frequently parking lot noise and disturbances which often turn violent.

Id. at 1607.

In addition to the above and other full reports,

the City relied on a summary of numerous studies, Joint Exh. 5 at 1379-1397, that "painted a moribund picture of the adult business and the communities surrounding them. They told of crime, disease, violence, blight, and depressed property values." Flanigan's II, 596 F.3d at 1280 (crediting Fulton County's reliance on summaries of studies).

The City also relied on judicial decisions discussing the negative secondary effects of adult establishments. The legislative record contains the Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir.1998) decision, Joint Exh. 5 at 1398-1414, which shows that cities may constitutionally separate alcohol sales from adult establishments to regulate the secondary effects that flow from the combination. Wise Enterprises, Inc. v. Unified Government of Athens-ClarkeCounty, 217 F.3d 1360 (11th Cir. 2000), Joint Exh. 5 at 1425-1435, likewise supports the City's

conclusion that separating alcohol and adult entertainment serves the City's interest in reducing secondary effects. Zibtluda, LLC v. Gwinnett County, 411 F.3d 1278 (11th Cir. 2005), Joint Exh. 5 at 1415-1424, shows that adopting licensing provisions for adult establishments is an acceptable way to address negative secondary effects. Moreover, the City relied on Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860 (11th Cir. 2007) (upholding alcohol ban for adult businesses), H&A Land Corp. v. City of Kennedale, 480 F.3d 336 (5th Cir. 2007) (upholding regulation of retail adult bookstores on secondary effects grounds), and other cases in Section 26-21 of the Adult Licensing Ordinance. Joint Exh. 2 at 2-4.

Also in the legislative record are first-hand accounts provided by local Sandy Springs residents regarding their experiences living near adult establishments, including the Plaintiffs in this case.

Robert Feifer's affidavit states that he routinely found condoms on the ground between the adult business and his business. Joint Exh. 5 at 3837:6-18; id. at 1134-1135. Club employees left the club's garbage at his back door one time, and he witnessed a vandalized vehicle near the adult business and his lot. Another resident was inside his car with his children and found a pair of panties on his residential mail box. Id. at 3784-87.

The City Council also weighed materials submitted by the adult establishments and concluded that they "are not credible on balance given the presence of the undesirable effects which are currently existing including alcohol abuse, fights, sex for hire, prostitution, diminished property values and deterioration of neighborhoods." Joint Exh. 2 at 2, Ordinance No. 2009-04-25 §26-21(7)(a). For example, the City Council received testimony from the

undercover investigators that a Fulton County Police Officer was present during one of the undercover operations, but failed to make any arrest or report any crime. Joint Exh. 5 at 3779:3-9. This factual finding also went un-rebutted by Plaintiffs' lawyers.

Additionally, the City Council received certified copies of the guilty plea of Fulton County Police Officer Lance, who was convicted of extorting protection money from one of the Plaintiffs in this case before the City's incorporation. Id. at1098-1105 (Indictment); id. at 1106-1124 (Government's bench brief); id. at 1125-1133 (guilty plea and plea agreement). Thus, the City Council expressly concluded in the preamble to the licensing Ordinance that the lack of police reports at adult establishments before the City's incorporation stems from Fulton County's failure to enforce its laws, not a lack of criminal activity.

Further, the Council heard from Mr. William

Holland that certain Fulton County studies that were based on calls for service data, and that those are not a reliable indicator of the crime associated with adult businesses serving alcohol. Id. at 3861-3862. The Council also heard from Dillon Fries, a certified real estate appraiser, that criticized economic impact documents tendered by adult industry lawyers. Id. at 1136-1185.

In addition, the Council also relied on the report of its retained expert, Richard McCleary, Ph.D. Id. at 51-122. His report explains how criminological theory predicts, and various studies corroborate, that sexually oriented businesses generate large, significant crime-related secondary effects. Id. at 59-94. The report reiterates what "[c]ommon sense indicates," Flanigan's II, 596 F.3d at 1279—that alcohol exacerbates the negative secondary effects of adult entertainment. Joint Exh. 5 at 63.

Based on this extensive body of secondary effects evidence, the Council found that adult establishments have a wide variety of adverse secondary effects justifying regulations for such establishments. Joint Exh. 2 at 2-4. Because the City may reasonably rely on all of this evidence, the City has satisfied its burden that it reasonably believed that the Ordinances may reduce the costs of secondary effects.

*d. Plaintiffs fail to cast "direct doubt" on the City's evidence.*

The trial testimony of Plaintiffs' expert witnesses, Dr. Reid and Mr. Hayter, revealed that they did not analyze or critique all of the City's voluminous secondary effects record. Dkt. No. [374], Vol. 1, 172:12-19 (Reid testifying that she did not "level any criticism against the vast majority of the legislative record"); id. at 88:9-17 (Hayter stating that he only considered Sandy Springs tax values). Thus, Plaintiffs did not even address—let alone cast "direct doubt"—on the

majority of the City's voluminous legislative record.

The party challenging adult business regulations bears the burden of disproving *each* secondary effect interest that a regulation may serve. Alameda, 535 U.S. at 435-36 (holding that evidence concerning crime is sufficient, regardless of inconclusive evidence regarding property values). To do so, the challenger must "cast direct doubt on *all* of the evidence that the City reasonably relied on when enacting the challenged ordinances." Daytona Grand, 490 F.3d at 884 (emphasis added).

Moreover, a city need not disprove a rationale that a challenger requires for addressing secondary effects. Alameda Books, 535 U.S. at 437. Rather, the challenger must address the *city's* rationale for its regulations and present "actual and convincing evidence . . . to the contrary." *Id.* at 438-39. Plaintiffs' trial evidence fails to "cast direct doubt" on all of the

City's secondary effects evidence, as required under Eleventh Circuit law. Daytona Grand and Peek-A-Boo II are instructive here.

In Daytona Grand, the City's ordinances prohibited alcohol and adult entertainment within 500 feet of each other *and* prohibited nudity throughout the City—regardless of the presence of alcohol. 490 F.3d at 865-68. The plaintiffs hired experts who challenged not only the legislative record for the City's ordinances, but who also conducted their own empirical studies in Daytona Beach. Id. at 879-80.

The district court, believing that the Supreme Court's Alameda Books decision "'raised the bar somewhat' on Renton's 'reasonably believed to be relevant' standard," id. at 880, struck down Daytona Beach's ordinances on the grounds that the plaintiffs' "experts' 'scientific' studies cast direct doubt on the City's 'anecdotal' evidence." Id.

The Eleventh Circuit reversed. It held that the experts failed to cast direct doubt on the city's regulatory rationale in either manner. First, the experts' attack that the City's legislative record was insufficiently "scientific" failed because Renton's "reasonably believed to be relevant" standard does not require scientific evidence. The court explicitly rejected plaintiffs'

> claim that either Alameda Books or Peek-A-Boo Lounge [I] raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies. Justice Kennedy's Alameda Books concurrence, which all parties agree states the holding of that case. . . emphasized that the evidentiary standard announced in *Renton* remained sound . . . ."

Id. at 880.

The Eleventh Circuit explained that the plaintiffs' argument that the legislative record was insufficiently scientific "essentially asks this Court to hold today that the City's reliance on anything but empirical studies based on scientific methods is

unreasonable. This was not the law before Alameda Books, and it is not the law now." Id. at 881.

Second, the court also rejected plaintiffs' argument that the plaintiffs' experts' "empirical" studies cast direct doubt on the City's secondary effects rationale. Id. at 882. The court observed the plaintiffs' studies "cast little or no doubt on the City's evidence that nudity in establishments that serve alcohol encourages 'prostitution, . . . undesirable behavior . . . , [and] sexual, lewd, lascivious, and salacious conduct among patrons and employees . . . in violation of law and [en]dangers . . . the health, safety and welfare of the public.'" Id. (alterations in original). This is because "many crimes do not result in calls to 911, and, therefore, do not have corresponding records in the City's CAD data. This is especially true for crimes, such as lewdness and prostitution, that the City sought to reduce by enacting the challenged ordinances." Id. at

882-83 (footnote omitted).

The Daytona Grand court also rejected, as insufficient, the plaintiffs' studies showing "that factors other than the presence of adult theaters affect crime rates in Daytona Beach" because "crime is plainly caused by many factors." Id. at 884."But that does little to undermine the City's conclusion" that adult businesses also affect crime. Id.

Finally, the Eleventh Circuit noted that "both [of plaintiffs' local] studies focus only on criminal activity and do not even purport to address the connection between adult theaters and urban blight." Id. "Thus," the court concluded, the plaintiffs "failed to cast direct doubt on all of the evidence that the City reasonably relied on when enacting the challenged ordinances." Id. The court then held that, because plaintiffs failed to cast direct doubt on the city's legislative record, "there is no need to consider the City's post-enactment

evidence." Id. at 885 n.35.

Like Daytona Grand, in Peek-A-Boo II the plaintiffs' experts both challenged the government's legislative record and conducted local studies to challenge the government's regulatory rationale. Peek-A-Boo II, 630 F.3d at 1351-52. And as in Daytona Grand, the Eleventh Circuit held that the government met its initial burden under Renton, id. at 1355-57, and that plaintiffs' experts failed to cast direct doubt on the government's regulatory rationale. Id. at 1357-60. The court observed that the plaintiffs' experts failed, *inter alia*: (1) to refute multiple studies in the legislative record, (2) to "directly address[] the twenty-five judicial opinions relied upon by the County," (3) to "cast any direct doubt on the affidavits submitted by the private investigator and two police officers detailing illegal activities" in the County's adult establishments, and (4) to address "an underestimation of the total number of

crimes, since certain crimes, such as lewdness and prostitution, are rarely reported." Id.

As to the plaintiffs' real estate study, it failed to cast direct doubt because: (1) it "measured the assessed value of properties," which "are far less accurate than appraisal values," (2) did not account for "generally rising neighborhood property values," and (3) did not evaluate "what improvements took place," and without that information, "it would not be proper to assume that a higher resale value meant that property values in the neighborhood were rising." Id. at 1360.

These cases reveal the ways in which Plaintiffs' experts have failed to cast direct doubt on the City's secondary effects rationale. First, Plaintiffs did not challenge the entirety or even a large part of legislative record. They did not address the City's reliance on numerous judicial decisions documenting such effects, and that failure is fatal to Plaintiffs' claim. Id. at 1359.

While the Court does find that Dr. Reid's study was scientific based upon the procedure used, the Court agrees with the Defendant that it does have some shortcomings. Specifically, the study was based upon police calls (as that is an ascertainable data set). Such a study does not reflect victimless crimes such as prostitution, though, a major concern for the City. And Dr. Reid did not analyze or critique the City's legislative record—her study was limited to crime reports within Sandy Springs. Dkt. No. [374], Vol. 1, 172:12-19. By ignoring the very predicate for the City's ordinances, Plaintiffs have failed to cast doubt on the City's rationale for regulating adult establishments to prevent secondary effects. Nor did Dr. Reid cast any doubt whatsoever on the direct evidence of secondary effects of illicit sexual behavior witnessed in and around Sandy Springs' sexually oriented businesses by various citizens and investigators. See, e.g., Joint Exh.

5 at 1056-1088.

Second, Plaintiffs' challenge fails because Dr. Reid applies a higher standard to the secondary effects question than what is constitutionally required. Using standards of methodology employed by social scientists, Dr. Reid analyzed data and concluded that alcohol-serving adult establishments in Sandy Springs do not cause an adverse increase in crime. Dkt. No. [374], Vol. 1, 167:10-12, 22-25. But the First Amendment does not require "a city to justify its ordinances with empirical evidence or scientific studies." Daytona Grand, 490 F.3d at 881. The City does not have to show that adult establishments cause an increase in crime worse than other businesses. It need only have a reasonable belief, for example, that its prohibition on alcohol, or dancer-patron physical contact, Joint Exh. 2 at 8, § 26-24(b)(4), may reduce the secondary effect of illicit sexual contact in strip clubs.

Moreover, "[e]ven if we were to accept that crime is greater in and around the non-adult establishments—and the record is hotly disputed on this point—a municipality would still be empowered to act in order to check a class of crime it found to be particularly troublesome." Flanigan's II, 596 F.3d at 1278-81. Dr. Reid admitted that her study did not include or consider crime incidents that were never reported to the police, Dkt. No. [374], Vol. 1, at 178:6-10), that "victimless" crimes like drug use and prostitution often go unreported, id. at 218:21-24, and that the under reporting or non-reporting of crime would make a difference in her study. Id. at 186:9-11. "By contrast, the City's 'anecdotal' evidence may be a more accurate assessment of such crimes because it is not based on a data set that undercounts the incidents of such 'victimless' crimes." Daytona Grand, 490 F.3d at 883.

Plaintiffs' real estate opinion, from Dale Hayter, Jr., is likewise insufficient to meet Plaintiffs' burden because it assumes that the City must show that adult establishments have a more depressive effect on property values than other businesses. Hayter formed his opinion based on tax assessor values, despite the fact that he "would not base an appraised value on the tax assessor's value," nor "feel comfortable professionally" using the tax assessor's analysis. Dkt. No. [374],Vol. 1 at 106:10-107:2, 114:14-17; accord Peek-A-Boo II, 630 F.3d at 1360 (noting"problems with" expert's report, which used "assessed value of properties," as opposed to appraisal values).

Again, the City is not required to produce empirical or scientific evidence to support its belief that its regulations may reduce the costs of secondary effects, but need only show that it relied on some evidence "reasonably believed to be relevant" to the

problem. Daytona Grand, 490 F.3d at 875. Here, the City considered extensive evidence that remains unrefuted. And even truly conflicting evidence on this policy question is "not sufficient to vitiate the result reached in the [] legislative process.'" Id. at 881.

Thus, "plaintiffs fail[ed] to cast direct doubt on [the City's] rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings," and accordingly, "the municipality meets the Renton standard." Alameda Books, 535 U.S. at 439. The City is therefore entitled to judgment on Plaintiffs' free speech claim.

*e. Even if Plaintiffs have cast direct doubt, the City has supplemented the record with additional evidence renewing support for its ordinances.*

Although Plaintiffs have failed to "cast direct doubt" on the City's regulatory rationale, the City has nevertheless adduced additional evidence

demonstrating the secondary effects that its ordinances target. Alameda, 535 U.S. at 439. This includes evidence of drug trafficking at Mardi Gras by dancers, Dkt. No. [376], Vol. 3 at 582-584, prostitution arrests of Mardi Gras dancers, id., and paid sexual touching between dancers and patrons in the main rooms and VIP areas at Mardi Gras, Flashers, and Main Stage. Dkt. No. [376], Vol. 3 at 635-656. Plaintiffs have themselves admitted that secondary effects occur at their establishments which suggests that separating nude dancers from patrons and adult establishments from alcohol may well prevent those effects.

