UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

HIGH FIVE INVESTMENTS, LLC and SHANNON VIDEO, INC. d/b/a ENTICE ADULT SUPERSTORE And d/b/a ENTICE MOVIES AND NOVELTIES

Plaintiffs,

v.

CIVIL ACTION FILE
NO. 4:06-CV-0190-HLM

FLOYD COUNTY, GEORGIA,

Defendant.

ORDER

This case is before the Court on Defendant's Renewed Motion for Summary Judgment [59], Plaintiffs' Motion for Leave to File Motion for Sanctions for Filing Affidavit in Bad Faith [94], Plaintiffs' Motion for Summary Judgment [95], and Defendant's Notice of Objection to Evidence and Motion to Disregard [114].

I. Plaintiffs' Motion for Sanctions

On November 19, 2007, Plaintiffs filed their Motion [f]or Leave to File Plaintiffs' Motion for Sanctions for Filing Affidavit in Bad Faith. (Docket Entry No. 94.)[1] Plaintiffs request that the Court sanction Defendant and its counsel for allegedly filing the Affidavit of James Martin, an assistant building official in the Rome/Floyd County Building Inspection Department, in bad faith. (Pls.' Br. Supp. Mot. Sanctions at 1.) Plaintiffs assert that Defendant and its counsel knew that the material facts averred to in Mr. Martin's affidavit were untrue. (Id.) Specifically, Plaintiffs argue that paragraphs six and seven of Mr. Martin's affidavit are false. (Id. at 2.)

On December 20, 2007, Defendant filed its Response to High Five's "Motion for Leave to File Plaintiffs' Motion for Sanctions for Filing Affidavit in Bad Faith." (Docket Entry No. 107).

As of the date of this Order, Plaintiffs have not filed a reply with regard to Defendant's Response and the time to do so has expired. The Court

[1] On November 26, 2007, Plaintiffs also filed their First Amendment to Plaintiffs' Brief in Support of Motion for Sanctions for Filing Affidavit in Bad Faith. (Docket Entry No. 101.)

therefore concludes that the briefing process with regard to Plaintiffs' Motion for Sanctions is complete, and the issue is ripe for resolution by the Court.

A. Affidavit of James Martin

On November 27, 2006, Defendant submitted the affidavit of Mr. Martin in support of its Motion for Summary Judgment. Defendant also cites Mr. Martin's affidavit in support of its Renewed Motion for Summary Judgment. Mr. Martin averred to the following, in relevant part:

> 1. My name is James Martin. I am over the age of eighteen years, and I am competent to testify to the matters contained in this Affidavit.
>
> 2. I am an Assistant Building Official in the Rome/Floyd County Building Inspection Department and I have worked in this position since July 2005. For 13 months prior to that time, I was a Building Inspector in the Rome/Floyd County Building Inspection Department.
>
> . . .
>
> 6. During my interaction with representatives of High Five Investments and other Plaintiffs in the above-styled action, I was never told or made aware of any plan or intent to use the building at 5561 Highway 52 North as an adult use, an adult bookstore, an adult video store, or any kind of sexually oriented business.
>
> 7. During the Building Inspection Department's interaction with representatives of High Five Investment and the other

> Plaintiffs in the above-styled action, the Building Inspection Department was never told or made aware of any plan or intent to use the building at 5561 Highway 53 North as an adult use, an adult bookstore, an adult video store, or any kind of sexually oriented business.

(Aff. of James Martin ¶¶ 1-2, 6-7.)

B. Discussion

Plaintiffs argue that Mr. Martin submitted a false affidavit in this case and request that the Court sanction Defendant and its attorneys. Plaintiffs assert that their counsel has investigated the statements made by Mr. Martin in paragraphs 6 and 7 of his affidavit and determined that those statements are false. According to Plaintiffs, their evidence clearly demonstrates that Floyd County Commission Chairman John Mayes, Floyd County Manager Kevin Poe, and Rome/Floyd County Building Inspection Department Director Mike Ashley were aware that Plaintiffs planned to open an adult store. Plaintiffs have submitted multiple affidavits from persons averring that Mr. Martin, Rome/Floyd County Building Department employees, and other Floyd County officials were aware that Plaintiffs planned to open an adult store on the property at issue. (See generally Aff. of Charles Craton, III; Aff. for High Five Investments, LLC; Aff. of Thomas Leland Griffith; Aff. of Michael

Ashley.) Plaintiffs also cite newspaper articles regarding the property at issue which quote Floyd County officials' statements regarding the property's proposed use. (Pls.' Br. Supp. Mot. Sanctions at 6-7.)

Defendant argues that Plaintiffs Motion for Sanctions is untimely, fails to prove that Defendant's evidence is false, and fails to show that Defendant or its attorneys offered testimony at odds with facts indisputably within their knowledge. Defendant contends that Plaintiffs filed their Motion for Sanctions nine to eleven months after they knew, or should have known, of Mr. Martin's allegedly false statements, and have provided no justifications for this delay. Defendant also asserts that Plaintiffs' evidence does not establish that Mr. Martin's disputed statements are false. Defendant contends that Plaintiffs' evidence does not specifically prove those statements to be false, is conclusory and speculative, and is inadmissible hearsay. Defendant also argues that Plaintiffs have not presented evidence that Mr. Martin's affidavit was offered in bad faith by Defendant or its attorneys, and have not proven that Mr. Martin's affidavit contradicts other facts indisputably within Mr. Martin's knowledge.

Pursuant to Federal Rule of Civil Procedure 56(g), regarding affidavits made in bad faith,

> [i]f satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Fed. R. Civ. P. 56(g). "There appear to be few situations in which the courts have resorted to Rule 56(g)." 10B Charles Alan Wright, et al., Federal Practice and Procedure § 2742 (3d ed. 1998).

The Court is not satisfied that Defendant submitted Mr. Martin's affidavit in bad faith or that Mr. Martin's affidavit is false, as Plaintiffs contend. Mr. Martin's affidavit presents relevant and admissible facts regarding the building permit for the property at issue. Mr. Martin is competent to testify to those facts, which are within his personal knowledge as an assistant building official within the Rome/Floyd County Building Inspection Department. Furthermore, Plaintiffs have not submitted undisputed evidence that Mr. Martin's affidavit is false, was submitted in bad faith, or was submitted for the purpose of delay. Rather, Plaintiffs cite affidavits by others which allegedly contradict Mr. Martin's statements that

neither he nor the Rome/Floyd County Building Inspection Department was told of any plan to use the property as an adult store. The Court observes that many of the statements within those affidavits constitute inadmissable hearsay or speculation, do not involve Mr. Martin or the Rome/Floyd County Building Inspection Department, or simply raise credibility issues. None of those affidavits prove that Mr. Martin's statements in paragraphs 6 and 7 of his affidavit are flatly at odds with facts indisputably within Mr. Martin's knowledge.

For the reasons set forth above, the Court is not satisfied that Mr. Martin's affidavit was submitted in bad faith or solely for delay. The Court therefore concludes that the requested sanctions are not appropriate under the above circumstances. Consequently, the Court denies Plaintiffs' Motion for Leave to File Plaintiffs' Motion for Sanctions for Filing Affidavit in Bad Faith.

II. Defendant's Motion to Disregard

On December 28, 2007, Defendant filed its Notice of Objection to Evidence and Motion to Disregard. (Docket Entry No. 114.) Defendant argues that, throughout this litigation, Plaintiffs have represented R. Bruce McLaughlin as an expert witness regarding whether sexually oriented businesses are associated with adverse secondary effects, and, after the close of discovery and deadlines for disclosure of experts, now attempt to expand Mr. McLaughlin's testimony to include areas not previously disclosed. Defendant also contends that Plaintiffs have submitted other evidence which includes hearsay, legal conclusions, and affidavits not based on personal knowledge, and requests that the Court disregard those affidavits and other evidence.

On January 14, 2008, Plaintiffs filed their Response to Defendant Floyd County's Motion to File Notice of Objection to Evidence and Motion to Disregard. (Docket Entry No. 120.)

On January 15, 2008, Plaintiffs filed the Second Affidavit of Charles T. Craton III. (Docket Entry No. 122.)

On January 31, 2008, Defendant filed its reply. (Docket Entry No. 124.)

The Court therefore concludes that the briefing process with regard to Plaintiffs' Motion to Disregard is complete, and the issue is ripe for resolution by the Court.