Dr. McCleary and Bill Huff also provided additional evidence to demonstrate the City's regulatory interest. Dr. McCleary showed that, in his opinion, Sandy Springs adult establishments lie inside crime hot spots. Dkt. No. [375], Vol. 2 at 401:22-23. He explained the importance of anecdotal investigative

observations inside adult establishments because those reveal valid secondary effects that typically do not show up in crime data. Id. at 418:8-419:2. Bill Huff addressed the negative impacts that Mardi Gras, Flashers, and Inserection have on real estate near their sites, including long-standing commercial vacancies near them and a lack of residential "tear-down" redevelopment that occurs elsewhere throughout Sandy Springs. Id. at 291-306.

**3. Plaintiffs' narrow tailoring argument, based on a misreading of Justice Kennedy's concurrence in *Alameda Books* and Plaintiffs' economic choices, contravenes governing law.**

Plaintiffs make a novel narrow tailoring argument based on their interpretation of Justice Kennedy's Alameda Books concurrence, but acknowledge that the argument has not been accepted. Dkt. No. [374], Vol. 1 at 27:23-28:5. Plaintiffs contend that if this Court assesses how "speech will fare," Alameda, 535 U.S. at 450 (Kennedy, J., concurring),

under the ordinance, the Court must find that the ordinance is not narrowly tailored as the clubs will be forced to shut down without alcohol revenues. The ordinances, Plaintiffs contend, therefore could not be "proportional" under Justice Kennedy's analysis. Id. at 22-26; see also Alameda, 535 U.S. at 450-51 (Kennedy, J., concurring). The Court finds that under governing Eleventh Circuit authority, however, the City's regulations are narrowly tailored. Additionally, the Court explains why Plaintiffs' narrow tailoring theory is unsound.

The City's time, place, and manner regulations for operating adult establishments satisfy the fourth prong of O'Brien analysis because they are narrowly tailored to reduce and prevent negative secondary effects without substantially burdening speech. A law is narrowly tailored if it "promotes a substantial government interest that would be achieved less

effectively absent the regulation." Daytona Grand, 490 F.3d at 885 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989)).

Plaintiffs object to the City's regulations that prohibit alcoholic beverages in adult businesses and that require separation between adult businesses and establishments licensed to sell alcoholic beverages. But there is no "constitutional right to drink while watching nude dancing." Sammy's of Mobile, 140 F.3d at 999. Courts have acknowledged the "enhanced secondary effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing," Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 727-28 (7th Cir. 2003), and that prohibiting alcohol at adult businesses will undoubtedly reduce that secondary effect. Id. As the City's interest in reducing secondary effects would be served less effectively absent the separation

requirement, these provisions are narrowly-tailored. Daytona Grand, 490 F.3d at 886 (upholding 500-ft. buffer between adult entertainment and alcohol).

Multiple Eleventh Circuit decisions uphold ordinances that, in combination, have more restrictive rules than Sandy Springs. Daytona Grand upheld three ordinances challenged on the ground that "the combined effect" of the ordinances "is that at least G-strings and pasties are required in all adult theaters regardless of location, and that Ordinance 02-496's slightly more modest clothing requirements apply at establishments that either serve alcohol or are located within 500 feet of an establishment that serves alcohol." 490 F.3d at 885. The Eleventh Circuit stated: "We break no new ground in rejecting Lollipop's argument." Id. at 886 (citing Supreme Court and Eleventh Circuit cases). "[B]oth the requirement that dancers wear G-strings and pasties in all adult

theaters, and the additional requirement of clothing somewhat more modest within 500 feet of establishments that serve alcohol, are narrowly tailored under O'Brien." Id. (footnoted omitted).

As the Court's summary judgment order explained, "the Daytona Grand court upheld a more restrictive ordinance, and because the court has already found these provisions satisfy the O'Brien test, the court grants summary judgment on Count II, section (e), to the defendant." Dkt. No. [301] at 52.

Similarly, Peek-A-Boo II upheld an adult licensing ordinance that contained the substantive regulations in the Sandy Springs ordinance (no alcohol, annual licensing for businesses and employees, dancer-patron buffer, no touching, *etc.*). 630 F.3d at 1350. But Manatee County's ordinance combined those rules with additional rules prohibiting nudity, requiring semi-nude conduct (*i.e.*, pasties and G-string dancing) to

occur in a room of at least 1,000 sq. ft., and requiring all adult establishments to close at midnight. Id. at 1350. Sandy Springs' ordinance is more permissive: it allows nudity, does not set a minimum room size, and sets closing time at 4 a.m. (2:55 a.m. on Sunday). Joint Exh. 2 at 7,§ 26-24(b)(1).

Plaintiffs claim Justice Kennedy's concurrence imposed a heightened form of intermediate scrutiny, but it did not. All five of the post-Alameda Books decisions from the Eleventh Circuit that uphold alcohol separation requirements recognize that Justice Kennedy's concurrence is the holding of Alameda Books. Yet *none* of them impose the heightened form of intermediate scrutiny that Plaintiffs urge this court to adopt. See, e.g., Flanigan's II, 596 F.3d at 1277 n.7; Daytona Grand, 490 F.3d at 874 n.20; Peek-A-Boo II, 630 F.3d at 1354 n.7.

Rather, Justice Kennedy's concurrence was

written to address the rationale for applying intermediate scrutiny in the first place. His position

> is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects *prior to* implementation, as Justice Souter and the other dissenters would require, see generally Alameda Books, 122 S.Ct. at 1744-51; but that a municipality's *rationale* must be *premised* on the theory that it '*may* reduce the costs of secondary effects without substantially reducing speech.' Id. at 1742 (emphasis added).

Ben's Bar, Inc., 316 F.3d at 721; see also Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546, 562 (5th Cir. 2006) (noting that Alameda Books did not address narrow tailoring); Entm't Prods., Inc. v. Shelby County, 721 F.3d 729, 742 (6thCir. 2013) ("The appellants' legal theory would expand Justice Kennedy's concurrence beyond any recognizable limiting principle, and we accordingly reject it.")

Plaintiffs' argument at the trial was, essentially, that "the sum of the Ordinance's parts place[] such a significant burden on speech as to violate the First

Amendment, even though each individual provision is constitutional." Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291, 299 (6th Cir. 2008). "This argument is unavailing." Id.

Plaintiffs' claim that they would make an *economic* decision to shut down if they cannot serve alcohol, and that this renders the City's regulations unconstitutional. This theory contravenes the fundamental holding that "[t]he inquiry for First Amendment purposes is not concerned with economic impact." Renton, 475 U.S. at 54 (quoting Young, 427 U.S. at 78 (Powell, J., concurring)). See also Imaginary Images, Inc. v. Evans, 612 F.3d 736, 743 (4th Cir. 2010) (citing this same page of the Renton decision and holding that showing "loss of revenue" is insufficient under intermediate scrutiny).

Plaintiffs' theory has been repeatedly rejected. Here, as in Entertainment Productions Inc., 721 F.3d

at 740, the plaintiffs "argue that the [ordinance] fails Justice Kennedy's proportionality requirement from Alameda Books, 535 U.S. at 450 (Kennedy, J., concurring in judgment)," because the loss of revenue portended by complying the ordinances would cause their "exit from the adult entertainment market would cause a rapid decrease in the quantity and accessibility of adult speech." Plaintiffs "would have us believe that because they have voluntarily ceased production of adult entertainment, the availability of protected adult speech has dropped to zero." Id. at 741. "Accordingly, they theorize, the Ordinance cannot pass muster under Alameda Books." Id.

But the "problem with this argument is that it ignores the fact that any reduction in the availability of erotic speech is due not to the operation of the Ordinance, but to the appellants' economic choice to invest their resources elsewhere." Id. The Sixth Circuit

explained that:

> It is not enough that the ban, combined with outside forces such as the relative demands for striptease, bikini contests, and alcohol, result in an economic climate where it is more lucrative to operate a non-nude club with alcohol than a nude club without. Were this sufficient to sustain a proportionality argument under Alameda Books, it is hard to see how any government action that alters the economic calculus of adult-oriented businesses would not potentially violate the First Amendment . . . . The appellants' legal theory would expand Justice Kennedy's concurrence beyond any recognizable limiting principle, and we accordingly reject it.

Id. at 742; see also Ctr. for Fair Public Policy v. Maricopa Cty., 336 F.3d 1153, 1162 (9th Cir. 2003) (rejecting claim that "Justice Kennedy meant to precipitate a sea change" in this area of law); MJJG Rest. LLC v. Horry Cty., 102 F. Supp. 3d 770, 789 (D.S.C. 2015) ("[P]laintiff essentially argued that, regardless of how much property is available, it is not worth it to relocate because the midnight closing time, space restrictions, touching restrictions, and license

requirements make it commercially impracticable to run a profitable business. . . . [T]o the extent the plaintiffs are trying to use Justice Kennedy's concurrence in Alameda, which addressed a zoning regulation, to suggest that a regulation on conduct is unconstitutional if it harms the profitability of the adult business model, such an argument has been firmly rejected."). The Court therefore finds that Defendants are entitled to judgment in their favor on Plaintiffs' First Amendment claim.

## IV. Plaintiffs' facial overbreadth challenge fails as a matter of law.

### A. Section 26-29(d) does not regulate speech.

Plaintiffs' overbreadth claim against § 26-29(d)'s ban on adult entertainment inside private rooms fails because § 26-29(d)[5] does not punish any protected

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[5] § 26-29(d) provides in relevant part, "*Private rooms prohibited.* It shall be unlawful for any employee or independent contractor to engage in adult

speech. Virginia v. Hicks, 539 U.S. 113, 118-19 (2003).

As a narrow exception to the established standing rule that a litigant may not assert the rights of third parties, the First Amendment overbreadth doctrine is "strong medicine" that should be employed "only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). It is properly invoked only where there exists "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court. . . ." Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

An overbreadth claim fails if the challenged law

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entertainment or to expose any specified anatomical areas in the presence of a patron in any separate area including, but not limited to, any room or booth, within an adult establishment to which entry or access is blocked or obscured by any door, curtain or other barrier separating entry to such area from any other area of the establishment." Joint Exh. 2 at 13, § 26-29(d).

can be narrowly construed. Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld."); see also Broadrick, 413 U.S. at 613 ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."). Thus, "[t]he first step" in evaluating an overbreadth claim is "to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." United States v. Williams, 553 U.S. 285, 293 (2008).

Section 26-29(d) does not proscribe protected speech. Section 26-29(d) makes it unlawful for an employee or independent contractor to do two overlapping things in the presence of a patron in a

private room:

> "engage in adult entertainment"; and
>
> "expose any specified anatomical areas."

See Joint Exh. 2 at 13. While § 26-29(d) is written in the disjunctive ("engage in adult entertainment *or* to expose any specified anatomical areas," these provisions are actually overlapping because § 26-22 of the Adult Licensing Code defines "adult entertainment" as "live conduct characterized by the display of specified anatomical areas [*i.e.*, "Human genitals or public region, buttock, or female breast below a point immediately above the top of the areola"; or "Human male genitalia in a discernibly turgid state, even if completely and opaquely covered," Adult Licensing Code, § 26-22]." See Joint Exh. 2 at 5-6. Thus, § 26-29(d) makes it unlawful for an employee or independent contractor to (1) engage in "live conduct characterized by the display of specified anatomical

areas" [*i.e.*,"adult entertainment"], or to (2) "expose any specified anatomical areas." Because exposure of specified anatomical areas is not "protected free speech," see Barnes, 501 U.S. at 581 (noting nudity is not *per se* "inherently expressive"); Pap's A.M., 529 U.S. at 289 ("Being 'in a state of nudity' is not an inherently expressive condition."), § 26-29(d) cannot be overbroad with respect to speech. Hicks, 539 U.S. at 118-19.

Unable to demonstrate that § 26-29(d) prohibits speech, Plaintiffs argue that § 26-29(d) is overbroad because it prohibits exposure of genitals in "three fourths or more" of their establishments because the vestibules/front entries of their establishments are separated from the main stage by curtains, doors, etc.Dkt. No. [342] at 2. Thus, they argue, the main stage would be a prohibited"private room" under the Ordinance. Id.

But § 26-29(d) does not prevent dancing on a main stage, for the obvious reason that the main stage is not "private." Section 26-29(d) prohibits adult entertainment in "private rooms"—*i.e.*, "any separate area, including but not limited to, any room or booth, within an adult establishment to which entry or access is blocked or obscured by any door, curtain or other barrier separating entry to such area from any other area of the establishment." The phrase"including, but not limited to, any room or booth" modifies the "separate area . . .within an adult establishment" where exposure of private parts cannot occur, and that modifying phrase clarifies that it does not matter whether the separate area is labeled a VIP room, booth, or champagne lounge. The separate area must be one "to which entry or access is blocked or obscured . . . separating entry to such area" from other areas of the club. This limitation is part and parcel of the rule.

Thus, the meaning of "private rooms" is clear. Regardless, even if Plaintiffs' "three-fourths" complaint were valid, § 26-29(d) is not overbroad because it does not proscribe speech. Hicks, 539 U.S. at 118-19.

### B. Plaintiffs' claim fails the exacting standards for facial overbreadth claims.

Even if § 26-29(d)'s prohibition on exposing specified anatomical areas in private rooms could be construed to proscribe some protected speech, Plaintiffs' overbreadth claim would still fail because § 26-29(d)'s plainly legitimate sweep dwarfs any impermissible application. Hicks, 539 U.S. at 118-19.

Because overbreadth invalidation precludes *any* enforcement of a law, a plaintiff must show that the law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep' . . . ." Id. This is because "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting

all enforcement of that law—particularly a law that reflects ' legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Id. at 119 (quoting Broadrick, 413 U.S. at 615). "[T]he overbreadth doctrine's concern with 'chilling' protected speech 'attenuates'" as the regulated activity "moves from'pure speech' toward conduct.'" Id. at 124 (quoting Broadrick, 413 U.S. at 615). The Supreme Court has emphasized that "[s]ubstantial social costs [are] *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." Id. at 119 (emphasis in original).

Therefore, the claimant seeking facial invalidation of a law "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." Id. at 122 (quoting New York State Club Ass'n,Inc. v. City of

New York, 487 U.S. 1, 14 (1988)); see also DA Mortgage v. Miami Beach, 486 F.3d 1254, 1270 (11th Cir. 2007). The law's demonstrated application to protected free speech must be "'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation." Hicks, 539 U.S. at119-20 (quoting Broadrick, 413 U.S. at 613).

Here, the regulation "does not punish a substantial amount of protected free speech," but rather targets illicit sex activity in private areas of adult clubs. By doing so, there is little doubt that § 26-29(d) has a "plainly legitimate sweep." "Ample evidence . . . supports the . . . finding that illegal and unhealthy activities take place in small rooms at adult entertainment establishments." Lady J. Lingerie, Inc. v. Jacksonville, 176 F.3d 1358, 1365 (11th Cir. 1999); see also Peek-A-Boo II, 630 F.3d at 1351 ("Another

reason Dr. McCleary offered [for secondary effects] is that features of the physical layout of these businesses—including private rooms and narrow corridors—strongly inhibited surveillance and policing."); see also id. at 1357 (citing, as secondary effects evidence, "the affidavits of Tom McCarren, detailing illegal activity taking place inside sexually oriented businesses in Manatee County, including illegal touching in private rooms"). Plaintiffs' own admissions demonstrate that illegal activity takes place inside Flashers and Mardi Gras's private rooms, and these admissions are confirmed by the City's witnesses, specifically Reeves and Stevens.

Because Plaintiffs cannot demonstrate any impermissible applications of §26-29(d), nor show that those applications dwarf the regulation's plainly legitimate sweep, facial invalidation of § 26-29(d) is unwarranted. Hicks, 539 U.S. at 119.

**C. Peek-A-Boo II defeats Plaintiffs' claim.**

Peek-A-Boo II also defeats Plaintiffs' overbreadth claim. In Peek-A-Boo II, the Eleventh Circuit upheld "an across-the-board ban on appearing in a 'state of nudity'" where nudity meant "the showing of the human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.'" 630 F.3d at 1350. And "[e]mployees appearing semi-nude," *e.g.*, showing a majority of the buttocks or the lower portion of the female breast, had to "'remain[] at least six (6) feet from any patron or customer and on a stage that is at least eighteen (18) inches from the floor in a room of at least one thousand (1,000) square feet.'" Id.

This is an *a fortiori* case. Under Peek-A-Boo II, it is *constitutional* to ban nudity *everywhere* in an

adult business, and to restrict semi-nudity to *only* an elevated stage in a main room of 1,000 square feet. Conversely, it is not *unconstitutional* to allow both nudity and semi-nudity in adult clubs, while prohibiting such exposure to patrons in private rooms. Because the City's regulations of nudity and semi-nudity are less restrictive than what the Eleventh Circuit upheld in Peek-A-Boo II, they are not unconstitutionally overbroad.

Plaintiffs posit a number of arguments to extract § 26-29(d) from the binding authority of Peek-A-Boo II. First, they argue that, even though Peek-A-Boo II upheld a ban on total nudity everywhere in adult businesses, that case is irrelevant because it "concerned a different jurisdiction, with different ordinances and different facts," Dkt. No. [351] at 4-5, and "[c]ases involving the regulation of sexually oriented businesses are of necessity fact-specific, and

the answer in eachone is largely driven by the nature of the record." Id. at 3 n.3 (citing Peek-A-Boo II, 630 F.3d at 1360). But the Eleventh Circuit's "fact-specific" statement refers to determinations concerning the evidentiary standard of Renton—*i.e.*, whether a city relied upon any "evidence reasonably believed to be relevant when enacting an adult establishments ordinance. It does not refer to overbreadth determinations—*i.e.*, whether a law can be construed narrowly—which are inherently legal in nature. Moreover, Peek-A-Boo II shows the constitutionality of the City's regulation on both factual and legal grounds. Factually, Peek-A-Boo II had a substantial evidentiary record concerning secondary effects. But the Sandy Springs record is likewise extensive. Legally, Peek-A-Boo II upheld a ban on nudity, a ban on alcohol, and a ban on semi-nudity in a room less than 1,000 square feet in size.

Plaintiffs also argue that § 26-29(d) is overbroad because "[i]n Atlanta's metro area, nude (not semi-nude) dancing is the industry standard." Dkt. No.[351] at 5. As an initial matter, Plaintiffs' characterization of the "industry standard" in Atlanta's metro area is at least questioned by the fact that several municipalities in the Atlanta metro area constitutionally proscribe nudity in adult businesses. See, e.g., Trop, Inc. v. City of Brookhaven, 764 S.E.2d 398 (Ga. 2014) (§ 15-511(a), available at https://www.municode.com/library/ga/brookhaven/codes/code_of_ordinances?nodeId=CH15LIPEBURE_ARTXIISEORBU_S15-511PRCO (last visited Jan. 27,2016) ("No patron, employee, or any other person shall knowingly or intentionally, in a sexually oriented business, appear in a state of nudity . . .")); Oasis Goodtime Emporium I, Inc. v. City of Doraville, 773 S.E.2d 728, 731 n.4 (Ga. 2015) ("Code § 6–416(a) says:

No patron, employee, or any other person shall knowingly or intentionally, in a sexually oriented business, appear in a state of nudity . . .”). Regardless, since the Supreme Court (Barnes) and Eleventh Circuit (Peek-A-Boo II) have both held that banning nudity in adult establishments does not offend the First Amendment, § 26-29(d)s’ ban on nudity only in private rooms is not overbroad.

Plaintiffs further contend that the Court cannot rely on Peek-A-Boo II because such reliance would necessary hinge on the same “greater-includes-the-lesser”reasoning that was rejected in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). Dkt. No. [351] at 6 & n.4. In that case, Rhode Island argued that because it could ban the sale of alcoholic beverages outright, it could necessarily ban the way in which such beverages are advertised. In rejecting Rhode Island’s “greater-includes-the-lesser” argument, the

Court held that "[a]lthough we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial *activity* is 'greater' than its power to ban truthful, non-misleading *speech*." Id. at 511 (emphasis in the original). The reasoning behind 44 Liquormart does not apply here. Unlike Rhode Island, which argued that it could ban protected *speech* because it could ban commercial *activity*, the City argues that it can ban *nudity* in private rooms inside adult establishments because Peek-A-Boo II held that it was constitutional for a city to ban *nudity* everywhere in adult establishments and restrict *semi-nudity* to *only* an elevated stage in a main room of 1,000 feet or more (so long as it had the requisite legislative record to support secondary effects). The City's apples-to-apples argument is unlike Rhode Island's failed syllogism,

which compared apples (*commercial activity*) to oranges (*commercial speech*). Thus, Peek-A-Boo II remains binding and Plaintiffs' overbreadth challenge fails.

### D. The City's definition of "adult entertainment" is not overbroad.

To bolster their overbreadth claim against the City's ban on adult entertainment in private rooms, Plaintiffs suggest that the City's definition of "adult entertainment" is unconstitutionally overbroad. See Dkt. No. [342] at 2-4. But Plaintiffs' critique fails because substantively identical definitions have been upheld by the Eleventh Circuit and other appellate courts throughout the United States. See Peek-A-Boo II, 630 F.3d at 1350 n.2 (upholding ordinance in which adult entertainment encompassed "showing a majority of the male or female buttocks"); Daytona Grand, 490 F.3d at 865-67 (upholding more restrictive regulations regarding nudity and exposure of anatomical areas).

Therefore, the Court finds Defendants are entitled to judgment on Plaintiffs' overbreadth claim.

## Conclusion

The Court finds that, for the foregoing reasons, Defendant Sandy Springs in entitled to judgment on all of Plaintiffs' remaining claims which were tried before this Court. The Clerk is **DIRECTED** to terminate this case.

**IT IS SO ORDERED** this 1st day of March, 2016.

/s/ Leigh Martin May
LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE

[Case: 16-14428 Date Filed 11/27/2017]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 16-14428-EE

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FLANIGAN'S ENTERPRISES, INC OF GEORGIA,
d.b.a. Mardi Gras,
FANTASTIC VISUALS, LLC,
d.b.a. lnserection,
6420 ROSWELL RD., INC.,
d.b.a. Flashers,

Plaintiffs - Appellants,

MARSHALL G. HENRY, et al.,

Intervenor Plaintiffs,

versus

CITY OF SANDY SPRINGS, GEORGIA,

Defendant - Appellee.

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Appeal from the United States District Court
for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, and ROSENBAUM and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Bane are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42

## U. S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## U. S. Const., Amend. XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any

State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CERTIFICATE

I, Michael D. Casey, City Clerk and Custodian of Records for the City of Sandy Springs, Georgia, hereby certify that the seventeen (17) pages of photocopied matter attached hereto is a true and correct copy of Chapter 26, **Article II. - ADULT ESTABLISHMENTS of THE CODE OF THE CITY OF SANDY SPRINGS, GEORGIA**, adopted March 4, 2008, and including revisions through SUPPLEMENT N0.7.

This 5th day of March 2015.

/s/ Michael D. Casey
Michael D. Casey, CMC
City Clerk

ARTICLE II.- ADULT ESTABLISHMENTS

Sec. 26-21. - Findings.

The council of the city is deeply and profoundly concerned about the many types of criminal activities frequently engendered by adult establishments.

(1) The city is becoming an increasingly attractive place for the location of commercial enterprises and of residences for families, and the council is committed to adopting ordinances designed to protect the quality of life for its constituents.

(2) The council desires to establish policies that provide the maximum protection of the general welfare, health, morals, and safety of the residents of the city.

(3) The governing authority of each municipal corporation is authorized to enact ordinances which have the effect of restricting the operation of adult bookstores and video stores to areas zoned for commercial or industrial purposes, provided in O.C.G.A. § 36-60-3.

(4) The state supreme court, in Chambers d/b/a Neon Cowboy v. Peach County, Georgia, 266 Ga.318 (1996), held that local governments may adopt ordinances designed to combat the undesirable secondary effects of sexually explicit

businesses, and further held that a governing authority seeking to regulate adult establishments must have evidence of a relationship between the proposed regulation and the undesirable secondary effects it seeks to control.

(5) The state supreme court further held in the same opinion that in passing its regulation, a local government may rely on the experience of other counties and municipalities to demonstrate such a relationship.

(6) The United States Supreme Court, in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), held that a local government may rely on the experience of other cities in enacting legislation to regulate adult entertainment business.

(7) The city council has received extensive evidence of secondary effects that are currently occurring within the city at adult establishments. Such evidence consisting of direct testimony of undercover agents and citizens that detailed in explicit terms that violations of law are occurring within the existing adult establishments located within the city. Further, that at least one uniformed county police officer was observing these violations and failed to act on such blatant violations. The city council has considered the affidavit and guilty plea involving former Fulton County Police

Department Captain Mark Lance wherein he pled guilty to extorting protection money from an adult establishment located within the city. The city council has considered the testimony in contrast with studies and precedents offered by the adult entertainment business.

a. The city council has considered live testimony from Dr. Bill Holland, former Deputy Director for the Georgia Bureau of Investigation, over the Georgia Crime Information Center ("GCIC") and Dr. Richard Clarke, Director of Planning for the City of Atlanta Police Department, and from Dillon Fries, certified real estate appraiser, former member of the Appraisal Foundation Advisory Council and the Metro Atlanta Relocation Council, and has testified in state and federal courts across the country. The testimony of such witnesses in the weighed opinion of the city council is that the studies proffered by the adult entertainment industry are not credible on balance given the presence of the undesirable effects which are currently existing including alcohol abuse, fights, sex for hire, prostitution, diminished property values and deterioration of neighborhoods. Moreover, based

on the evidence presented on balance, it appears that the lack of police reports at adult establishments are a result of the county's failure to enforce such laws. Moreover, the city council notes the study prepared by the county in the early 1990s coincided with the time period Captain Lance was providing police protection for an adult establishment, therefore, condemning the validity of such studies.

b. The city council has further received direct testimony involving adult bookstores, explicit media outlets, and adult novelty stores wherein one such establishment used glory holes and booths and considered direct testimony from an undercover former law enforcement officer that illegal activities occurred at one of the adult establishments.

(8) Based on the experiences of other municipalities and counties including, but not limited to, Tucson, Arizona; Garden Grove, California; Ellicottville, New York; New York, New York; Oklahoma City, Oklahoma; Dallas, Texas; Houston, Texas; St. Croix County, Wisconsin; and Gwinnett County, Georgia, which are found to be relevant to the problems faced

by the city, the city council notes the documented negative economic, physical, and social impact adult entertainment businesses have on the community.

(9) Among the undesirable community conditions identified with live nude entertainment at which alcohol is served or consumed are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior, and acceleration of community blight.

(10) The council further finds it has an important governmental interest in reducing crime and protecting surrounding properties from adverse impacts, which interest is unrelated to the suppression of speech.

(11) It is the intent of the city council to enact an ordinance, narrowly tailored, sufficient to combat the undesirable secondary effects of adult entertainment businesses, including the serving and consumption of alcoholic beverages at adult entertainment facilities.

(12) The city council desires to regulate the adult entertainment businesses within the city limits. Notwithstanding, this article is not to be construed as an

endorsement from the city of these establishments. The city council understands that adult entertainment businesses are actually protected under the free speech clause of the First Amendment of the Constitution of the United States for their role in communicating "erotic speech." The courts allow communities to regulate speech, not based on the content of the speech, but in time, place, and manner in which it is presented.

(13) It is the intent of this article to regulate the time, place, and manner of the operation of businesses or facilities that offer adult entertainment as defined in section 26-22. It is well established and has been the experience of other communities in the state and throughout the United States that adult entertainment, which includes public nudity, has been associated with and may encourage disorderly conduct, prostitution and sexual assault. This section advances the substantial government interest in promoting and protecting public health, safety, and general welfare, maintaining law and order and prohibiting public nudity. The section is narrowly constructed to protect the First Amendment rights of citizens of the city while furthering the substantial governmental interest of combating the secondary effects of public nudity and adult entertainment from areas and uses

of the community that are incompatible. Areas and uses that are to be protected from adult entertainment include, but are not limited to, residential, churches, day care centers, libraries, recreational facilities, and schools.

(14) Based on the experiences of other counties and municipalities, the city council takes note of the patent conditions and secondary effects attendant to the commercial exploitation of human sexuality, which do not vary greatly among the similar communities within our country.

(15) The city council further finds that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in establishments offering live nude entertainment or "adult entertainment," whether such alcoholic beverages are sold on the premises or not, begets criminal behavior and tends to create undesirable community conditions. In the same manner, establishments offering cinematographic or videographic adult entertainment have the same deleterious effects on the community. Among the acts of criminal behavior found to be associated with the commercial combination of live nudity and alcohol consumption or sale, live commercial nudity in general, and cinematographic or

videographic adult entertainment are disorderly conduct, prostitution, public solicitation, public indecency, fighting, battery, assaults, drug use and drug trafficking. Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860 (11th Cir. 2007); 5634 East Hillsborough Ave., Inc. v. Hillsborough County, 2007 WL 2936211 (M.D. Fla. Oct. 4, 2007), aff'd, 2008 WL 4276370 (11th Cir. Sept. 18, 2008) (per curiam). See also California v. LaRue, 409 U.S. 109 (1972); N.Y. State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).