A. Evidence at Issue

1. Plaintiffs' Initial Disclosures

Plaintiffs identified the following people in their initial disclosures as individuals likely to have discoverable information that Plaintiffs may use to support their claims or defenses: Charles Craton, Susan Craton, Ken Gabler, Janet Gabler, John Mayes, Jerry Jennings, Tom Bennett, Garry Fricks, Chuck Hufstetler, Kathy Arp, Scott Bergthold, R. Bruce McLaughlin, Mike Ashley, and Deanna Dennis. (Pls.' Initial Disclosures ¶ 4, Attach. A.)

2. McLaughlin Affidavit

On October 27, 2006, Plaintiffs attached the first Affidavit of Robert Bruce McLaughlin to their Motion for Preliminary Injunction. (Docket Entry No. 9-9.) In his first affidavit, Mr. McLaughlin avers to his education, credentials, and employment, and then testifies on the issue of sexually

oriented businesses and adverse secondary effects. (See generally Aff. of Robert Bruce McLaughlin ("McLaughlin Aff. I").)

On December 8, 2006, Plaintiffs filed their Initial Disclosures. (Pls.' Initial Disclosures.) Plaintiffs identified Mr. McLaughlin as a witness and included his expert report as an attachment to their Initial Disclosures, which stated, in relevant part:

> This Planning Review is prepared as the Consultant's Expert Report pursuant to Rule 26, Fed. R. Civ. P., in High Five Investments and Shannon Video v. Floyd County, United States District Court, Northern District of Georgia, Case No. 4[:]06-CV-190[-]HLM.
>
> . . .
>
> The analysis and opinions are limited to my analysis of the secondary effects studies conducted in the jurisdictions listed herein, my analysis of the impacts of Adult Uses on property values, calls for police service and urban blight. At this time, Bruce McLaughlin Consulting Services, Inc. has not been retained to consider if the Floyd County adult use zoning regulations leave adequate alternative avenues of communication for sexually-oriented Adult Uses but a supplemental Planning Review will be prepared if we are retained for this purpose.
>
> . . .
>
> This report comprises a complete statement of all of my opinions on the instant topic to which I presently contemplate testifying.

> However, some of the Appendices may be updated or edited prior to the trial of this matter. Also, as noted above, Bruce McLaughlin Consulting Services, Inc., may be retained to determine if the Floyd County Adult Use Zoning Regulations provide adequate alternative avenues of communication for sexually-oriented Adult Uses, in which case a Supplemental Planning Review will be prepared.
>
> . . .
>
> The purpose of this Planning Review is to review the documents made a part of the Floyd County records as the alleged predicate for the Adult Use Ordinance adopted by the Floyd County Board of County Commissioners in May, 2006.

Id. Attach. A, App. B at i, v, vi, & 1.

On March 9, 2007, Plaintiffs filed their First Supplement to Initial Disclosures, disclosing a list of cases in which Mr. McLaughlin had testified during the prior four years. (Docket Entry No. 49.)

On May 24, 2007, Plaintiffs filed their Supplements to Attachment B of Plaintiffs' Initial Disclosures, updating Mr. McLaughlin's critique of municipal studies, his court testimony, and his resume. (Docket Entry No. 71.)

On July 31, 2007, Plaintiffs filed the Second Affidavit of R. Bruce McLaughlin as an attachment to their Motion for Leave to File Motion to Strike Affidavit and Expert Report of Richard McCleary and for Sanctions

Against Defendant ("Motion to Strike"). (Docket Entry No. 80-3.) In his second affidavit, Mr. McLaughlin updated his resume, and averred as to cases in which Defendant's counsel has represented local governments in similar litigation, and again testified with regard to the issue of sexually oriented business and adverse secondary effects. (See generally Second Aff. of R. Bruce McLaughlin ("McLaughlin Aff. II").)

On August 6, 2007, Plaintiffs filed their Third Supplement to Initial Disclosures, Attachment B, updating Mr. McLaughlin's expert report with regard to the description of an adult store in a study used by Defendant's expert, Dr. Richard McCleary. (Docket Entry No. 81.)

On August 20, 2007, Plaintiffs attached the Third Affidavit of R. Bruce McLaughlin to their reply regarding their Motion to Strike. (Docket Entry No. 83-2.) In his third affidavit, Mr. McLaughlin criticizes Dr. McCleary's qualifications and prior testimony with regard to sexually oriented businesses and adverse secondary effects. (See generally Third Aff. of R. Bruce McLaughlin ("McLaughlin Aff. III").)

On November 20, 2007, Plaintiffs filed the Fourth Affidavit of R. Bruce McLaughlin in support of Plaintiffs' Motion for Summary Judgment and

Plaintiffs' Response in Opposition to Defendant's Renewed Motion for Summary Judgment and Brief in Support of Plaintiffs' Motion for Summary Judgment. (Docket Entry Nos. 95, 98.) Mr. McLaughlin's fourth affidavit is separated into the following sections: Part I. Personal Background; Part II. The Store's Location; Part III. Alternative Avenues of Communication; Part IV. The Floyd County Predicate Documents Cannot Reasonably Be Believed to be Relevant to Floyd County; Part V. Dr. McCleary's Floyd Report is Internally Inconsistent and is Inconsistent with its Cited Sources and Thus Creates Genuine Issues of Material Fact Within Itself; Part VI. Dr. McCleary's Work is Results-Driven, Untrustworthy, Unreliable and Invalid; Part VII. St. Paul, 1978; Part VIII[.] The "Foreign Studies" Offer No Proof of Adverse Secondary Effects; Part VIII[.] A. Study Protocols; Part VIII. A. Planning Sources; VIII. B. Statistical Sources; VIII. C. Legal Sources; VIII. C.1. Reference Manual; VIII. C.2. Law Review Articles; VIII. C.3. Case Law; and IX. Application. (See generally Fourth Aff. of R. Bruce McLaughlin ("McLaughlin Aff. IV").) In Part II, Mr. McLaughlin discusses the location of the property at issue, the land use planning effect of the property's location and segregation requirements for sexual-oriented adult uses, and states that

there are genuine issues of material fact with regard to Defendant's regulatory framework and segregation requirement with regard to the property at issue and adult uses. (Id. ¶¶ 4-23.) In Part III, Mr. McLaughlin discusses whether the ordinance at issue leaves sufficient alternative avenues of communication. (Id. ¶¶ 24-45.) In Part IV, Mr. McLaughlin discusses the studies and cases cited in the ordinance at issue, the population of the areas studies as compared to Floyd County, states that as a matter of fact it is wrong to conclude that legislators may reasonably rely on studies of high density areas to regulate an adult bookstore in a rural area, and states that there are genuine issues of material fact as to whether the studies cited in the ordinance at issue apply in a rural area. (Id. ¶¶ 46-58.) In Part V, Mr. McLaughlin criticizes Dr. McCleary's expert report, discusses his own work, and states that there is a genuine issue of material fact as to whether that report is correct. (Id. ¶¶ 59-109.) In Part VI, Mr. McLaughlin quotes and then comments upon the testimony of Dr. McCleary in other cases, and states that there is a genuine issue of material facts as to the veracity of Dr. McCleary's theories regarding the secondary effects of certain adult uses. (Id. ¶¶ 110-138.) In Part VII, Mr. McLaughlin discusses

Dr. McCleary's deposition testimony with regard to Dr. McCleary's 1978 St. Paul Report, and quotes from and discuses the Report itself. (Id. ¶¶ 139-170.) In Part VII, Mr. McLaughlin identifies and discusses publications and documents that he concludes are relevant to the instant case, including planning and statistical publications, law review articles, and case law, and states that there is a genuine issue of material fact as to whether the predicate documents cited in the Ordinance provide a basis for regulating sexually oriented adult businesses. (Id. ¶¶ 171-.)

3. Other Affidavits and Evidence

In his first affidavit, Charles Craton averred to the following statements at issue:

> 5.
>
> Because Floyd County did not have any adult ordinances or zoning laws applicable to adult retail stores, and in an effort to assure no legal challenges for the business, we chose (even though not legally required) to use the city of Rome adult ordinances as a benchmark for determining our future location. We made this decision because the city of Rome and Floyd County share a number of common agencies, especially around zoning and land use: The Rome/Floyd County Planning Commission has been in existence since March 14, 1947. For years, the role of the commission has been to make recommendations to the City and County Commissions on matters regarding land use and development. As a result, Rome

and Floyd County created the Unified Land Development Code (ULDC) adopted in August 2001. Also, Rome and Floyd County share the operational and inspection facilities and personnel for the building inspection department and Fire Marshall.

. . .

10.

After evaluating this information, Mr. Begner indicated to me and my partners that there were no zoning or licensing laws in unincorporated Floyd County that prohibited the opening of an adult retail store on said property, and that Floyd County had no adult regulations at all, other than regulations regarding the use of alcohol in strip club establishments. Consequently, the property could indeed be legally used to operate a take-home adult retail store.

. . .

15.

I contacted Mr. Begner to determine what "occupancy classification" I should indicate on the form. Mr. Begner informed me that "Retail Services, Adult Entertainment Uses" for Floyd County referred to adult clubs and alcohol, not retail stores. Mr. Begner explained that this was because the Floyd County Code regulated adult entertainment clubs and prohibited serving alcohol in such clubs, but the County did not, in any manner, regulate adult bookstores. The closest "occupancy classification" listed on the form that represented our business was under *Retail Sales, Category 5942: "bookstore, news dealers, or newsstands."*

. . .

24.

On February 1, 2006, Scott Silvery, Fire Marshall, and James Martin, Assistant County Building Inspector conducted one of the final inspections prior to issuance of a Certificate of Occupancy. I was present at the property that day to discuss some of the final punch list items with Tom Griffith. I did not see or speak with Scott Silvery, but I did speak with James Martin about the future of the property. At the conclusion of the inspection, and as James Martin was leaving the building, he said to me *"I look forward to coming back as a customer."* Tom Griffith overheard Martin's comments to me. It was clear to me that James Martin meant that he looked forward to being a customer at our adult store.

25.

It is beyond any doubt that County Commission Chairman John Mayes, head building inspector Mike Ashley, Assistant Building Inspector James Martin, the Fire Marshall, and other senior county officials were well aware I was planning to open an adult retail store in Floyd County PRIOR TO THE ISSUANCE OF A CERTIFICATE AND WITHIN A MONTH OF ISSUANCE OF A BUILDING PERMIT.

. . .

28.

On March 26, 2006, some two months before the store opened, the *Rome News Tribune* published a front-page article (Exhibit B, attached thereto), in which Kevin Poe, Floyd County Manager was quoted as saying, "I've fielded several phone calls from several citizens. The zoning on the property allows them to operate a bookstore. There's nothing that can be done to restrict them from operating. We don't require business licensing." John Mayes, Floyd County Commission Chairman, was quoted as saying, "The property is zoned heavy commercial, wh[i]ch allows adult bookstores. I think it is legal. We're going to watch it very closely."

29.

On March 28, 2006, the Rome News Tribute published an article (Exhibit C, attached thereto) in which Floyd County Commissioner Gary Fricks is quoted as saying, "I think the zoning is appropriate for that area. It's a four-lane corridor. It's a main artery."

. . .

31.

By the end of May 2006, the Floyd County Commission had enacted ordinances regulating adult stores. Although we has assumed that longstanding laws regarding grandfathering existing uses would be applicable in our case, the county chose to enact an ordinance that targeted our new business for extinction.

(Aff. of Charles T. Craton, III ¶¶ 5, 10, 15, 24-25, 28-29, 31 (emphasis in original).) Two Rome News-Tribune articles dated March 26, 2006, and March 30, 2006, are attached as exhibits to Mr. Craton's affidavit. (Id. Exs. B, C.)

In his affidavit, Michael Ashley, Director of the Rome/Floyd County Building Inspection Department in 2005, averred to the following statements at issue:

5.

On December 20, 2005, when a building permit was issued to contractor Tom Griffith, who performed renovations on the building where Entice would be located, I, as well as all other employees of the Building Inspection Department, including

> James Martin, in particular, were well aware that Plaintiffs planned to open an adult bookstore in the building.

(Aff. of Michael Ashley ¶¶ 2, 5.)

4. Poe Deposition

On December 22, 2006, Plaintiffs served a Notice of Deposition on Defendant stating, in relevant part, that Plaintiffs' counsel

> will take the deposition of a designated agent or agents of Floyd County . . . Such designated agent(s) will be prepared to testify with regard to the ordinance's enactment process, each and every governmental interest meant to be furthered by the provisions of Floyd County Ordinance 2006-002A, how such interests are furthered by the regulations, and the origin, timing and authenticity of all materials the County relied upon for enactment of said Ordinance.

(Docket Entry No. 37 Ex.1.) Defendant designated Mr. Poe as its agent with regard to the above Notice. (Dep. of Kevin Poe at 6-7.)

Mr. Poe, Floyd County Manager, made the following statements at issue during his February 5, 2007, deposition:

> Q And as a matter of fact, at the time there was no business license needed for a store that sold adult or sexually explicit material; was there?
>
> A No.

Q Okay. And at the time that the building permit was sought, do you -- did the zoning code authorize -- now, I am not talking about the state law but the Floyd County zoning code allow for an adult business at that location?

MR. BERGTHOLD: Objection. That's asking for legal analysis, and this is a fact witness.

Q I think you can answer it subject to his objection.

MR. BERGTHOLD: You can answer if you know.

A It allowed for a retail business to operate in a commercial zone.

Q The zoning code did not prohibit the sale of adult material at the time the building permit was sought, did it, at that location?

A No.

. . .

Q Did he--in fact, did he participate, that is, Mr. Bergthold appear before the commission and give testimony relative to enacting the ordinance?

A Yes.

Q How many times did he speak in public that you know of?

A Just once at the public hearing.

Q Before that did he to your knowledge create the ordinance itself to be considered?

MR. BERGTHOLD: Objection. Irrelevant.

A Yes.

. . .

Q And it was also -- then last, it was also true that you didn't require business licenses for an adult store at the time; correct?

A Correct.

. . .

Q But it is true, isn't it, that the property is zoned to permit adult bookstores at the time?

A At the time.

. . .

Q What is -- generally in the zoning code what is your understanding of the term nonconforming use?

MR. BERGTHOLD: Objection. It goes beyond the scope of the Rule 30(b)6 notice. You may answer from your personal knowledge, but you won't be speaking on behalf of the County.

A Nonconforming use is a use of the property that doesn't conform to the zoning standards that are set forth.

Q isn't it true that it is something that was legal and becomes an illegal use?

A If something can get grandfathered in, say when we are adopting zoning, certain things will continue to operate even though they are designated nonconforming use.

Q And it is true, is it not, that the term grandfathering is similar to the term nonconforming use?

A They can go hand in hand, yes.

Q And before the ordinance at issue was enacted, isn't it true that all nonconforming uses were permanent unless abandoned or otherwise made illegal because they were expanded?

MR. BERGTHOLD: Objection. Foundation.

A Generally that's true. There are things that go into play that would create something to not become a nonconforming use.

Q And generally nonconforming uses are permanent and run with the land, do they not, unless abandoned or expanded?

A Generally.

. . .

Q . . . Is it the County's position that Entice is not allowed to use the two-year amortization because it was never legal?

A No.

MR. BERGTHOLD: Objection. You are asking for a legal analysis, and we have already stated our position that –

MR. BEGNER: Okay.

MR. BERGTHOLD: -- the business was always illegal under the state law.

MR. BEGNER: That would just be his opinion.

MR. BERGTHOLD: That's his opinion. That's outside the scope of this deposition.

MR. BEGNER: Right.

Q Look at D, please, and if you would read it to yourself for a second, and particularly 1, 2, and 3 at the bottom.

A Okay.

Q In determining – this has to do, does it not, with seek procedure, that is, D, for seeking a hardship extension on the amortization clause?

A That is correct.

Q Can you tell me or has there been any discussion about what a substantial investment in 1 is defined as? Or what is substantial?

MR. BERGTHOLD: I will object on – calls for a legal analysis, and also it is outside the scope of the deposition. Subject – deposition notice, as was the previous answer on whether you guys are lawful at the location, but I will let the witness answer if he has any personal knowledge of that.

A I don't have any personal knowledge of any discussions about defining that.

Q Okay. And you don't have any – do you have in mind your own definition?

A No.

Q Okay. The same question about – in paragraph – when readily converted to another conforming use. Have you head anything discussed about what that means?

A No.

Q And do you have your own opinion?

A No.

Q Now look at 2 a second where it says, the applicant will be unable to recoup said investments as of the date established for termination of the use. Do you see that?

A Yes.

Q Do you understand that – have there been any discussions about recoup meaning recoup out of profits or any other discussions about what recoup means?