(16) Among the undesirable community conditions identified in other communities with the commercial combination of live nudity and alcohol consumption or sale, commercial nudity in general, and cinematographic or videographic adult entertainment are depression of property values and acceleration of community blight in the surrounding neighborhood, increased allocation of and expenditure for law enforcement personnel to preserve law and order, and increased burden on the judicial system as a consequence of the criminal behavior described in this article. The city council finds it is reasonable to believe that some or all of these undesirable community conditions are occurring, and will continue to occur in the city.

(17) The city council further finds that other

forms of adult entertainment including, but not limited to, adult bookstores, adult novelty shops, adult video stores, peep shows, and adult theaters have an adverse effect upon the quality of life in surrounding communities.

(18) The city council further finds that the negative secondary effects of adult establishments upon the city are similar whether the adult establishment features live nude dancing or sells books/videotapes depicting sexual activities. H & A Land Corp. v. City of Kennedale, 480 F.3d 336 (5th Cir. 2007); High Five Investments, LLC v. Floyd County, No. 4:06-CV-0190-HLM (N.D. Ga. Mar. 14, 2008).

(19) Therefore, the city council finds that it is in the best interests of the health, welfare, safety and morals of the community and the preservation of its businesses, neighborhoods, and of churches, schools, residential areas, public parks and children's day care facilities to prevent or reduce the adverse impacts of adult establishments by restricting hours of operation, prohibiting alcohol sale or consumption, and restricting the distance from other adult establishments and restricting the distance from residential areas, schools, public parks, churches, and children's day care facilities.

(20) The city council finds that licensing and regulations are necessary for any adult establishment.

(21) The city council finds that these regulations promote the public welfare by furthering legitimate public and governmental interests including, but not limited to, reducing criminal activity and protecting against or eliminating undesirable activities impacting adversely the community conditions and further finds that such will not infringe upon the protected Constitutional rights of freedom of speech or expression. To that end, the city council directed the city attorney to prepare this article.

(22) The city council hereby re-adopts and incorporates these pre-enactment findings and evidence into the adoption of the following code amendments.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-22. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Adult bookstore* means a commercial establishment or facility in the city that maintains 25 percent or more of its floor area for the display, sale,

and/or rental of the following items (aisles and walkways used to access these items shall be included in "floor area" maintained for the display, sale, and/or rental of the items):

(1) Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, videocassettes, CDs, DVDs or other video reproductions, or slides or other visual representations which are characterized by their emphasis upon the display of specified sexual activities or specified anatomical areas, as defined herein; or

(2) Instruments, devices, novelties, toys or other paraphernalia that are designed for use in connection with specified sexual activities as defined herein or otherwise emulate, simulate, or represent "specified anatomical areas" as defined herein.

*Adult entertainer* means any person employed by an adult entertainment establishment who exposes his or her specified anatomical areas, as defined herein, on the premises of the establishment. For purposes of this article, adult entertainers include employees as well as independent contractors.

*Adult entertainment* means live conduct characterized by the display of specified anatomical areas. None of the definitions contained in this section shall be construed to permit any act that is in violation of any city, county or state law.

*Adult entertainment establishment* means any establishment or facility in Sandy Springs where adult entertainment is regularly sponsored, allowed, presented, sold, or offered to the public.

*Adult establishment* means any adult bookstore, adult entertainment establishment, adult motion picture theater, or adult motion picture arcade.

*Adult motion picture arcade* means a commercial establishment to which the public is permitted or invited wherein coin or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors or other image producing devices are regularly maintained to show images to five or fewer persons per machine at any one time and where the images so displayed are distinguished or characterized by an emphasis upon matter displaying specified sexual activities or specified anatomical areas.

*Adult motion picture theater* means a commercial establishment where films, motion pictures, videocassettes, slides, or similar photographic reproductions which are characterized by their emphasis upon the display of specified sexual activities or specified anatomical areas are regularly shown to more than five persons for any form of consideration.

*Church, temple or place of worship* means a facility in which persons regularly assemble for religious ceremonies. This shall include, on the same lot, accessory structures and uses such as minister's and caretaker's residences and other uses identified under the provisions for administrative and use permits.

*Day care facility* means a use in which shelter, care, and supervision for seven or more persons on a regular basis away from their residence for less than 24 hours a day. A day care facility may provide basic educational instruction. The term shall include nursery school, kindergarten, early learning center, play school, preschool, and group day care home.

*Golf course* means a use of land for playing the game of golf. The term shall not include miniature golf but may include a country club and a driving range as an accessory use.

*Hearing officer* means an attorney, not otherwise employed by the city, who is licensed to practice law in Georgia, and retained to serve as an independent tribunal to conduct hearings under this article.

*Library* means a place set apart to contain books and other literary material for reading, study, or reference, for use by members of a society or the general public.

*Minor* means any person who has not attained the age of 18 years.

*Operator* means the manager or other person principally in charge of an adult establishment.

*Owner* means any individual or entity holding more than a 30 percent interest in any sole proprietorship, partnership, or member-managed limited liability company controlling, operating, or owning an adult establishment.

*Park* means any lands or facility owned,

operated, controlled or managed by any county, city or federal government or any governmental entity in and upon which recreational activities or places are provided for the recreation and enjoyment of the general public.

*Premises* means the building for which or upon which a license is issued hereunder and the terms "premises" and "building" are further defined as a structure or edifice enclosing a space within its exterior walls, and covered with a roof or outside top covering of a building or connected or attached or joined with or by a wall, roof, walkway or breezeway. Any structure or structures of any nature that share a wall, roof, walkway or breezeway shall be considered a single premises and building for the purposes of this Code. No building may be subdivided for the purpose of creating more than one premises for the purposes of this Code. In addition, the term "premises" shall include the land and real estate as well as its appurtenances, including the entire parcel together with the boundaries thereof, upon which the licensed premises sits as well as the area of land surrounding said premises.

*Recreational court, private* means an improved area designed and intended for the playing of a game or event such as basketball or tennis, and which serves a single-family dwelling(s), duplex dwellings and/or multifamily dwellings, or combinations of dwelling types, including such improved areas which are owned and/or controlled by a neighborhood club or similar organization. A basketball goal adjoining a driveway of typical residential driveway dimensions shall not constitute a recreational court.

*Recreational court, public* means an improved

area designed and intended for the playing of a game or event such as basketball or tennis, and is operated as a business or as a club unless such club is a neighborhood club or similar organization identified under recreational court, private.

*Recreation fields* means an outside area designed and equipped for the conduct of sports and leisuretime activities including, but not limited to, softball, soccer, football, and field hockey.

*Regularly* means the consistent and repeated doing of an act on an ongoing basis.

*School* means any educational facility established under the laws of the state (and usually regulated in matters of detail by local authorities), in the various districts, counties, or towns, maintained at the public expense by taxation, and open, usually without charge, to all residents of the city, town or other district or private facility which has students regularly attending classes and which teach subjects commonly taught in these schools of this state.

*Specified anatomical areas* shall include any of the following:

(1) Human genitals or pubic region, buttock, or female breast below a point immediately above the top of the areola; or

(2) Human male genitalia in a discernibly turgid state, even if completely and opaquely covered.

*Specified criminal activities* shall include any of the following specified crimes for which less than five years has elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date:

(1) Rape, child molestation, sexual assault, sexual battery, aggravated sexual assault, aggravated sexual battery, or public indecency;

(2) Prostitution, keeping a place of prostitution, pimping, or pandering;

(3) Obscenity, disseminating or displaying matter harmful to a minor, or use of child in sexual performance;

(4) Any offense related to any sexually-oriented business, including controlled substance offenses, tax violations, racketeering, crimes involving sex, crimes involving prostitution, or crimes involving obscenity;

(5) Any attempt, solicitation, or conspiracy to commit one of the foregoing offenses; or

(6) Any offense in another jurisdiction that, had the predicate act(s) been committed in Georgia, would have constituted any of the foregoing offenses.

*Specified sexual activities* shall include any of the following:

(1) Sexual intercourse, oral copulation, anal intercourse, oral-anal copulation, bestiality, masturbation, or excretory functions in the context of sexual relations, and any of the following sexually oriented acts or conduct: anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty;

(2) Clearly depicted human genitals in a state of sexual stimulation, arousal or tumescence;

(3) Use of human or animal ejaculation, sodomy, oral copulation, coitus, or masturbation;

(4) Masochism, erotic or sexually oriented torture, beating or the inflicting of pain;

(5) Erotic or lewd touching, fondling or other sexual contact with an animal by a human being; or

(6) Human excretion, urination, menstruation, vaginal or anal irrigation.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-23.- Location and distance requirements.

(a) No adult entertainment establishment shall be located any closer than 50 feet from any establishment authorized and licensed to sell

alcoholic beverages or malt beverages or wine for consumption on the premises. For the measurement required by this subsection, distance shall be measured from the nearest public entrance of the structure or tenant space of the adult entertainment establishment to the nearest entrance to the public of the structure or tenant space of the establishment authorized and licensed to sell alcoholic beverages or malt beverages or wine for consumption on the premises.

(b) Additional location restrictions for adult establishments are as follows:

(1) An adult establishment must be located at least 300 feet from the properties listed below:

a. The property line of any Suburban A, Suburban B, Suburban C, R-1, R-2, R-2A, R-3, R-3A, R-4A, R-4, R-5, R-5A, R-6, NUP, CUP, TR, A, A-L, AG-1 zoned property, or property conditioned for residential purposes; and

b. The property line of any public park, public recreational fields, public recreational courts, public golf course, public playground, public playing field, government building owned and/or occupied by such government, library, civic center, public or private school, commercial day care facility or

church.

(2) For the measurements required by subsection 26-23(b)(1 ), the distance shall be measured in a straight line from the structure or tenant space of the applicable adult establishment to the closest property line of the zoned property or uses outlined in subparts (b)(1 )a or (b)(1 )b, above. Where property conditioned for residential purposes is part of a mixed use development, the distance shall be measured to the closest boundary of the area shown on the approved site plan as conditioned for residential purposes. Where a use listed in subpart (b)(1)b is located in a structure or tenant space in a multi-tenant development, the distance shall be measured to the structure or tenant space of that use rather than the property line of the overall development, so as to maximize the number of locations available to adult establishments. The zoning and/or use of land in adjacent jurisdictions shall not disqualify any location within the City of Sandy Springs from being available to an adult establishment.

(c) No adult establishment shall be located any closer than 400 feet from any other adult establishment. For the measurement required by this subsection, distance shall be measured in a straight line from the nearest public entrance of the structure or tenant space of the adult

establishment to the nearest public entrance of the structure or tenant space of the other adult establishment.

(d) Notwithstanding any provision in the Sandy Springs Code of Ordinances to the contrary, an adult establishment in a location that satisfies the standards in this section 26-23 shall not be deemed noncompliant with this section by virtue of the subsequent establishment of a land use or zoning district specified in this section.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009; Ord. No. 2012-02-03, § 1, 2-7-2012)

Sec. 26-24. - Rules of operation.

(a) *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

*Fixed stage* shall be defined as a raised floor area designed exclusively for use by adult entertainers at least four feet from the seating area of patrons, and on which no patron shall be allowed.

*Full lighted* shall mean illumination equal to three and one-half footcandles per square foot.

(b) *Compliance with rules.* Adult establishments, and any person, firm, partnership, or corporation licensed hereunder, shall comply with the following rules and regulations

pertaining to the operation of the adult establishment and governing conduct on the premises of the establishment:

(1) No adult establishment shall operate between the hours of 4:00 a.m. and 8:00 a.m. Monday through Saturday. No adult establishment shall operate between the hours of 2:55 a.m. and 9:00a.m. on Sunday.

(2) No person under the age of 18 years shall be permitted on the premises of an adult establishment.

(3) No adult entertainment shall occur within four feet of any patron or in any location other than on a fixed stage.

(4) No patron, customer or guest shall be permitted to have any physical contact with any part of the body or clothing of any adult entertainer.

(5) The license shall be displayed in a prominent place on the premises at all times.

(6) No licensee or his employees or contractors shall permit any alcoholic beverages to be served or consumed on the premises.

(7) All areas of an adult establishment shall be fully lighted at all times patrons are present on the premises.

(8) All adult entertainment which is licensed or permitted by this article shall be carried on inside a closed building with all windows and doors covered so that the activities carried on inside cannot be viewed from the immediate areas surrounding the outside of the building.

(c) *License revocation.* Violations of these rules and regulations may result in the revocation of the license.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-25. -Adult establishment work permit.

(a) No person, including, but not limited to, cashiers, stocking clerks, performers, dancers, adult entertainers, bartenders, barmaids, bouncers, valets, dj's, bar backs, waiters, waitresses, bathroom attendants and musicians, working either as an independent contractor or as an employee at any establishment holding a license hereunder shall begin working at such establishment, either temporarily or permanently, until such person has made application for an adult establishment work permit (hereinafter referred to as "work permit") to the city police department and has been issued an annual work permit or a temporary work permit by the city police department. Upon the filing of a complete application for a work permit, the city police department shall immediately issue a temporary work permit to the applicant if the applicant seeks to work in a

licensed adult establishment and the completed application, on its face, indicates that the applicant is eligible for an annual work permit. The temporary work permit shall expire upon the final decision of the city to deny or grant an annual work permit. Within 30 days of receipt of a completed application, the city police department shall either issue an annual work permit or a written notice of nonclearance. In the event the city police department has not issued a work permit or has not issued a written notice of nonclearance within the 30-day period following receipt of a completed application, the applicant shall be deemed to have been granted an annual work permit hereunder and may begin work at the applicable adult establishment.

(b) All persons required to obtain a work permit hereunder, prior to the date of their first work in an adult establishment, shall report to the city police department for purposes of making application for a work permit to work at an adult establishment. The application shall be provided by the city police department and shall be signed by the applicant. An application shall be considered complete when it contains the following:

(1) The applicant's full legal name and any other names used by the applicant in the preceding five years;

(2) Current business address or another mailing address for the applicant;

(3) Written proof of age, in the form of a driver's license, a picture identification document containing the applicant's date of birth issued by a governmental agency, or a copy of a birth certificate accompanied by a picture identification document issued by a governmental agency;

(4) The adult establishment work permit application fee;

(5) A statement of whether an applicant has been convicted of or has pled guilty or nolo contendere to a specified criminal activity as defined in this article, and if so, each specified criminal activity involved, including the date, place, and jurisdiction of each as well as the dates of conviction and release from confinement, where applicable; and

(6) A complete set of fingerprints taken by the city police department. The city police department shall provide fingerprinting service upon the request of the applicant during regular office hours.

The city police department shall conduct a criminal investigation to the extent allowed by law on any person making application for an adult establishment work permit under this section.

(c) Within 30 days of receiving a completed application, the city police department shall issue an annual work permit to an applicant

unless:

(1) The applicant is less than 18 years of age;

(2) The applicant has failed to provide information as required by this article for issuance of a work permit or has falsely answered a question or request for information on the application form;

(3) The application fee for an adult establishment work permit required by this article has not been paid; or

(4) The applicant has been convicted of or pled guilty or nolo contendere to a specified criminal activity, as defined in this article.