A Not that I recall.

Q And do you have your own definition in mind?

A No.

Q And in 3 do you have any – where it says, the applicant has made in good-faith efforts to recoup the investment and to relocate the use to a location in conformance with this section, have you heard anybody talk about what good faith means, the definition?

MR. BERGTHOLD: I will go ahead and make my standing objection to that entire line of questioning as outside the scope of the 30(b)6 deposition notice. Subject to that you may answer.

A No.

Q And do you have your own opinion?

A No.

(Poe Dep. at 3, 8-9, 16, 27-28, 38-39, 45-48.)

B. Applicable Law

The Court may only consider admissible evidence when ruling on a motion for summary judgment. Cf. Broadway v. City of Montgomery, Ala., 530 F.2d 657, 661 (5th Cir. 1976).[2] When ruling on such a motion, the Court will assess the admissibility of evidence and will consider any objections raised by the parties to testimony presented in affidavits at that time. Jordan, 227 F. Supp. 2d at 1346-47.

Federal Rule of Civil Procedure 56(e) requires, in relevant part, that affidavits be made on "personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e). "The proper method for challenging the admissibility of evidence in an affidavit is to file a notice of

[2] Opinions of the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the Eleventh Circuit, are binding precedent on this Court. See Bonner v. City of Prichard, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

objection to the challenged testimony . . . ." Jordan v. Cobb County, Ga., 227 F. Supp. 2d 1322, 1346 (N.D. Ga. 2001). "A nonmoving party, opposing a motion for summary judgment supported by affidavits cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial . . . The evidence presented cannot consist of conclusory allegations or legal conclusions." Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991). Likewise, general assertions and legal conclusions in depositions do not give rise to genuine issues of material fact precluding a grant of summary judgment. See Lovable Co. v. Honeywell, 431 F.2d 668, 674 (5th Cir. 1970); Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013, 1015 (5th Cir. 1967).

With regard to hearsay, "[t]he general rule is that inadmissible hearsay 'cannot be considered on a motion for summary judgment.'" Macuba v. Deboer, 193 F.3d 1316, 1322 (11th Cir. 1999). It is well settled in the Eleventh Circuit that courts may consider a hearsay statement when ruling on a motion for summary judgment if the statement could be reduced to admissible form at trial. Macuba, 193 F.3d at 1323. However, "[e]ven on

summary judgment, a court is not obligated to take as true testimony that is not based upon personal knowledge." Citizens Concerned About Our Children v. School Bd. of Broward County, Fla., 193 F.3d 1285, 1295 n.11 (11th Cir. 1999) (per curiam).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). For example, in United States v. Baker, 432 F.3d 1189 (11th Cir. 2005), the Eleventh Circuit held that newspaper articles were inadmissible hearsay when "relevant primarily to establish the truth of their contents." 432 F.3d at 1211-12; see also Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 392 (5th Cir. 1961) ("a newspaper article is hearsay, and in almost all circumstances is inadmissible").

Additionally, Rule 26(a)(2), regarding the disclosure of expert testimony, requires parties to disclose the identity of its expert witnesses along with a written report prepared and signed by the witness setting forth all the opinions the witness will express and the basis and reasons for those opinions. Fed. R. Civ. P. 26(a)(2)(B). Those disclosures must be made at

the times and in the sequence ordered by the court. Fed. R. Civ. P. 26(a)(2)(C). "[I]f the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B)," it must be made "within 30 days after the other party's disclosure." Fed. R. Civ. P. 26(a)(2)(C)(ii).

This Court requires a party to disclose its expert testimony on the Court's Initial Disclosure form, which is due within thirty days after the appearance of a defendant by answer or motion. See N.D. Ga. R. 26.1 A.-B. & Form I App. B. Similarly, a party also must provide "the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i).

A party must supplement its initial disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery

process or in writing." Fed. R. Civ. P. 26(e)(1)(A). Local Rule 26.2 C. also requires, in relevant part, that

> [a]ny party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery.
>
> Any party who does not comply with the provisions of the foregoing paragraph shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

N.D. Ga. R. 26.2 C. Furthermore, pursuant to Rule 37(c), in relevant part,

> [i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1).

C. Discussion

1. Fourth Affidavit of R. Bruce McLaughlin

Defendant argues that the Court should disregard Mr. McLaughlin's fourth affidavit and accompanying exhibits concerning the subjects not

previously disclosed. Defendant asserts that Plaintiffs failed to disclose Mr. McLaughlin's expert testimony regarding the availability of alternative sites for sexually oriented businesses in violation of the Federal Rules of Civil Procedure and the Court's Local Rules. Defendant contends that Plaintiffs only disclosed Mr. McLaughlin as an expert on the issue of whether sexually oriented business are associated with adverse secondary effects and that his expert report, supplemental disclosures, and first three affidavits only discussed that subject. Defendant asserts that in responding to its Renewed Motion for Summary Judgment, Plaintiffs impermissibly attempt to expand the scope of Mr. McLaughlin's expert testimony into two new areas not previously disclosed--land use planning and alternative avenues of communication. Defendant argues that it is prejudiced by the alleged expansion of Mr. McLaughlin's expert testimony because discovery has closed and the time has passed for Defendant to depose Mr. McLaughlin with regard to those subjects and hire its own expert in that regard. Defendant also argues that Plaintiffs' failure is unjustified given that Plaintiffs had multiple opportunities to supplement Mr. McLaughlin's expert report prior to responding to Defendant's Renewed Motion for Summary Judgment.

Additionally, Defendant argues that Plaintiffs were on notice of their duty to disclose any such expansion.

Defendant also asserts that Mr. McLaughlin's fourth affidavit is not mere rebuttal evidence, as Defendant never designated an expert on the above subjects and disclosed all of its evidence relevant to alternative sites in its initial Motion for Summary Judgment filed on November 28, 2006.

Defendant also asserts that portions of Mr. McLaughlin's fourth affidavit are inadmissible because they constitute hearsay or speculation, are not based on his personal knowledge, or contain legal arguments and conclusions. Specifically, Defendant takes issue with Mr. McLaughlin's assertions that Defendant's expert had to recalculate data to achieve desired results, that the authors of certain studies were required to support a particular conclusion, that there are genuine issues of material fact with regard to certain issues, and that Defendant's general permitting process is devoid of procedural safeguards and time limits.

Plaintiffs argue that Defendant was on notice that Mr. McLaughlin might determine if the ordinance at issue provides adequate alternative avenues of communication for sexually oriented adult uses. Plaintiff states

that their anticipation of a supplemental report in that regarding was based upon their expectation that Defendant might rely on such an expert. According to Plaintiffs, Defendant did not rely on such an expert, but rather relies on the affidavit of Marshall Plants, Geographic Information Systems Manager for Rome and Floyd County, regarding that issue. Plaintiffs contend that Defendant did not offer Plants as an expert witness or provide an expert report in that regard, but that Mr. Plant's affidavit and the associated exhibits evaluate alleged alternative avenues of communication. Plaintiffs assert that therefore they are not required to produce an expert or expert report in order to respond to Mr. Plant's affidavit. Plaintiffs contend that Mr. McLaughlin's fourth affidavit is merely a response to Mr. Plant's affidavit and is based on Mr. McLaughlin's own perception, rather than scientific, technical, or other specialized knowledge. Plaintiffs also contend that Part II of Mr. McLaughlin's fourth affidavit is integral to his secondary effects analysis.

Plaintiff also argues that McLaughlin was not required to speculate about the study results discussed in his fourth affidavit and the freedom of the researchers. Plaintiff contends that McLaughlin made those statements

based on the findings in those studies and other researchers' commentary on the work of Defendant's expert. Plaintiff also contends that Mr. McLaughlin's comments are supported by the adoption of adult ordinances by other government entities prior to the completion of studies regarding adult uses in those cities.

For the following reasons, the Court disregards the portions of Mr. McLaughlin's fourth affidavit discussing subject matter beyond possible secondary adverse effects of adult businesses, as well as those portions containing inadmissible hearsay, speculation, conclusory statements, legal conclusions, and legal arguments.

First, the Court concludes that Mr. McLaughlin's fourth affidavit improperly expands the opinions set forth in his expert report. Plaintiffs have identified Mr. McLaughlin as their expert witness in this case, and therefore must comport with the disclosure deadlines and requirements of Rule 26 and Local Rule 26. Plaintiffs filed Mr. McLaughlin's expert report on December 8, 2006, and filed three supplements to that report, the last of which was filed on August 6, 2007. Throughout this litigation, Plaintiffs have represented that Mr. McLaughlin will testify regarding the issue of adverse

secondary effects and adult businesses, and Mr. McLaughlin's expert report and three supplements focused on that subject. Plaintiffs filed Mr. McLaughlin's fourth affidavit on November 20, 2007, long after Defendant filed Mr. Plants' affidavit on November 27, 2006, and after the close of discovery. In his fourth affidavit, Mr. McLaughlin expanded his testimony to other areas of land use planning and alternative avenues of communication. Any such material change or addition to Mr. McLaughlin's testimony is untimely and unjustified at this point in the litigation, when Defendant may not depose Mr. McLaughlin on the new subject matter, and long after the time for disclosure of expert testimony and rebuttal testimony has expired.

Additionally, the Court is not convinced that Plaintiffs are merely offering Mr. McLaughlin's testimony as a fact witness and to rebut the affidavit of Mr. Plants. The Court agrees with the parties that Mr. Plants was not offered as an expert witness and observes that Mr. Plants is the Geographic Information Manager for Rome and Floyd County. (See generally Aff. of Marshall Plants.) Mr. Plants averred to the distances between certain parcels in Floyd County, including the property at issue.

(Id.)[3] In his fourth affidavit, however, Mr. McLaughlin goes beyond simply stating the distances between parcels and discusses land use planning with regard to the segregation of adult businesses. Furthermore, the fact that Defendant did not offer an expert on those subject areas and Plaintiffs' notice to Defendants that Mr. McLaughlin may be retained to testify regarding those subjects does not excuse Plaintiffs' failure to amend Mr. McLaughlin's expert testimony in a timely manner, or allow Plaintiffs to enter such testimony at this late date.

Second, the Court concludes that the majority of the remaining sections of Mr. McLaughlin's fourth affidavit contains hearsay, conclusory statements, legal conclusions, and legal arguments. In his fourth affidavit, Mr. McLaughlin cites and discusses testimony given by Defendant's expert in other cases, and speculates that Defendant's expert recalculated data to achieve a desired result and that the authors of other studies were required to support a particular conclusion. Mr. McLaughlin makes conclusory

[3] To the extent that Mr. Plants concludes that any such parcels are "legally available to sexually oriented businesses," the Court observes that Mr. Plants is making a legal conclusion, and the Court will not consider those determinations. Likewise, Mr. McLaughlin's statements in his fourth affidavit that there are genuine issues of material facts with regard to Defendant's regulatory framework and segregation requirements are also improper legal conclusions.

statements discounting the Ordinance's predicate documents and studies as a whole. Mr. McLaughlin also restates and analyzes law review articles and case law. Such testimony is not within the personal knowledge of Mr. McLaughlin, and constitutes hearsay, speculation, and legal arguments. Similarly, Mr. McLaughlin's statements that certain Floyd County processes are "devoid of procedural safeguards" and time limits, and his repeated assertions that "genuine issues of material fact" remain with regard to certain issues constitute impermissible legal conclusions, rather that facts within his personal knowledge.

The Court therefore concludes that Plaintiffs are attempting to supplement Mr. McLaughlin's expert report without substantial justification and to Defendant's detriment, and also concludes that Mr. McLaughlin's fourth affidavit contains improper hearsay, legal conclusions, and legal arguments which the Court will not consider when ruling on the parties' instant cross-Motions for Summary Judgment.

2. Additional Affidavits and Evidence

Defendant argues that Plaintiffs failed to disclose other evidence during discovery and thus that additional evidence is admissible. Defendant

asserts that Plaintiffs failed to disclose Thomas Griffith, Rosa Dupree, Roger Webber, and Ed Deters as witnesses in Plaintiffs' initial disclosures and later supplements. Defendant contends that Mr. Griffith and Ms. Dupree's affidavits cannot be used for impeachment purposes because those affidavits do not disprove or cast doubt on Mr. Martin's affidavit. Defendant also contends that Plaintiffs attempt to use evidence provided by Mr. Webber and Mr. Deters to prove activities by Defendant's counsel in a separate, unrelated case, and therefore that evidence also is irrelevant. According to Defendant, the letters exchanged between Mr. McLaughlin and Mr. Deters were not disclosed during discovery and thus are inadmissible.

Defendant also asserts that portions of Mr. Craton's first affidavit, and Mr. Griffith, Ms. Dupree, Mr. Webber, and Michael Ashley's affidavits are inadmissible because they constitute hearsay or speculation, are not based on the affiants' personal knowledge, or contain legal arguments and conclusions. Additionally, in its reply brief, Defendant also objects to Mr. Craton's second affidavit as untimely, irrelevant, and containing inadmissible hearsay. Mr. Craton's second affidavit was filed after Defendant's Motion to Disregard and after Plaintiffs filed their response to that Motion. Defendant

further contends that portions of Kevin Poe's deposition are inadmissible as legal conclusions or were not based on Mr. Poe's personal knowledge, and contends that Plaintiffs' counsel questioned Mr. Poe on subjects that were beyond the scope of issues about which Defendant designated Mr. Poe to discuss.

Plaintiffs argue that Defendant was provided with notice of the documents from Mr. Webber and Mr. Deters by the issuance of Plaintiffs' Subpoena Duces Tecum and that Plaintiffs were denied those documents due to Defendant's attorney's objection in that regard. Plaintiffs also argue that the affiants at issue properly state what others told them and how those statements had meaning in the context in which they were uttered. According to Plaintiffs, the affiants are not speculating, but are "stating first-hand knowledge of what individuals' statements conveyed to them." (Pls.' Resp. Def.'s Mot. Disregard at 6-7.) Plaintiffs assert that it is generally accepted that statements in affidavits are presumed to be made on personal knowledge and contend that Defendant has not cited to any evidence indicating the contrary with regard to the affidavits at issue. Plaintiffs also assert that statements regarding what other people told the affiant are

offered for impeachment purposes. With regard to Mr. Craton's first affidavit, Plaintiffs argue that "It doesn't matter whether or not its true that James Martin looked forward to coming back as a customer. It matters that he knew that Craton was opening an adult store." (Id. at 10.) Plaintiffs contend that the newspaper articles attached to Mr. Craton's first affidavit also are not offered for the truth of the matters discussed therein, but to show that it was common knowledge in the community that the property at issue was going to house an adult store. Likewise, Plaintiffs contend that Ms. Dupree's statement regarding what she was told by Mr. Poe was offered to show Mr. Poe's state of mind. Plaintiffs also argue that Defendant designated Mr. Poe to represent Floyd County as its deponent, and that it was part of Mr. Poe's job to offer the legal interpretations to which Defendant objects.

As an initial matter, the Court observes that Plaintiffs did not identify Mr. Griffith, Ms. Dupree, Mr. Webber, or Mr. Deters as individuals likely to have discoverable information in Plaintiffs' Initial Disclosures. Plaintiffs have not addressed this issue, and have not argued that those witnesses are used solely for impeachment purposes, or that Plaintiffs' failure to list those witnesses on Attachment A to their Initial Disclosures was substantially

justified or harmless. The Court therefore concludes that Plaintiffs failed to identify those witnesses as required by Rule 26(a) and, pursuant to Rule 37(c)(1), Plaintiffs may not use those witnesses to supply evidence with regard to the instant cross-Motions for Summary Judgment, at a hearing, or at a trial in this case. Consequently, the Court grants Defendant's Motion to Disregard as to the affidavits of Mr. Griffith, Ms. Dupree, Mr. Webber, and Mr. Deters and any exhibits thereto. The Court next addresses the affidavits of Mr. Craton and Mr. Ashley, and the deposition testimony of Mr. Poe.

For the following reasons, the Court disregards portions of Mr. Craton and Mr. Ashley's affidavits, and portions of Mr. Poe's deposition.

First, the Court concludes that paragraphs 5, 10, 15, 24, 25, 28, 29, and 31 of Mr. Craton's first affidavit contain impermissible hearsay, speculation, legal conclusions, and legal arguments. In paragraphs 5 and 31, Mr. Craton makes statements regarding Floyd County ordinances and their applicability and avers to the role and actions of the Rome/Floyd County Planning Commission. Similarly, in paragraphs 10 and 15, Mr. Craton recounts his attorney's legal analysis of Floyd County regulations. Those statements constitute legal conclusions and information not within Mr.