(d) If the applicant is deemed ineligible to receive a work permit hereunder based on any of the eligibility requirements contained in subsection (c), the city police department shall issue a written notice of nonclearance to the applicant stating that the person is ineligible for such work permit and explaining the reasons therefore.

(e) Any annual work permit issued hereunder shall expire 12 months from the date of issue shown on the work permit. The person issued an adult establishment work permit shall make application for renewal at least 60 days prior to the expiration of the work permit in order to continue working at the adult establishment after expiration of the 12-month issue period.

Such renewal application shall include the same information as, and be treated the same as, an initial application pursuant to this section 26-25. The city council shall prescribe a reasonable application fee for an annual adult establishment work permit.

(f) Any person that has been granted a work permit hereunder shall bring such work permit to the applicable adult establishment and shall make it available to any member of the city police department upon request on the premises of an adult establishment. If the work permit is revoked or suspended, the work permit shall be returned to the city police department upon request. It shall be unlawful for any person to transfer, alter, conceal, deface or otherwise destroy the work permit or to refuse to return a work permit to the city police department in the event of suspension, revocation or expiration.

(g) If a person, subsequent to the issuance of a work permit hereunder, violates any provision of this article or otherwise becomes ineligible hereunder to receive a work permit, the city police department shall issue a written notice of intent to suspend or revoke the work permit.

(h) (1) When the city police department issues a written notice of nonclearance or a written notice of intent to suspend or revoke a work permit, the city police department shall immediately send such notice, which shall include the specific grounds under this article for such action,

to the applicant or permittee (respondent) by personal delivery or certified mail. The notice shall be directed to the most current business address or other mailing address on file with the city police department for the respondent. The notice shall also set forth the following: The respondent shall have ten days after the delivery of the written notice to submit, at the office of the city clerk, a written request for a hearing.

(2) If the respondent does not request a hearing within said ten days, the city police department's written notice shall become a final denial, suspension, or revocation, as the case may be, on the 30th day after it is issued, and shall be subject to the provisions of subsection (4) below.

(3) If the respondent does make a written request for a hearing within said ten days, then the city clerk shall, within ten days after the submission of the request, send a notice to the respondent indicating the date, time, and place of the hearing. The hearing shall be conducted not less than ten days nor more than 20 days after the date that the hearing notice is issued. The city shall provide for the hearing to be transcribed. At the hearing, the respondent shall have the opportunity to present all of respondent's arguments and to be represented by counsel, present evidence and witnesses on his or her

behalf, and cross-examine any of the city police department's witnesses. The city police department shall also be represented by counsel, and shall bear the burden of proving the grounds for denying, suspending, or revoking the work permit. The hearing shall take no longer than two days, unless extended at the request of the respondent to meet the requirements of due process and proper administration of justice. The hearing officer shall issue a final written decision, including specific reasons for the decision pursuant to this article, to the respondent within five days after the hearing. If the decision is to deny, suspend, or revoke the work permit, the decision shall advise the respondent of the right to appeal such decision to the superior court by writ of certiorari, and the decision shall not become effective until the 30th day after it is rendered. If the hearing officer's decision finds that no grounds exist for denial, suspension, or revocation of the work permit, the hearing officer shall, contemporaneously with the issuance of the decision, order the city police department to immediately withdraw the notice and to notify the respondent in writing by certified mail of such action. Where applicable, the city police department shall contemporaneously therewith issue the annual work permit to the applicant.

(4) If any court action challenging a work

permit decision is initiated, the city shall prepare and transmit to the court a transcript of the hearing within 30 days after receiving written notice of the filing of the court action. The city shall consent to expedited briefing and/or disposition of the action, shall comply with any expedited schedule set by the court, and shall facilitate prompt judicial review of the proceedings. The following shall apply to any person lawfully working at an adult establishment on the date on which the completed work permit is filed with the city police department. Upon the filing of any court action to appeal, challenge, restrain, or otherwise enjoin the city's enforcement of any denial, suspension, or revocation of a temporary or annual work permit, the city police department shall immediately issue the respondent a provisional work permit. The provisional work permit shall allow the respondent to continue employment in an adult establishment and will expire upon the court's entry of a judgment on the respondent's appeal or other action to restrain or otherwise enjoin the city's enforcement.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009; Ord. No. 2012-02-03, § 2, 2-7-2012)

Sec. 26-26.- License required.

(a) It shall be unlawful for any person, association,

partnership, or corporation to operate, engage in, conduct, or carry on, in or upon any premises within the city, an adult establishment as defined in this article without an annual license to do so.

(b) The issuance of such an annual license shall not be deemed to authorize, condone or make legal any activity thereunder if the same is deemed illegal or unlawful under the laws of the state or the United States.

(c) No annual license for an adult establishment shall be issued by the city if the premises to be used also holds a license to sell alcoholic beverages or malt beverages and wine for consumption on the premises. Any premises licensed as an adult establishment shall not be eligible to apply at anytime for a license to sell alcoholic beverages or malt beverages and wine for consumption on the premises, nor shall such adult establishment allow patrons, members, or guests to bring in or otherwise consume alcoholic beverages.

(d) Any person, firm, partnership, or corporation desiring to operate an adult establishment within the territorial boundaries of the city shall be required to file for a new license each year, with all supporting documentation pursuant to subsection 26-28(b).

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-27.- On-premises operator required.

An adult establishment shall have one or more designated persons to serve as an on-premises operator. An on-premises operator shall be principally in charge of the establishment and shall be located on the premises during all operating hours.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-28.- Application process and qualifications.

(a) Process. Any person, association, partnership or corporation desiring to obtain a license to operate, engage in, conduct, or carry on any adult establishment in the city shall make application to the city · manager or designee of the city. Such application shall be made on forms furnished by the city, shall be made in the name of the adult establishment by an applicant who is a natural person and an agent of the adult establishment and shall include the names of the operators as defined herein and of the owners as defined herein. If the adult establishment is a corporation, then the agent for purposes of making application for a license hereunder shall be an officer of the corporation. If the adult establishment is a partnership, the agent for such purposes shall be a general partner. At the time of submitting such application, a nonrefundable fee payable in cash or by certified check in the amount of $300.00 shall be paid to the city manager or designee to defray, in part, the cost of investigation and report required by this article. The city manager or designee shall issue a receipt showing that such application fee has been paid. The filing of

an application for license does not authorize the operation of, engaging in, conducting or carrying on of any new adult establishment. If a completed application and fee is submitted for a pre-existing adult establishment that is in a location in the city where an adult establishment is allowed, and the application, on its face, indicates that the applicant is entitled to an annual adult establishment license, the city manager shall immediately issue a temporary license to the applicant. The temporary license shall expire upon the final decision of the city to deny or grant an annual license.

(b) *Contents*. An application for an adult establishment license shall be considered complete when it contains the following information:

(1) The full true name and any other names used by the applicant, the operators and owners in the preceding five years;

(2) The current business address or other mailing address of the applicant, the operators and owners;

(3) Written proof of age in the form of a driver's license, a picture identification document containing the applicant's date of birth issued by a governmental agency, or a copy of a birth certificate accompanied by a picture identification document issued by a governmental agency, for each applicant, operator and

owner;

(4) A statement of whether the adult establishment seeking a license, in previous operations in this or any other location, has had its license or permit for an adult entertainment business or similar type of business revoked or suspended, and the reason(s) therefor;

(5) If the application is made on behalf of a corporation, the name of the corporation, exactly as shown in its articles of incorporation or charter, together with the state and date of incorporation. If the application is on behalf of a limited partnership, a copy of the certificate of limited partnership filed with the county clerk of superior court shall be provided. If one or more of the partners is a corporation, the provisions of this subsection pertaining to corporations shall apply;

(6) For each applicant, operator, and owner, a statement of whether the person has been convicted of or has pled guilty or nolo contendere to a specified criminal activity as defined in this article, and if so, each specified criminal activity involved, including the date, place, and jurisdiction of each as well as the dates of conviction and release from confinement, where applicable. Each person required to disclose convictions hereunder shall also provide a signed and notarized consent, on forms prescribed by the state crime

information center and made available at the city police department, authorizing the release of his or her criminal records to the permits unit of the city police department;

(7) A complete set of fingerprints of the applicant and the operators, taken by the city police department. The city police department shall provide fingerprinting service upon the request of the applicant(s) or operator(s) during regular office hours;

(8) The address of the premises where the adult establishment will be operated, engaged in, conducted, or carried on;

(9) The identity of the person(s) designated to serve as an on-premises operator who shall be principally in charge of the establishment and shall be located on the premises during all operating hours;

(10) Each application for an adult establishment license shall be personally verified and acknowledged under oath to be true and correct by:

a. The individual, if application is made on behalf of an individual;

b. The general partner, if application is made on behalf of a partnership;

c. The president of the corporation, if

application is made on behalf of a corporation;

d. The managing member, if application is made on behalf of a limited liability company; or

e. The chief administrative official, if application is made on behalf of any other organization or association.

(c) *Appearance by applicant.* The applicant shall personally appear before the city manager or designee and produce proof that the nonrefundable $300.00 application fee has been paid and shall present the application containing the aforementioned and described information.

(d) *Investigation; standards for granting of license.* The city shall have 30 days from the date of actual receipt of a completed application as set forth in subsection (b) of this section, to investigate the facts provided in the application and the background of the applicant, the operators and the owners. The city manager or designee of the city shall stamp the date of actual receipt of each application on the first page thereof and notify the applicant of the actual receipt of the application within five business days of actual receipt of such application. The city manager or designee shall approve or deny any application for an adult establishment license within 30 days of actual receipt of such properly completed application.

In the event the city manager has not granted a license or has not issued a written notice of intent to deny the license within the 30-day period following the date of complete application, the annual adult establishment license shall be deemed to have been granted. The application for an adult establishment license shall be granted unless the city manager or designee finds:

(1) The required $300.00 fee has not been paid;

(2) The applicant has made a material misrepresentation in the application or has failed to provide information required by this article for issuance of license;

(3) The applicant or an operator or owner has been convicted of or pled guilty or nolo contendere to a specified criminal activity, as defined in this article;

(4) The applicant or any of the operators or owners has had an adult establishment license or other similar license or permit revoked for cause by the city, the county or any other county, or municipality located in or out of this state within the preceding five years prior to the date of application;

(5) An applicant, operator, or owner is less than 18 years of age;

(6) The business has failed to identify an

operator as defined herein that will be on the premises at all times during which the business is open; or

(7) The location of the proposed premises does not comply with any requirement set forth in section 26-23

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009; Ord. No. 2012-02-03, §§ 3, 4, 2-7-2012)

Sec. 26-29.- Conduct or activities prohibited.

(a) *Employment of minors or unpermitted persons.* No adult establishment shall employ or contract with a person under the age of 18 years or an adult entertainer who has not obtained a permit pursuant to this article.

(b) *Engaging in specified sexual activities prohibited*. No adult entertainer, other employee, patron or other person at an adult establishment shall be allowed to engage in any specified sexual activity as defined herein on the premises of any adult establishment.

© *Public indecency prohibited.* No adult entertainer, other employee, patron or other person at an adult establishment shall, while on the premises of an adult establishment, commit the offense of public indecency as defined in O.C.G.A. § 16-6-8.

(d) *Private rooms prohibited.* It shall be unlawful for any employee or independent contractor to

engage in adult entertainment or to expose any specified anatomical areas in the presence of a patron in any separate area including, but not limited to, any room or booth, within an adult establishment to which entry or access is blocked or obscured by any door, curtain or other barrier separating entry to such area from any other area of the establishment.

(e) *Physical layout requirements of booths, rooms, etc.* Any adult entertainment business having available for customers, patrons, or members any booth, room, or cubicle for the private viewing of any video or motion picture must comply with the following requirements:

(1) *Access.* Each booth, room, or cubicle shall be totally accessible to and from aisles and public areas of the video store, and shall be unobstructed by any curtain, door, lock, or other controltype or view-obstructing devices or materials.

(2) *Construction.* Every booth, room, or cubicle shall meet the following construction requirements:

a. Each booth, room, or cubicle shall be separated from adjacent booths, rooms and cubicles and any nonpublic areas by a wall.

b. Each booth, room, or cubicle shall have at least one side totally open to a public lighted area or aisle so that there is an unobstructed view

of anyone occupying the booth from the area in which the cash register for the video store is located.

c. All walls shall be solid and without openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth-textured and easily cleanable.

d. The floor must be light colored, nonabsorbent, smooth-textured and easily cleaned.

e. The lighting level of each booth, room, or cubicle when not in use shall be a minimum of ten candles at all times, as measured from the floor.

(3) *Occupants.* Only one individual shall occupy a booth, room, or cubicle at any time. No occupant of same shall engage in any type of sexual activity, cause any bodily discharge or litter while in the booth, room, or cubicle. No individual shall damage or deface any portion of the booth, room, or cubicle.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-30.- Scienter required to prove violation or business licensee liability.

This article does not impose strict liability.

Unless a culpable mental state is otherwise specified herein, a showing of a knowing or reckless mental state is necessary to establish a violation of a provision of this article. Notwithstanding anything to the contrary, for the purposes of this article, an act by a person working on the premises of the adult establishment that constitutes grounds for suspension or revocation of that person's work permit shall be imputed to the adult establishment licensee for purposes of finding a violation of this article, or for purposes of license denial, suspension, or revocation, only if an officer, director, general partner, managing member, or operator of the adult establishment knowingly or recklessly allowed such act to occur on the premises. It shall be a defense to liability that the person to whom liability is imputed was powerless to prevent the act.

(Ord. No. 2009-04-25, § 1, 4-21-2009)

Editor's note-

Ord. No. 2009-04-25, § 1, adopted April 21, 2009, amended § 26-30 in its entirety. The former§ 26-30 pertained to penalty for violation of section 26-29 and derived from Ord. No. 2008-08-41, adopted Aug. 19, 2008.

Sec. 26-31.- Unlawful operation declared nuisance.

Any adult establishment operated, conducted or maintained contrary to the provisions of this article shall be and the same is hereby declared to be unlawful and a public nuisance. The city may, in addition to or in lieu of prosecuting a criminal action hereunder, commence an action or actions, proceeding or

proceedings for abatement, removal or injunction thereof in the manner provided by law. The city may take such other steps and shall apply to such court or courts as may have jurisdiction to grant such relief as will abate or remove such adult establishment and restrain and enjoin any person from operating, engaging in, conducting or carrying on an adult establishment contrary to the provisions of this article.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-32.- Inspection of adult establishment.

The city police department shall have the authority to periodically inspect the portions of adult establishments where patrons are permitted, to determine compliance with all provisions of this article, during those times when the adult establishment is occupied by patrons or is otherwise open to the public.