Craton's personal knowledge, and Plaintiffs have not explained why Mr. Craton is competent to testify to such matters. Furthermore, to the extent they are offered for the truth of the matter asserted, Mr. Craton's statements regarding what his attorney told him constitute impermissible hearsay and Plaintiffs have not explained how that information could be reduced to admissible evidence at trial. The Court therefore concludes that the above statements constitute legal conclusions and legal arguments and thus those portions of the Mr. Craton's first affidavit do not comport with Rule 56(e).

In paragraph 24, Mr. Craton makes a statement about the meaning of James Martin's alleged statement to Mr. Craton. Similarly, in paragraphs 25 and 31, Mr. Craton avers to the knowledge of Floyd County officials and their motives in enacting the ordinance at issue. Those statements constitute speculation by Mr. Craton, and do not involve information within Mr. Craton's personal knowledge. Plaintiffs argue that Mr. Craton merely is stating his personal opinion about what individuals' statements conveyed to him. The Court, however, observes that, pursuant to Rule 56(e), affidavits must be made on personal knowledge. Mr. Craton's beliefs as to the meaning of a person's statement, what others were aware of, and the motives of others

do not constitute facts within his personal knowledge. The Court therefore concludes that the above statements constitute inadmissible hearsay and speculation.

Additionally, the two newspaper articles attached as exhibits to Mr. Craton's first affidavit constitute hearsay, as they were written in 2006, and do not fall within one of the hearsay exceptions, such as the ancient document exception illustrated in Federal Rule of Evidence 901(b)(8).[4] Plaintiffs argue that the articles are not offered for the truth of what they report, but are offered to show that it was common knowledge that Plaintiffs would open an adult store on the property at issue. Contrary to Plaintiffs' assertion, Plaintiffs are offering the newspaper articles for the truth of the matter asserted--the knowledge of those quoted in the article. Plaintiffs also have not stated a valid exception to the hearsay rule, nor have Plaintiffs explained how the information contained in those articles could be reduced to admissible evidence. The Court therefore concludes that those articles are inadmissible hearsay.

---

[4] Federal Rule of Evidence 901(b)(8) explains that documents which have been in existence for twenty years or more may be authenticated and may be admissible as an exception to the rule excluding hearsay. See Fed. R. Evid. 901(b)(8) (citing ancient documents as example of hearsay evidence which can be authenticated).

The Court observes that the parties have not fully briefed the Court with regard to Mr. Craton's second affidavit, but the Court also will not consider portions of Mr. Craton's second affidavit which constitute hearsay and speculation, which are not based on his personal knowledge, and which constitute legal conclusions and arguments.

Second, the Court concludes that paragraph 5 of Mr. Ashley's affidavit contains impermissible speculation. In paragraph 5, Mr. Ashley avers that other employees of the Rome/Floyd County Building Inspection Department were aware that Plaintiff planned to open an adult bookstore in the property at issue. The Court therefore concludes that the above statement constitutes speculation by Mr. Ashley, and does not involve information within his personal knowledge.

Third, the Court concludes that portions of Mr. Poe's deposition constitute legal conclusions and may not be considered by the Court with regard to the parties' cross-Motions for Summary Judgment. The Court agrees with Defendant that the portions of Mr. Poe's deposition in which he testifies to the legal meaning of the laws at issue and other legal terms and to their effect on the property at issue constitute legal conclusions. The

Court is not convinced that Mr. Poe's position as Floyd County Manager allows the Court to consider such legal conclusions with regard to the parties' pending cross-Motions for Summary Judgment.

The Court, however, disagrees with Defendant that Mr. Poe's deposition testimony regarding Attorney Bergthold's participation in creating the ordinance at issue is clearly not within Mr. Poe's personal knowledge. The Court has reviewed Mr. Poe's deposition testimony regarding that subject and Mr. Poe does not indicate that he has no knowledge of that issue. The Court does not consider whether that testimony is relevant with regard to the parties' cross-Motions for Summary Judgment, but concludes that there is no reason to disregard that testimony at this time. The Court also disagrees with Defendant's argument that Plaintiffs could not question Mr. Poe with regard to subject matter outside the scope of Plaintiffs' 30(b)(6) Notice of Deposition. See King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995); accord Cabot Corp. v. Yamulla Enters., Inc., 194 F.R.D. 499, 500 (M.D. Pa. 2000). This issue, however, does not change the above analysis or the Court's decision to disregard the above testimony. The Court therefore concludes that only the portions of Mr. Poe's testimony which

constitute legal conclusions may not be considered by the Court with regard to the parties' cross-Motions for Summary Judgment.

The Court therefore concludes that Mr. Craton and Mr. Ashley's affidavits contain improper hearsay, speculation, legal conclusions, and legal arguments which the Court will not consider when ruling on the parties' instant cross-Motions for Summary Judgment. The Court also concludes that the portions of Mr. Poe's deposition testimony which constitute legal conclusions should be disregarded.

3. Summary

Consequently, the Court grants in part and denies in part Defendant's Motion to Disregard. The Court grants Defendant's Motion to Disregard as to the portions of Mr. McLaughlin's fourth affidavit discussed supra Part II.C.1., and will disregard his discussion of subject matter beyond possible adverse secondary effects of adult businesses, and those portions of his fourth affidavit containing inadmissible hearsay, legal conclusions, and legal arguments. The Court grants Defendant's Motion to Disregard as to the portions of Mr. Craton and Mr. Ashley's affidavits, and Mr. Poe's deposition discussed supra Part II.C.2., and denies that Motion with regard to Mr. Poe's

deposition testimony regarding Attorney Bergthold's participation in creating the ordinance at issue.

III. Standard Governing Cross-Motions for Summary Judgment

As an initial matter, the Court observes that both parties have filed Motions for Summary Judgment. The Court first addresses the standard for such cross summary judgment motions and then addresses those Motions.

"When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." Gart v. Logitech, Inc., 254 F.3d 1334, 1338-39 (Fed. Cir. 2001). Because both Plaintiffs and Defendant have filed Motions for Summary Judgment, the Court must consider those Motions separately. The Court first addresses Defendant's Renewed Motion for Summary Judgment, and then addresses Plaintiffs' cross-Motion for Summary Judgment.

IV. Defendant's Renewed Motion for Summary Judgment

A. Factual Background

Keeping in mind that when deciding a motion for summary judgment, the Court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion, the Court provides the following statement of facts. See Harris v. Coweta County, Ga., 433 F.3d 807, 811 (11th Cir. 2005), rev'd on other grounds, 127 S. Ct. 1769 (2007). This statement does not represent actual findings of fact. Jones v. Am. Gen. Life Ins. Co., 370 F.3d 1065, 1069 n.1 (11th Cir. 2004) (citing Wooden v. Bd. of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1271 n.9 (11th Cir. 2001)). Instead, the Court has provided the statement simply to place the Court's legal analysis in the context of this particular case or controversy.

1. Parties

Plaintiff High Five Investments, LLC ("High Five") is a Georgia limited liability company licensed to do business in the State of Georgia. (Compl. ¶ 1.)

Plaintiff Shannon Video, Inc. ("Shannon Video") d/b/a Entice Adult Superstore and Entice Movies and Novelties ("Entice") is a Georgia corporation licensed to do business in the State of Georgia. (Compl. ¶ 2.)

Defendant Floyd County, Georgia ("Floyd County") is a political subdivision of the State of Georgia. (Compl. ¶ 3.)

2. Establishment of High Five and Entice

On July 5, 2005, Charles Craton signed a Commercial Purchase and Sale Agreement to purchase the property located at 5561 New Calhoun Highway for $322,500. (Craton Aff. ¶¶ 7-8.) In October 2005, High Five purchased the above property with the specific intention of opening an adult retail store on the premises. (Id. ¶ 11.) On behalf of High Five, Mr. Craton hired Tom Griffith to perform extensive remodeling work on a vacant building located on the property. (Id. ¶¶ 6, 12.)

On December 20, 2005, Floyd County issued High Five a Building Permit to renovate the above property. (Compl ¶ 23; Answer Ex. C.) On February 9, 2006, Floyd County issued High Five a Certificate of Occupancy. (Compl. ¶ 23; Answer Ex. D.)

High Five spent $200,000 renovating the buildings in order to lease the property to Entice. (High Five Aff. ¶ 6.) High Five committed to a twenty-one year mortgage agreement for $435,000 for the property, including monthly payments of $4,500. (Id. ¶ 5.) It then leased the building in which Entice is located to Shannon Video for use as an adult bookstore for twenty-one years at a monthly rental rate of $5,000. (Id. ¶ 7.) High Five and Shannon Video owe their investors over $107,000. (Id. ¶ 8.)

Entice opened for business on May 2, 2006. (Compl. ¶ 23.) Plaintiffs' store is within 1,000 feet of several parcels zoned S-R or suburban residential. (Def.'s Statement of Material Facts ("DSMF") ¶ 5; Pls.' Resp. Def.'s Statement of Material Facts ("PRSMF") ¶ 5.)[5] One parcel that is 385 feet from Plaintiffs' building is zoned S-R and is occupied by a residence that

[5] The Court observes that Plaintiffs admit that one parcel is within 1,000 feet of their store and then argue that the sites are more remote due to features of the area and argue that the distance should not be measured by a straight line. Pursuant to Local Rule 56.1 B.(2), a response to a movant's statement of undisputed facts shall contain concise, nonargumentative responses, and the Court will deem the movant's facts admitted unless the respondent directly refutes those responses with concise responses supported by specific cites to evidence, states a valid objection to the admissibility of the movant's facts or points out that the movant's facts are not material or fail to comply with the local rule. N.D. Ga. 56.1B.(2)(a)(1)-(2). Plaintiffs response is argumentative and otherwise does not comport with Local Rule 56.1 B.(2). Additionally, the method of measuring distances between parcels is not at issue in this case and, with regard to O.C.G.A. § 36-60-3, is established by State law. Consequently, the Court deems the above fact admitted.

was built in 1984. (DSMF ¶ 6; PRSMF ¶ 6.)[6] Another parcel located 407 feet from Plaintiffs' building is zoned S-R. (DSMF ¶ 7; PRSMF ¶ 7.)[7] One parcel that is 936 feet from Plaintiffs' building is zoned S-R and is occupied by a residence that was built in 1972. (DSMF ¶ 8; PRSMF ¶ 8.)[8]

3. O.C.G.A. § 36-60-3

The Georgia General Assembly amended O.C.G.A. § 36-60-3 in its 1997 regular session, as described in the act's preamble:

> AN ACT to amend Code Section 36-60-3 of the Official Code of Georgia Annotated, relating to the restriction of adult bookstores and movie houses to certain areas, so as to define certain terms; to prohibit the location of an explicit media outlet or adult movie house within 1,000 feet of a school building, school grounds, college campus, public place of worship, or area zoned primarily for residential use; to provide for applicability; to authorize more

---

[6] Plaintiffs admit the above fact, but reference their response to paragraph 5 of Defendant's Statement of Material Facts. For the reasons set forth supra note 5, the Court deems the above fact admitted.

[7] Plaintiffs admit that the above referenced parcel may be located 407 feet from their building, and reference their response to paragraph 5 of Defendant's Statement of Material Facts. For the reasons set forth supra note 5, the Court deems the above fact admitted.

[8] Plaintiffs admit that the above referenced parcel may be zoned S-R, and reference their response to paragraph 5 of Defendant's Statement of Material Facts. Plaintiffs, however, do not cite evidence directly refuting the zoning classification of the above referenced parcel. For the reasons set forth supra note 5, the Court deems the above fact admitted.

stringent local restrictions; to provide an effective date; to repeal conflicting laws; and for other purposes.

1999 Ga. Laws 305, pmbl. Section 2 of the act indicates that it "shall become effective on July 1, 1997." Id. § 1.

O.C.G.A. § 36-60-3 provides as follows:

(a) As used in this Code section, the term:

(1) "Adult bookstore" means any commercial establishment in which is offered for sale any book or publication, film, or other medium which depicts sexually explicit nudity or sexual conduct.

(2) "Adult movie house" means any movie theater which on a regular, continuing basis shows films rated "X" by the Motion Picture Coding Association of America or any movie theater which presents for public viewing on a regular, continuing basis so-called "adult films" depicting sexual conduct.

(3) "Explicit media outlet" means any commercial establishment which has an inventory of goods that is composed of at least 50 percent of books, pamphlets, magazines, or other printed publications, films, or other media which depict sexually explicit nudity or sexual conduct.

(4) "Sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is female, breast which, to the average person, applying contemporary community

standards, taken as a whole, lacks serious literary, artistic, political, or scientific value and predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity or sex.

(5) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals or pubic area with less than a full opaque covering or the depiction of covered or uncovered male genitals in a discernibly turgid state which, to the average person, applying contemporary community standards, taken as a whole, lacks serious literary, artistic, political, or scientific value and predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity or sex.

(b) The governing authority of each county and municipal corporation is authorized to enact, for their respective jurisdictions, ordinances which shall have the effect of restricting the operation of adult bookstores, explicit media outlets, and adult movie houses to areas zoned for commercial or industrial purposes; provided, however, that no explicit media outlet or adult movie house shall be located within 1,000 feet of any school building, school grounds, college campus, public place of worship, or area zoned primarily for residential purposes. As used in this subsection, the term "school building" shall apply only to public or private school buildings. The distance requirement provided in this subsection for explicit media outlets and adult movie houses shall not apply to said locations which hold lawful permits or business licenses on July 1, 1997. In determining the distance requirements provided for in this Code section, the measurement shall be from the closest property line on which the adult bookstore, explicit media outlet, or adult movie house is located to the closest property line on which the school, college, religious institution, public place of worship, or area zoned primarily for residential purposes is located. Nothing in this

> Code section shall be construed so as to prohibit the adoption by the governing authority of any county or municipality of restrictions relating to the location of adult bookstores, explicit media outlets, and adult movie houses which are more stringent than the requirements of this Code section.
>
> (c) Any person, firm, or corporation violating any ordinance enacted pursuant to subsection (b) of this Code section shall be guilty of a misdemeanor. Each day of operation in violation shall be deemed a separate offense.

O.C.G.A. § 36-60-3.

4. Floyd County Ordinances

On May 23, 2006, the Floyd County Commission (the "Commission") enacted its Ordinance Establishing Licensing Requirements and Regulations for Sexually Oriented Businesses (the "Ordinance"). (Compl. ¶ 27; Answer ¶ 27, Ex. A (certified copy of Ordinance Establishing Licensing Requirements and Regulations for Sexually Oriented Businesses adopted on May 23, 2006, "Ordinance").) The Ordinance's preamble states that:

> **WHEREAS**, sexually oriented businesses require special supervision from the public safety agencies of the County in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the County; and
>
> **WHEREAS**, the Board of Commissioners finds that sexually oriented businesses, as a category of establishments,

are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, as a category of establishments, have deleterious secondary effects and are often associated with crime and adverse impacts on surrounding properties; and

WHEREAS, the Board of Commissioners desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from crime; preserve the quality of life; preserve the character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, the County recognizes its constitutional duty to interpret, construe, and amend its laws to comply with constitutional requirements as they are announced; and

WHEREAS, with the passage of any ordinance, the County and the Board of Commissioners accept as binding the applicability of general principles of criminal and civil law and procedure and the rights and obligations under the United States and Georgia Constitutions, Georgia Code, and the Georgia Rules of Civil and Criminal Procedure; and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the U.S. Constitution or the Georgia Constitution, but to enact legislation to further the content-neutral governmental interests of the County, to wit, the controlling of secondary effects of sexually oriented businesses.

(Ordinance at 1-2.)