(Ord. No. 2009-04-25, § 1, 4-21-2009)

Editor's note-

Ord. No. 2009-04-25, § 1, adopted April 21, 2009, amended§ 26-32 in its entirety. The former § 26-32 pertained to conditions of adult establishment and derived from Ord. No. 2008-08-41, adopted Aug. 19, 2008.

Sec. 26-33.- Denial, suspension or revocation of license; hearing.

(a) *Grounds.*

(1) A license may be denied to persons or

entities that have submitted an incomplete application or that have failed to satisfy any of the requirements of section 26-28

(2) Any of the following shall be grounds for suspension or revocation of a license:

a. The making of any statement on an application for a license issued hereunder which is material and is later found to be false;

b. Violation of any of the regulations or prohibitions of this article; or

c. With respect to the applicant, operators and owners, conviction of or a plea of guilty or nolo contendere to any specified criminal activity, as defined in this article.

(3) The city manager or his or her designee shall issue a written notice of intent to deny, suspend, or revoke an adult establishment license when the city manager or designee finds there are grounds for the denial, suspension, or revocation of the license.

(b) *Procedure.*

(1) When the city manager issues a written notice of intent to deny, suspend, or revoke a license, the city manager shall

immediately send such notice, which shall include the specific grounds under this article for such action, to the applicant or licensee (respondent) by personal delivery or certified mail. The notice shall be directed to the most current business address or other mailing address on file with the city manager for the respondent. The notice shall also set forth the following: The respondent shall have ten days after the delivery of the written notice to submit, at the office of the city clerk, a written request for a hearing.

(2) If the respondent does not request a hearing within said ten days, the city manager's written notice shall become a final denial, suspension, or revocation, as the case may be, on the 30th day after it is issued, and shall be subject to the provisions of subsection (4) below.

(3) If the respondent does make a written request for a hearing within said ten days, then the city clerk shall, within ten days after the submission of the request, send a notice to the respondent indicating the date, time, and place of the hearing. The hearing shall be conducted not less than ten days nor more than 20 days after the date that the hearing notice is issued. The city shall provide for the hearing to be transcribed. At the hearing, the respondent shall have the opportunity to present all of respondent's arguments

and to be represented by counsel, present evidence and witnesses on his or her behalf, and cross-examine any of the city manager's witnesses. The city manager shall also be represented by counsel, and shall bear the burden of proving the grounds for denying, suspending, or revoking the license. The hearing shall take no longer than two days, unless extended at the request of the respondent to meet the requirements of due process and proper administration of justice. The hearing officer shall issue a final written decision, including specific reasons for the decision pursuant to this article, to the respondent within five days after the hearing. If the decision is to deny, suspend, or revoke the license, the decision shall advise the respondent of the right to appeal such decision to the superior court by writ of certiorari, and the decision shall not become effective until the 30th day after it is rendered. If the hearing officer's decision finds that no grounds exist for denial, suspension, or revocation of the license, the hearing officer shall, contemporaneously with the issuance of the decision, order the city manager to immediately withdraw the intent to deny, suspend, or revoke the license and to notify the respondent in writing by certified mail of such action. If the respondent is not yet licensed, the city manager shall contemporaneously therewith issue the license to the applicant.

(4) If any court action challenging a licensing decision is initiated, the city shall prepare and transmit to the court a transcript of the hearing within 30 days after receiving written notice of the filing of the court action. The city shall consent to expedited briefing and/or disposition of the action, shall comply with any expedited schedule set by the court, and shall facilitate prompt judicial review of the proceedings. The following shall apply to any adult establishment that is lawfullyoperating as an adult establishment on the date on which the completed license application is filed with the city manager: Upon the filing of any court action to appeal, challenge, restrain, or otherwise enjoin the city's enforcement of any denial, suspension, or revocation of a temporary license or annual license, the city manager shall immediately issue the respondent a provisional license. The provisional license shall allow the respondent to continue operation of the adult establishment and will expire upon the court's entry of a judgment on the respondent's appeal or other action to restrain or otherwise enjoin the city's enforcement.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-34.- Nonrenewability; change of ownership of establishment.

(a) All persons, firms, companies, or corporations, including limited liability corporations and professional corporations, licensed to operate adult businesses in the municipal limits of the city previously registered with the county shall be granted an additional 45 days to file a new application for a license to operate said adult establishment with the city following the effective date of the ordinance from which this article is derived.

(b) All licenses granted after January 1, 2006, and under this chapter shall expire on December 31 of each year, commencing December 31, 2006. Licensees shall be required to file a new application, with the requisite $300.00 fee, with the city manager or designee on the form provided for a new license for the ensuing year. Such application shall be treated as an initial application and the applicant shall be required to comply with all rules and regulations for the granting of licenses as if no previous license had been held. For any applications for a new license after January 1, 2006, an application must be filed on or before November 30 of each year. Any applications received after November 30 shall pay, in addition to the annual fee, a late charge of 20 percent. If a license application is received after January 1, reasonable investigative and administrative costs will be assessed as may be prescribed from time to time by the city council.

(c) All licenses granted under this article shall be for the calendar year, and the full license fee must be paid for a license application filed prior to July 1 of the license year. One-half of a full license fee shall be paid for any license

application filed after July 1 of the license year.

(d) Any person applying for a new license issued under this article who shall pay the required fee for an annual license, or any portion thereof, after January 1, shall, in addition to the annual fee and late charges, pay simple interest on the delinquent balance at the annual rate then charged by the Internal Revenue Service of the United States on unpaid federal income taxes.

(e) A change of ownership shall require a new license.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-35.- Fee.

The application fee for the adult establishment license shall be $300.00 and shall be paid as set forth in this article.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-36.- Compliance with applicable laws by licensee.

Any person, firm, partnership, or corporation who holds an adult establishment license must also display the adult establishment license issued hereunder in a conspicuous location. Failure to display the adult establishment license in a conspicuous location may result in a fine of $50.00.

(Ord. No. 2008~08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-37.- Nonconforming adult establishment uses/amortization.

(a) *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

*Financial expenditures* means the capital outlay made by the applicant to establish the adult establishment, exclusive of the fair market value of the building and property in and on which such use is located and site improvements unrelated to the nonconforming adult establishment, i.e., paving, fencing, etc.

*Nonconforming adult establishment use* means an adult establishment use which:

(1) Was lawful and valid when established, as evidenced by a certificate of occupancy as provided in article 23, section 23.1 of the city zoning ordinance; and

(2) Does not conform to one or more location requirements of this article or is not in a zoning district where a new adult establishment use would be allowed.

(b) Any adult establishment that is a nonconforming use shall not be expanded or

otherwise altered outside the scope of the nonconformity currently existing.

(c) All nonconforming adult establishment uses shall terminate by December 31, 2010, except that a nonconforming adult establishment use may be continued beyond that date for a limited period of time authorized by the city council, provided that:

(1) An application has been made by the owner of such establishment to the city council within 120 days after January 1, 2006;

(2) The city council finds in connection with such establishment that:

a. The applicant had made, prior to the nonconformity, financial expenditures related to the nonconformity;

b. The applicant had not recovered 90 percent of the financial expenditures related to the nonconforming; and

c. The period for which such establishment may be permitted to continue is the minimum period sufficient for the applicant to recover substantially all of the financial expenditures incurred related to the nonconformity, but not more than five years;

(3) In order to secure an extension of time, the written application for such extension must set forth the following information:

a. The amount of the financial expenditures for improvements in the existing enterprise through the date of passage and approval of the ordinance from which this article was originally derived;

b. The date each improvement was made with proof of expenditure;

c. The amount of such financial expenditures that has been or will be realized through the effective date;

d. The life expectancy of the existing enterprise, as based on federal depreciation guidelines; and

e. The existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting the termination of such lease.

This information shall be supported by relevant documentary evidence such as financial statements, copies of lease agreements to premises and any equipment, and tax records. Copies of such documentary evidence must be attached to the application for extension. No investment that was not incurred by the date of passage and approval of this

article shall be considered.

(Ord. No. 2009-04-25, § 1, 4-21-2009)

Editor's note-

Ord. No. 2009-04-25, § 1, adopted April21, 2009, amended§ 26-37 in its entirety. The former § 26-37 pertained to similar subject matter and derived from Ord. No. 2008-08-41, 8-19-2008.

Sec. 26-38. -Alcoholic beverages prohibited; exceptions.

No person, association, partnership, limited liability company, or corporation operating or working in an adult establishment shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor, beer or wine or controlled substance defined by state law upon the premises of the adult establishment. Any adult establishment that had a license granted by the county shall not be subject to this section until January 1, 2006, at which time all adult establishments within the city shall be subject to this provision, including those licensed before the effective date of the ordinance from which this article is derived.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Sec. 26-39.- Penalties.

Any person, firm, partnership, or corporation violating the provisions of this article shall be guilty of a violation of this Code, and shall be punished by a fine not to exceed $1,000.00 per violation or by

imprisonment for a period not to exceed 60 days, or by both such fine and imprisonment. In addition to such fine and/or imprisonment, a violation of this article shall also be grounds for suspension or revocation of the license issued hereunder.

(Ord. No. 2008-08-41, 8-19-2008; Ord. No. 2009-04-25, § 1, 4-21-2009)

Secs. 26-40--26-65.- Reserved.

ORDINANCE NO. 2009-04-22

STATE OF GEORGIA
COUNTY OF FULTON

AN ORDINANCE AMENDING SECTION 3.3.l, SECTION 3.3.5, SECTION 3.3.18, SECTION 3.3.19, SECTION 4.3.l, AND SECTION 19.3.20, AND REPEALING SECTION 19.3.21, OF THE ZONING ORDINANCE OF THE CITY OF SANDY SPRINGS

WHEREAS, the Mayor and City Council of the City of Sandy Springs are charged with the protection of the public health, safety, and welfare of the citizens of Sandy Springs; and

WHEREAS, the State of Georgia authorizes the City of Sandy Springs to exercise regulations where it sees fit to maintain the safety and welfare of the citizens; and

NOW, THEREFORE, to accomplish the foregoing, the Mayor and City Council of the City of Sandy Springs, Georgia while in regular session on April 21, 2009 al 6:00 p.m., pursuant to their authority, do hereby ordain that sections within the Zoning Ordinance of the City of Sandy Springs are hereby amended as follows.

Section l. Section 3.3.1 of the Zoning Ordinance of the City of Sandy Springs, Georgia is hereby amended lo read as follows:

3.3.1. A

Accessory Site Feature. Mechanical, electrical and ancillary equipment, cooling towers, mechanical penthouses, heating and air conditioning units and/or pads, exterior ladders, storage tanks, processing equipment, service yards, storage yards, exterior work areas, loading docks, maintenance areas, dumpsters, recycling bins, and any other equipment, structure or storage area located on a roof, ground or building.

Adjoin. To have a common border with. Adjoin may also mean coterminous, contiguous, abutting and adjacent.

Administrative Minor Variance. A variance to the minimum district yard requirements of not more than 1 foot, granted administratively by the Director of Community Development.

Administrative Modification. A change to an approved condition of zoning that constitutes only a technical change and does not involve significant public interest as determined by the Director of Community Development.

Administrative Variance. A request for relief from: 1) the standards contained in Article 34, Development Regulations, 2) a request to reduce the 10 foot improvement setback adjacent to buffers or 3) a request for 10% reduction of parking spaces as required in Article 18.2.4.

Adult Bookstore. A commercial establishment or facility in the city that maintains 25 percent or more of its floor area for the display, sale, and/or rental of the following items (aisles and walkways used to access these items shall be included in "floor area" maintained

for the display, sale, and/or rental of the items):

(1) Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, videocassettes, CDs, DVDs or other video reproductions. or slides or other visual representations which are characterized by their emphasis upon the display of specified sexual activities or specified anatomical areas, as defined herein; or

(2) Instruments, devices, novelties, toys or other paraphernalia that are designed for use in connection with specified sexual activities as defined herein or otherwise emulate, simulate, or represent "specified anatomical areas" as defined herein.

Adult Entertainment. Live conduct characterized by the display of specified anatomical areas. None of the definitions contained in this section shall be construed to permit any act that is in violation of any city, county or state law.

Adult entertainment establishment. Any establishment or facility in Sandy Springs where adult entertainment is regularly sponsored, allowed, presented, sold, or offered to the public.

Adult establishment. Any adult bookstore, adult entertainment establishment, adult motion picture theater, or adult motion picture arcade.

Adult motion picture arcade. A commercial establishment to which the public is permitted or invited wherein coin or slug-operated or electronically,

electrically or mechanically controlled still or motion picture machines, projectors or other image producing devices are regularly maintained to show images to five or fewer persons per machine at any one time and where the images so displayed are distinguished or characterized by an emphasis upon matter displaying specified sexual activities or specified anatomical areas.

Adult motion picture theater. A commercial establishment where films, motion pictures, videocassettes, slides, or similar photographic reproductions which are characterized by their emphasis upon the display of specified sexual activities or specified anatomical areas are regularly shown to more than five persons for any form of consideration.

Alternative Antenna Support Structure. Clock towers, campaniles, free standing steeples, light structures and other alternative designed support structures that camouflage or conceal antennas as an architectural or natural feature (not to include man made trees).

Amateur Radio Antenna. Radio communication facility that is an accessory structure to a single family residential dwelling operated for non-commercial purposes by a Federal Communication Commission licensed amateur radio operator. The term antenna shall include both the electronic system and any structures it is affixed to for primary support.

Antenna. Any exterior apparatus designed for telephone, radio, or television communications through the sending and/or receiving of electromagnetic waves.

Apartment. A building which contains three or more

dwelling units either attached to the side, above or below another unit. Apartment may also refer to a dwelling unit attached to a non-residential building. (See Dwelling, Multi-Family)

Appeal. A request for relief from a decision made by the Director of Community Development, other department directors, the Board of Appeals, and/or the City of Council.

Applicable Wall Area. The wall on which a wall sign is attached including all walls and windows that have the same street or pedestrian orientation. All open air spaces shall be excluded from the applicable wall area.

Attic. An unheated storage area located immediately below the roof.

Automotive Garage. A use primarily for the repair, replacement, modification, adjustment, or servicing of the power plant or drive-train or major components of automobiles and motorized vehicles. The repair of heavy trucks, equipment and automobile body work shall not be included in this use. The outside storage of unlicensed and unregistered vehicle is prohibited as part of this use. (See Auto Specialty Shop and Service Station)

Automotive Specialty Shop. A use which provides one or more specialized repair sales and/or maintenance functions such as the sale, replacement, installation or repair of tires, mufflers, batteries, brakes and master cylinders, shock absorbers, instruments (such as speedometers and tachometers), radios and sound systems or upholstery for passenger cars, vans, and light trucks only. No use authorized herein shall

permit any private or commercial activity which involves auto/truck leasing, painting, repair or alteration of the auto body, nor shall any repair, replacement, modification, adjustment, or servicing of the power plant or drive-train or cooling system be permitted, except that minor tune-up involving the changing of spark plugs, points or condenser, including engine block oil changes, are permitted. (See Repair 3 .3.18 and Service Station 3 .3.19)

Section 2. Section 3.3.5 of the Zoning Ordinance of the City of Sandy Springs, Georgia is hereby amended to read as follows:

3.3.5 E

Environmentally Adverse. Any use or activity which poses a potential or immediate threat to the environment and/or is physically harmful or destructive to living beings as described in the Executive Order 12898 regarding Environmental Justice.

Environmentally Stressed Community. A community exposed to a minimum of two environmentally adverse conditions resulting from public and private municipal (e.g., solid waste and wastewater treatment facilities, utilities, airports, and railroads) and industrial (e.g., landfills, quarries and manufacturing facilities) uses.

Section 3. Section 3.3.18 of the Zoning Ordinance of the City of Sandy Springs, Georgia is hereby amended to read as follows:

3.3.18 R

Recreational Court, Private. An improved area

designed and intended for the playing of a game or event such as basketball or tennis, and which serves a single family dwelling(s), duplex dwellings and/or multifamily dwellings, or combinations of dwelling types, including such improved areas which are owned and/or controlled by a neighborhood club or similar organization. A basketball goal adjoining a driveway of typical residential driveway dimensions shall not constitute a recreational court.

Recreational Court, Public. An improved area designed and intended for the playing of a game or event such as basketball or tennis, and is operated as a business or as a club unless such club is a neighborhood club or similar organization identified under Recreational Court, Private.

Recreational Facilities. Includes parks, recreation areas, golf courses, playgrounds, recreation counters (indoor & outdoor), playing fields, and other similar uses or facilities.

Recreation Fields - An outside area designed and equipped for the conduct of sports and leisure-time activities including but not limited to softball, soccer, football, and field hockey.

Recreational Vehicle. A vehicle used for leisure time activities and as a dwelling unit while traveling. Examples include a camper, a motor home and a travel trailer. As distinguished from a mobile home, dimensions shall not exceed a width of eight and one-half (8.5) feet and a length of forty five ( 45) feet.

Recycling Center, collecting. Any facility utilized for the purpose of collecting materials to be recycled

including, but not limited to, plastics, glass, paper and aluminum materials. Such use may be principal or accessory to a non-residential use on non-residentially zoned property, except AG-1 zoned properties unless, the primary use is a permitted non-residential use.

Recycling Center, processing. Any facility utilized for the purpose of collecting, sorting and processing materials to be recycled including, but not limited to, plastics, glass, paper and aluminum materials whenever such use is permitted in M-1 and M-2 Zoning Districts. A recycling center is not to be considered a landfill.

Regularly. The consistent and repeated doing of an act on an ongoing basis.

Relocated Residential Structure. A dwelling which has been removed from one location for relocation to another lot.

Repair Garage, Automobile. A use which may provide a full-range of automotive repairs and services including major overhauls. May include paint and body shops.

Repair Garage, Truck and Heavy Equipment. A use which may provide a full-range of repairs and services including major overhauls on trucks and heavy equipment. Includes paint and body shops.

Residential Use\Dwelling. Any building or portion thereof where one actually lives or has his home; a place of human habitation

Restaurant. A food service use which involves the preparation and serving of food to seated patrons. A

cafeteria shall also be considered to be a restaurant. The restaurant seating area must be at least 40% of the gross square footage of the restaurant facility. Seating space located outside of the main structure (i.e. patios, decks, etc.) shall not be included in calculating the seating space.

Restaurant, Fast Food. A food service establishment which sells food from a counter or window for consumption on-premises or off-premises. Tables may be provided, and food may be served at a table, but may not be ordered from a table.

Retail Use. A business whose primary purpose is the sale of merchandise to consumers.
Retreat. See Lodge.

Right-of-Way. A portion of land over which a local or state government has designated a right of use.

Roadside Produce Stand. A use offering either farm-grown, prepared food products such as fruits, vegetables, canned foods, or prepared packaged meats for sale from a vehicle or a temporary structure. The consumption of food on-site is prohibited. The use is permitted in C-1, C-2, M-1, M-2 and AG- 1 Districts.

Roadside Vending. The sale of merchandise such as clothing, crafts, household item, firewood, etc., from a temporary table or cart.

Rooming House. A residential use other than a hotel or motel in which lodging may be provided to non-household members for periods of 30 days or longer, and which does not include the provision of meals.

Section 4. Section 3.3.19 of the Zoning Ordinance of the City of Sandy Springs, Georgia is hereby amended to read as follows:

3.3.19 S

Salvage/Storage/Junk Facility. Any use involving the storage or disassembly of wrecked or junked automobiles, trucks or other vehicles; vehicular impound lots; storage, bailing or otherwise dealing in scrap irons or other metals, used paper, used cloth, plumbing fixtures, appliances, brick, wood or other building materials; and the storage or accumulation outside of a storage building of used vehicle tires or tire carcasses which cannot be reclaimed for their original use. Such uses are storage and/or salvage facilities whether or not all or part of such operations are conducted inside or outside a building or as principal or accessory uses. State approval is required for all sites utilized for reclamation and/or disposal of toxic and/or hazardous waste.

Scale. Scale refers to the relationship of the size of a building to neighboring buildings and of a building to a site. In general, the scale of new construction should relate to the majority of surrounding buildings

School. Any educational facility established under the laws of the state (and usually regulated in matters of detail by local authorities), in the various districts, counties, or towns, maintained at the public expense by taxation, and open, usually without charge, to all residents of the city, town or other district or private facility which has students regularly attending classes and which teach subjects commonly taught in these schools of this state.

School, Private. An educational use having a curriculum at least equal to a public school, but not operated by the Fulton County Board of Education.

School, Special. An educational use devoted to special education including the training of gifted, learning disabled, mentally and/or physically handicapped persons, but not operated by the Fulton County Board of Education.

Screen. A fence, wall, hedge, landscaping, earthen berm, buffer area or any combination of these that is designed to provided a visual and/or physical barrier.

Seasonal Business Use. A primary use involving the sale of items related to holidays which may be conducted outside of the building, but within the confines of a parcel zoned CUP or MIX (commercial components), C-1, C-2, M-lA, M-1, or M-2. A Seasonal Business Use is permitted in AG-1 and residential districts if occupied by either a church, school, or lodge/retreat existing as a conforming use. See the appropriate Administrative Permit.

Secondary Variance. An appeal of a decision and/or action of a department director or deputy department director authorized to hear a variance request or interpretation of the Zoning Ordinance.

Self-Storage/Mini. A single-level structure or group of structures containing separate spaces/stalls and which are leased or rented to individuals for the storage of goods.

Self-Storage/Multi. A multi-level structure containing separate storage rooms/stalls under a single roof that

are leased or rented.

Senior Housing. A single family or multi-family development intended for, operated for and designed for older persons in accord with the Fair Housing Amendments Act. Senior housing communities are designed for seniors to live on their own, but with the security and conveniences of community living. Senior housing communities may provide communal dining rooms and planned recreational activities (congregate living or retirement communities), while others provide housing with only minimal amenities or services.

Service Commercial Use. A business whose primary purpose is to provide a service.

Service Line - a distribution line that transports natural gas from a common source of supply to: (1) a customer meter or the connection to a customer's piping, whichever is farther downstream, or (2) the connection to a customer's piping if there is no customer meter. The customer meter is the meter that measures the transfer of gas from one operator to a customer.

Service Station. A use which provides for the sale of motor vehicle fuels and automotive accessories, and which may provide minor repair and maintenance services. A service station shall be limited to 4 or fewer bays excluding no more than one attached or detached bay for washing cars.

Setback. A space between a property line and a building or specified structure.

Setback, Minimum. The minimum yards as specified in

the various use districts. A minimum required space between a property line and a structure. An area identified by a building line.

Shopping Center. A group of four ( 4) or more stores, shops, restaurants, and other businesses within a single architectural plan supplying many basic shopping needs and having a common parking lot.

Sidewalk. A paved area designated for pedestrians which is constructed in accordance with Sandy Springs standards.

Sign. See Article 33, Signs, for all definitions regarding signage.

Site Plan. A detailed plan, drawn to scale, based on a certified boundary survey, and reflecting conditions of zoning approval, various requirements of State law, and City Ordinances and Resolutions.

Site Plan, Preliminary. A detailed plan, normally associated with rezoning and Use Permit requests, which is drawn to scale and reflects the various requirements of State law and of City Ordinances and Resolutions. A Preliminary Site Plan must be drawn to scale and shall contain information listed for such a plan in the development guidelines.

Skywalk. An elevated, grade separated pedestrian walkway or bridge located over a public right-of-way.

Specified Anatomical Areas. (1) Human genitals or pubic region, buttock, or female breast below a point immediately above the top of the areola; or (2) Human male genitalia in a discernibly turgid state, even if

completely and opaquely covered.

Specified sexual activities shall include any of the following:

(1) Sexual intercourse, oral copulation, anal intercourse, oral-anal copulation, bestiality, masturbation, or excretory functions in the context of sexual relations, and any of the following sexually oriented acts or conduct: anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty;

(2) Clearly depicted human genitals in a state of sexual stimulation, arousal or tumescence;

(3) Use of human or animal ejaculation, sodomy, oral copulation, coitus, or masturbation;

(4) Masochism, erotic or sexually oriented torture, beating or the inflicting of pain;

(5) Erotic or lewd touching, fondling or other sexual contact with an animal by a human being; or

(6) Human excretion, urination, menstruation, vaginal or anal irrigation.

Stadium. A large open or enclosed structure used for sports and other major events and partly or completely surrounded by tiers of seats for spectators.

Story. A portion of a building between the surface of any floor and the floor or space above it, excluding basements and attics.

Story, Half. A heated and finished area below a roof, one or more of the vertical walls of which are less than normal ceiling height for the building.

Street. A roadway/right-of-way located and intended for vehicular traffic. Streets may be public or they may be private if specifically approved by the Department of Community Development as part of a subdivision plat.

Public streets are rights-of-way used for access owned and maintained by the federal, state, or local government.

Private streets are roadways constructed to Fulton County or City Standards but owned and maintained by a private entity. Necessary easements for ingress and egress for police, fire, emergency vehicles and all operating utilities shall be provided. Should the City of Sandy Springs ever be petitioned to assume ownership and maintenance of the private streets prior to dedication of the streets, they must be brought to acceptable City standards subject to the approval of the Director of Public Works.

Stub streets are rights-of-way that dead ends into an interior property line.

Freeway - Any multi-lane roadway having full access control and separation of directional traffic. A freeway accommodates large volumes of high speed traffic and provides efficient movement of vehicular traffic for interstate and major through travel.

Principal Arterial - Any roadway that has partial or no access control and is primarily used for fast or heavy traffic. Emphasis is placed on mobility rather than access to adjacent land.

Minor Arterial - Any roadway that has partial or no access control and is primarily used for interconnectivity of major arterials and places more emphasis on access to adjacent land over mobility than principal arterials.

Collector Road - Any roadway that has partial or no access control and has more emphasis on access to adjacent land over mobility than arterials. The primary purpose is to distribute trips to and from the arterial system to their destination points and allow access to the local roads.

Local Road - Any roadway that has no access control and places strong emphasis on access to adjacent land over mobility while service to through traffic is discouraged.

Full Access Control - Preference is given to through traffic by providing access connections only with selected public roads and by prohibiting crossing at grade and direct private connections.

Partial Access Control - Preference is given to through traffic to a degree that in addition to connection with selected public roads, there may be some crossing at grade and some private connections.

No Access Control - Preference is generally given to access to adjacent land rather than mobility Structure (amended 12/16/08, RZ08-024, Ord. 2008-12-62). See Article 4 of the Land Development Regulations.

Structure, Accessory. A subordinate structure, customarily incidental to a principal structure or use and is located on the same lot. Examples of accessory structures in single-family dwelling districts include a well house, fence, tool shed, guest house and a detached garage.

Structure, Principal. A structure in which the principal use or purpose on a property occurs, and to which all other structures on the property are subordinate. Principal shall be synonymous with main and primary.

Subdivision (amended 12/16/08, RZ08-024, Ord. 2008-12-62). See Article 4 of the Land Development Regulations.

Surface, All-weather. Any surface treatment, including gravel, which is applied to and maintained so as to prevent erosion, and to prevent vehicle wheels from making direct contact with soil, sod or mud; and which effectively prevents the depositing of soil, sod or mud onto streets from areas required to be so treated.

Swimming Pool, Private. A recreation facility designed and intended for water contact activities which serves a single family dwelling(s), duplex dwellings and/or multi-family dwellings, or combinations of dwelling types, including pools which are owned and/or controlled by a neighborhood club or similar organization.

Swimming Pool, Public. A recreation facility designed and intended water contact activities which is operated as a business or as a club unless such club is associated with a neighborhood club or similar organization.

Section 5. Section 4.3.l of the Zoning Ordinance of the City of Sandy Springs, Georgia is hereby amended to read as follows:

4.3.1. NONCONFORMING LOTS, USES AND STRUCTURES. Within the zoning districts established by this Ordinance there may exist lots, structures, and uses of both land and structures which were lawful before this Ordinance was adopted or subsequently amended, but which would be prohibited, regulated, or restricted under the terms of this Ordinance as adopted or subsequently amended. Nonconforming lots, uses and structures may continue in their nonconforming status with the following limitations and/or requirements. The amortization of nonconforming adult establishment uses, however, shall be governed by Section 26-37 of The Code of the City of Sandy Springs, Georgia.

A. Nonconforming Lot. A single, lawful lot-of-record which does not meet the requirements of this Ordinance for area or dimensions, or both, may be used for the buildings and accessory buildings necessary to carry out permitted uses subject to the following provisions:

1. Parking space requirements as provided for in Article XVIII are

met; and

2. Such lot does not adjoin another vacant lot(s) or portion of a lot in the same ownership.

3. If two (2) or more adjoining lots or portions of lots in single ownership do not meet the requirements established for lot width, frontage or area, the property involved shall be treated as one lot, and no portion of said lot shall be used or sold in a manner which diminishes compliance with this Ordinance. This paragraph shall not apply to nonconforming lots when fifty percent or more of adjoining lots on the same street are the same size or smaller.

B. Nonconforming Uses of Land. When a use of land is nonconforming pursuant to the provisions of this Ordinance, such use may continue as long as it remains otherwise lawful and complies with the following provisions:

1. No nonconforming use shall be enlarged, increased or extended to occupy a greater area of land than that which was occupied at the time use became nonconforming;

2. No nonconforming use shall be moved in whole or in part to any other portion of the lot not

occupied by such use at the time the use became nonconforming; and

3. If any nonconforming use of land ceases for a period of more than one year, any subsequent use of such land shall comply with this Ordinance.

C. Nonconforming Use of Structures. If a lawful use of structure, or of a structure and lot in combination, exists at the effective date of adoption of this Ordinance or its subsequent amendment that would not be allowed under provisions of this Ordinance as adopted or amended, the use may be continued so long as it complies with other regulations, subject to the following conditions:

1. No existing structure devoted to a use not permitted by this Ordinance shall be enlarged, extended, constructed, reconstructed, moved, or structurally altered except in changing the use of the structure to a permitted use;

2. Any nonconforming use may be extended throughout any part of a building which was arranged or designed for such use at the time the use became nonconforming, but no such use shall be extended

to occupy any land outside such building;

3. If no structural alterations are made, any nonconforming use of a structure or structure and land may be changed to another nonconforming use of the same or more restrictive nature;

4. When a nonconforming use of a structure or a structure and land in combination is replaced with a conforming use, such structure or land may not later revert to a nonconforming use;

5. When a nonconforming use of a structure or structure and land in combination is discontinued or abandoned for one year, the structure or structure and land in combination shall not thereafter be used except in conformance with the regulations of the district in which it is located; and

6. A nonconforming use of a structure and/or a nonconforming use of land shall not be extended or enlarged by attachment to a building or land of additional signs which can be seen from off the land or by the addition of other uses of a nature which would be prohibited generally in the district.

D. Nonconforming Structures. When a structure exists on the effective date of adoption of this Ordinance or its amendments that could not be built under the terms of this Ordinance because of restrictions on building area, lot coverage, height, yards, or other characteristics of the structure or its location on the lot, such structure may remain as long as it complies with all other zoning regulations, subject to the following conditions:

1. No structure may be enlarged or altered in a way which increases its nonconformity;

2. Destruction, by any means, of more than sixty percent of the gross square footage of a structure shall require that the structure be reconstructed in conformity with the provisions of this Ordinance;

3. Any structure which is moved, for any reason and for any distance whatever, shall conform to the regulations for the district in which it is located.

E. Rezoning Which Results in Nonconforming Structures.
When a property containing lawful structures is rezoned, the following shall apply:

1. The approval of the rezoning by the City Council shall automatically reduce minimum yards to the extent necessary for existing structures to comply.

2. All new construction, expansions or additions shall comply with the minimum yard requirements of the new district.

3. Buffers and landscape areas shall be established by conditions of zoning which shall have precedence over the district standards contained in Section 4.23.

4. Destruction or removal of buildings which preexisted rezoning shall reinstate the development standards of the then applicable district provisions of this Zoning Ordinance.

F. Exemptions Due to City, County or State Action. Whenever a lot becomes nonconforming as a result of land acquisition by the city, county, or state, building permits shall be granted for new construction provided the proposed structure complies with all but lot area requirements, and setback requirements shall be reduced without requirement for a variance to the extent of the width of the acquired property.

Whenever a structure becomes nonconforming as a result of city, county, or state action other than an amendment to this Ordinance, the use of the structure may continue and the structure may be replaced as though no nonconformity exists if, subsequent to such action, the structure is destroyed.

Section 6. Section 19.3.20 of the Zoning Ordinance of the City of Sandy Springs, Georgia is hereby amended to read as follows:

19.3.20. ADULT ESTABLISHMENTS

INTENT AND FINDINGS

It is the intent of this Section to regulate the place and manner of the operation of Adult Establishments as defined in this ordinance. It is well established and has been the experience of other communities in Georgia and throughout the United States that adult establishments have been associated with disorderly conduct, prostitution, negative impacts on surrounding properties, and other adverse secondary effects. This Section advances the substantial government interest in promoting and protecting public health, safety, and general welfare, and maintaining law and order. The Section is narrowly constructed to protect the First Amendment rights of citizens of Sandy Springs while furthering the substantial governmental interest of

combating the secondary effects of adult establishments from areas and uses in the community which are incompatible. Areas and uses which are to be protected from adult establishments include but are not limited to residential, churches, day care centers, libraries, recreational facilities, and schools. The City Council hereby readopts and incorporates by reference the findings and secondary effects evidence concerning adult establishments in the legislative record for Chapter 26, Article II of the Code of the City of Sandy Springs, Georgia and for ordinances adopting and amending those provisions.

The City Council finds, based upon an October, 1980, study by the Minnesota Crime Prevention Center, Inc., Minneapolis, Minnesota, entitled "An Analysis of the Relationship Between Adult Entertainment Establishments, Crime, and Housing Values", that adult establishments are significantly related to diminishing market values of neighboring residential areas, that adult establishments should not be located in residential areas, and that adult establishments should be permitted only in locations that are at least 1/10 mile, or approximately 500 feet, from residential areas.

The City Council further finds, based upon a June, 1978, study by the Division

of Planning of the St. Paul, Minnesota, Department of Planning and Economic Development and the Community Crime Prevention Project of the Minnesota Crime Control Planning Board entitled "Effects on Surrounding Area of Adult Entertainment Businesses in Saint Paul", that the presence of adult establishments correlates with a decreasing market value of neighboring residential areas, that adult establishments tend to locate in areas of poorer residential condition, tend to be followed by a relative worsening of the residential condition, and that more than two adult establishments in an immediate area is associated with a statistically significant decrease in residential property market value, and that such a concentration of adult establishments in a given area should be discouraged. The board also finds that such worsening of residential conditions will adversely affect uses found in residential areas or in the proximity of residential areas, such as public recreational facilities, public or private institutional uses, churches, schools, universities, colleges, trade-schools, libraries, and day care centers.

The City Council further finds, based upon a May 19, 1986, land use study conducted in Austin, Texas, that an adult establishment within one block of a residential area decreases the market value of homes, that adult establishments

are considered a sign of decline by lenders, making underwriters hesitant to approve the 90-95 percent financing many home buyers require, and that patrons of adult establishments tend to be from outside the immediate neighborhood in which the adult establishment is located.

The City Council further finds, based upon a March 3, 1986, study conducted by the Oklahoma City, Oklahoma, Community Development Department entitled "Adult Entertainment Businesses in Oklahoma City - A Survey of Real Estate Appraisers", that an adult establishment will have a negative effect on residential property market values if it is located closer than one block to residential uses.

The City Council further finds that this portion of this zoning ordinance regarding regulation of adult establishments was carefully considered by a work group of Fulton County staff drawn from the areas of law enforcement, land use, land planning, and law; by the planning commission at public meetings open to the citizens of Sandy Springs where public comment was available; and by a committee of citizens with expertise in law, real estate, land use, and other disciplines, who have reviewed this portion of the zoning ordinance particularly with respect to its provisions

relating to the effects of adult establishments on market values of residential and other property, and that the information gathered and results of this informal study support the need for these development standards.

This portion of the zoning ordinance is intended to be a carefully tailored regulation to minimize the adverse land use impacts caused by the undesirable secondary effects of adult establishments, and the City Council finds that restricting adult establishments to certain zones and imposing development standards can legitimately regulate adult establishments by establishing zones where adult establishments are most compatible with other uses or the surrounding neighborhood, and by requiring minimum distances to be maintained between adult establishments and other uses so as to afford the most protection to residential uses.

It is not the intent of the City Council, in enacting this portion to the zoning ordinance, to deny to any person rights to speech protected by the United States or Georgia Constitutions, nor is it the intent to impose any additional limitations or restrictions on the contents of any communicative materials, including sexually-oriented films, videotapes, books, or other materials: further, in the adoption of this amendment to the zoning

ordinance, the City Council does not intend to deny or restrict the rights of any adult to obtain or view any sexually oriented materials protected by the United States or Georgia Constitutions, nor does it intend to restrict or deny any constitutionally protected rights that distributors or exhibitors of such sexually-oriented materials may have to sell, distribute, or exhibit such constitutionally protected materials; finally, in the enactment of this portion of the zoning ordinance, the City Council intends to adopt a content neutral measure to address the secondary effects of adult establishments in continuation of practices that previously applied to the citizens of the now incorporated City of Sandy Springs as when they were formerly citizens residing in unincorporated Fulton County.

The city council hereby re-adopts and incorporates these pre-enactment findings and evidence into the adoption of the following code amendments.

19.3.20. A. Required Districts: C-1, C-2, M-1 and M-2

19.3.20. B. Standards:

1. All boundary lines of the premises to be used for an adult establishment must be located at least 300 feel from the properties

listed below:

a. The property line of any Suburban A, Suburban B, Suburban C, R-1, R-2, R-2A, R-3, R-3A, R-4A, R-4, R-5, R-5A, R-6, NUP, CUP, TR, A, A-L, AG-1 zoned property or property conditioned for residential purposes.

b. The property line of any public park, public recreational fields, public recreational courts, public golf course, public playground, public playing field, government building owned and occupied by such government, library, civic center, public or private school, commercial day care facility or church.

2. No premises to be used for an adult establishment shall be located any closer than 400 feet from any other premises used for an adult establishment. For the measurement required by this subsection, distance shall be measured from the nearest public entrance of the structure or tenant space in which the applicant is to be located to the nearest public entrance of the structure or tenant

space in which the other premises used for an adult establishment is located.

3. Access to adult establishment premises shall be from a major thoroughfare.

4. Adult establishments shall comply with the objective requirements of the subject property's zoning district (e.g., required setbacks of structures from lot lines) and with any preexisting, objective conditions (e.g., "no fast food restaurants") that were placed on the subject property when its present zoning classification was approved.

5. No premises containing an adult entertainment establishment shall be located any closer than 50 feet from any premises authorized and licensed to sell alcoholic beverages or malt beverages or wine for consumption on the premises. For the measurement required by this subsection, distance shall be measured from the nearest public entrance of the structure or tenant space in which the applicant is located to the nearest entrance to the public of the structure or tenant space in which the premises authorized and licensed to sell

alcoholic beverages or malt beverages or wine for consumption on the premises is located.

6. Adult entertainment establishments shall provide parking spaces at a ratio of 10 per 1000 gross square feet of floor space.

19.3.20. C. Administrative Permit Required:

New adult establishment uses shall file an application for an Administrative Permit with the Director of the Community Development Department. The application shall be complete when it contains the following:

1. Name of the business or applicant;

2 Business address;

3. Business phone number, fax number, and email address;

4. Certified boundary survey, prepared by a licensed surveyor, of the site and the property lines of surrounding properties identifying the use of properties at or within 1,000 feet of the boundary lines of the subject property;

5. A plan, drawn to scale, based on a

certified boundary survey, that shows compliance with the objective requirements of the subject property's zoning district (e.g., required setbacks of structures from lot lines), and that lists any preexisting, objective conditions (e.g., "no fast food restaurants") that were placed on the subject property when its present zoning classification was approved.

19.3.20. D. Permit Processing:

Within fourteen (14) days of receipt of a completed application for an Administrative Permit, the Director shall grant or deny the Administrative Permit and shall mail notice of the granting or denial to the applicant at the business address on the application. The Director shall grant the Administrative Permit unless the premises to be used for an adult establishment fails to meet one or more of the standards specified in Section 19.3.20.B, in which case the Director shall specify the standard(s) that the premises fails to meet. In the event the Director fails to act within the fourteen (14) day period the premises shall be deemed approved and permitted.

19.3.20 E. Appeal of Denial of Administrative Permit:

The applicant may appeal any denial of an Administrative Permit by filing a notice of appeal with the Mayor and City Council within 10 days of the date of the notice of denial. The Mayor and City Council shall place the appeal down for a hearing at the Council's next regularly scheduled meeting, or at a special hearing within 20 days of the filing of the notice of appeal, whichever is sooner, and shall provide notice to the applicant of the date, time, and place of the hearing at least seven (7) days prior to the hearing. At the hearing, the applicant and the Director shall have opportunity to make argument, present evidence, and cross-examine adverse witnesses. Within five (5) days after the hearing, the Mayor and City Council shall issue a decision either denying or granting the Administrative Permit and a statement of reasons for the decision. A denial by the Mayor and City Council may be appealed within 30 days of the date of said denial to the Superior Court by writ of certiorari.

19.3.20 F. Other Regulations:

Nothing in this section shall allow for the conducting or zoning of any business or entity which would otherwise be illegal.

Section 7. Section 19.3.2l of the Zoning Ordinance of the City of Sandy Springs, Georgia, entitled Adult Entertainment Establishments, is hereby repealed in its entirety.

Section 8. It is the intention of the Mayor and Council, and it is hereby ordained, that the provisions of this Ordinance shall become and be made part of the Zoning Ordinance of the City of Sandy Springs, Georgia. All ordinances or parts of ordinances in conflict herewith are repealed.

Section 9. If any clause, paragraph, phrase, section, sentence, or word of this ordinance is declared invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect any of the remaining clauses, paragraphs, phrases, sections, sentences, or words of this ordinance.

Section 10. This Ordinance is effective April 21, 2009.

ORDAINED this the 21st day of April, 2009.

Approved:

/s/ Eva Galambos
Eva Galambos, Mayor

Attest:

/s/ Michael D. Casey
Michael D. Casey, Interim City Clerk
(Seal)

CERTIFICATE

I, Michael D. Casey, City Clerk and Custodian of Records for the City of Sandy Springs, Georgia, hereby certify that the twenty-eight (28) pages of photocopied matter attached hereto is a true and correct copy of Chapter 6 - ALCOHOLIC BEVERAGES, of THE CODE OF THE CITY OF SANDY SPRINGS, GEORGIA, adopted March 4, 2008, and including revisions through SUPPLEMENT NO. 7.

This 5th day of March 2015.

/s/ Michael D. Casey
Michael D. Casey, CMC
City Clerk
(Seal)

Sec. 6-135.- Prohibited acts; sexual display on licensed premises.

(a) No licensee shall permit the sale of alcoholic beverages to any person who is in a state of noticeable intoxication or allow persons who are noticeably intoxicated to congregate on the licensed premises.

(b) No licensee shall permit any gambling, betting, lottery, or other device for the hazarding of any money or other thing of value on the licensed premises, except that this prohibition shall not apply with respect to a properly licensed bingo game.

(c) No licensee shall permit on the licensed premises any disorderly conduct or breach of the peace.

(d) No licensee shall suffer or permit any person to engage in live conduct exposing to public view the person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks, or any portion of the female breast below the top of the areola on the licensed premises.

(e) No licensee shall allow any person to engage in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual act prohibited by law, on the licensed premises.

(f) Exception. Nothing contained in subsection (d) of this section shall apply to the premises of any theatre, concert hall, art center, museum, or

similar establishment primarily devoted to the arts or theatrical performances, where the performances that are presented are expressing matters of serious literary, artistic, scientific, or political value.

(Ord. No. 2007-09-54, § 3(7.5.7), 9-18-2007; Ord. No. 2009-04-23, § 1, 4-21-2009; Ord. No. 2012-02-04, § 2, 2-7-2012)