Section 1 of the Ordinance, regarding the rationale and findings of the Commission's adoption of the Ordinance, provides:

> (a) Purpose. It is the purpose of this ordinance to regulate sexually oriented businesses in order to promote the health, safety, moral, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County. The provisions of this ordinance have neither the purpose nor the effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material.
>
> (b) Findings and Rationale. Based on evidence of the adverse secondary effects of adult uses presented in hearings and in reports made available to the Board of Commissioners, and on findings, interpretations, and narrowing constructions incorporated in the cases of City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002); City of Erie v. Pap's A.M., 529 U.S. 277 (2000); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), Young v. American Mini Threatres, 427 U.S. 50 (1976)[;] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); California v. LaRue, 409 U.S. 109 (1972); and
>
> Artistic Entertainment, Inc. v. City of Warner Robins, 331 F.3d 1196 (11th Cir. 2003); Artistic Entertainment, Inc. v. City of Warner Robins, 223 F.3d 1306 (11th Cir. 2000); Williams v. Pryor, 240 F.3d 994 (11th Cir. 2001); Williams v. A.G. of

Alabama, 378 F.2d 1232 (11th Cir. 2004); Gary v. City of Warner Robins, 311 F.3d 1334 (11th Cir. 2002); Ward v. County of Orange, 217 F.3d 1350 (11th Cir. 2000); Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999); David Vincent, Inc. v. Broward County, 200 F.3d 1325 (11th Cir. 2000); Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998); Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11th Cir. 1999); This That And The Other Gift and Tobacco, Inc. v. Cobb County, 285 F.3d 1319 (11th Cir. 2002); DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997); Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982); International Food & Beverage Systems v. Ft. Lauderdale, 794 F.2d 1520 (11th Cir. 1986); Gammoh v. City of La Habra, 395 F.3d 1114 (9th Cir. 2005); World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186 (9th Cir. 2004); Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir. 2003); and

Fairfax MK, Inc. v. City of Clarkston, 274 Ga. 520 (2001); Morrison v. State, 272 Ga. 129 (2000); Sewell v. Georgia, 233 S.E.2d 187 (Ga. 1977), dismissed for want of a substantial federal question, 435 U.S. 982 (1978) (sexual devices); Flippen Alliance for Community Empowerment, Inc. v. Brannan, 601 S.E.2d 106 (Ga. Ct. App. 2004); Oasis Goodtime Emporium I, Inc. v. DeKalb County, 272 Ga. 887 (2000); Chamblee Visuals, LLC v. City of Chamblee, 270 Ga. 33 (1998); World Famous Dudley's Food & Spirits, Inc. v. City of College Park, 265 Ga. 618 (1995); Airport Bookstore, Inc. v. Jackson, 242 Ga. 214 (1978);

and based upon reports concerning secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Austin, Texas - 1986; Indianapolis, Indiana - 1984; Garden Grove, California - 1991; Houston, Texas - 1983, 1997; Phoenix, Arizona - 1979, 1995-98; Chattanooga, Tennessee - 1999-2003; Minneapolis, Minnesota - 1980; Los Angeles, California - 1977; Whittier, California - 1978; Spokane, Washington - 2001; St. Cloud, Minnesota - 1994; Littleton,

Colorado - 2004; Oklahoma City, Oklahoma - 1986; Dallas, Texas - 1997; Greensboro, North Carolina - 2003; Amarillo, Texas - 1977; New York, New York Times Square - 1994; and the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses, (June 6, 1989, State of Minnesota),

the Board of Commissioners finds:

(1) Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects, including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.

(2) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.

(3) Each of the foregoing negative secondary effects constitutes a harm which the County has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the County's interest in regulating sexually oriented businesses extends to preventing future secondary effects of either current or future sexually oriented businesses that may locate in the County. The County finds that the cases and documentation

> relied on in this ordinance are reasonably believed to be relevant to the secondary effects.

(Ordinance § 1 (emphasis in original).)

The Ordinance defines "sexually oriented business" as "an 'adult bookstore or adult video store,' and 'adult cabaret,' and 'adult motion picture theater,' a 'semi-nude model studio,' a 'sexual device shop,' or a 'sexual encounter center.'" (Ordinance § 2.) "Adult bookstores" and "adult video stores" are defined by the Ordinance as,

> a commercial establishment which, as one of its principal business activities, offers for sale or rental for any form of consideration any one or more of the following: books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, digital video discs, slides, or other visual representations which are characterized by their emphasis upon the display of "specified sexual activities" or "specified anatomical areas."

(Id.) A commercial establishment is considered to have such a "principal business activity" if the establishment:

> (a) has a substantial portion of its displayed merchandise which consists of said items, or
>
> (b) has a substantial portion of the wholesale value of its displayed merchandise which consists of said items, or
>
> (c) has a substantial portion of the retail value of its displayed merchandise which consists of said items, or

> (d) derives a substantial portion of its revenues from the sale or rental, for any form of consideration of said items, or
>
> (e) maintains a substantial section of its interior business space for the sale or rental [of] said items; or
>
> (f) maintains an "adult arcade," which means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are regularly maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are characterized by their emphasis upon matter exhibiting "specified sexual activities" or specified "anatomical areas."

(Id.)[9] Pursuant to the Ordinance, "substantial" means "at least thirty-five percent (35%) of the item(s)." (Id.)

Section 4 of the Ordinance requires operators and employees of sexually oriented businesses to obtain a sexually oriented business license and sexually oriented business employee license, respectively. (Ordinance § 4(a)-(b).) Pursuant to Section 5 of the Ordinance, regarding the issuance of such licenses, upon the filing of a completed application for a sexually

---

[9] "Specified sexual activity" means: "intercourse, oral copulation, masturbation or sodomy;" or "excretory functions as a part of or in connection with any of the activities described . . . above." (Ordinance § 2.) "Specified anatomical areas" are defined as: "[l]ess than completely and opaquely covered: human genitals[;] pubic region; buttock; and female breast below a point immediately above the top of the areola;" and "[h]uman male genitals in a discernibly turgid state, even if completely and opaquely covered." (Id.)

oriented business license or employee license, the Clerk shall immediately issue a Temporary License to the applicant which will expire upon the final decision of the County to deny or grant an annual license. (Id. § 5(a), (b).) Section 5 requires the Clerk to issue a business license unless:

> (1) An applicant is less than eighteen (18) years of age.
>
> (2) An applicant has failed to provide information required by this ordinance for issuance of a license or has falsely answered a question or request for information on the application form.
>
> (3) The license application fee required by this ordinance has not been paid.
>
> (4) The sexually oriented business, as defined herein, is not in compliance with the interior configuration requirements of this ordinance or is not in compliance with locational requirements of this ordinance or the location requirements of any other part of the Floyd County Code.
>
> (5) Any sexually oriented business in which the applicant has had an influential interest, has, in the previous (5) years (and at a time during which the applicant had the influential interest):
>
> > (i) been declared by a court of law to be a nuisance; or
> >
> > (ii) been subject to an order of closure or padlocking.

> (6) An applicant has been convicted of or pled guilty or nolo contendere to a specified criminal activity, as defined in this ordinance.

(Id. § 5(a)(1)-(6).) The Ordinance sets forth similar criteria for the issuance of an employee license. (Id. § 5(b).) Additionally, within twenty days of the filing of a completed application for the above licenses, the Clerk shall either issue a license to the applicant or issue a written notice of intent to deny a license to the applicant. (Id. § 5(a), (b).) A sexually oriented business license is subject to an initial $100 licensing fee and an annual renewal fee of $50. (Id. § 6(a).) Likewise, a sexually oriented business employee license is subject to an initial $50 licensing fee and an annual renewal fee of $25. (Id.)

Pursuant to Section 11 of the Ordinance, if such licenses are denied, suspended, or revoked, the Clerk shall notify the applicants and specify a hearing date not more than twenty days after the notice regarding the action. (Ordinance § 11(a).) At such a hearing, the respondent shall have the opportunity to present his or her arguments, to be represented by counsel, to present evidence and witnesses, and to cross-examine the Clerk's witnesses. (Id.) The Clerk shall bear the burden of proving the grounds

upon which the action was taken. (Id.) The hearing officer shall issue a written decision within five days after the hearing. (Id.) If the decision denies, suspends, or revokes the license at issue, the decision will not take effect for thirty days, and the decision shall advise the respondent of his or her right to appeal the decision to a court. (Id.) If such a court action is filed, the Clerk shall immediately issue the respondent a Provisional License which will expire upon the court's entry of a judgment. (Id. § 11(b).)

Section 13 of the Ordinance, regarding hours of operation, states that "[n]o sexually oriented business shall be or remain open for business between 12:00 midnight and 6:00 a.m. on any day." (Ordinance § 13.)

Section 17 of the Ordinance, regarding the applicability of the Ordinance to existing businesses, provides:

> All existing sexually oriented businesses and sexually oriented business employees are hereby granted a De Facto Temporary License to continue operation or employment for a period of ninety (90) days following the effective date of this ordinance. By the end of said ninety (90) days, all sexually oriented businesses and sexually oriented business employees must conform to and abide by the requirements of this ordinance.

(Ordinance § 17 (emphasis in original).)

Section 18 of the Ordinance prohibits the following conduct, in relevant part:

> It is unlawful for a sexually oriented business to knowingly violate the following regulations or to knowingly allow an employee or any other person to violate the following regulations.
>
> (a) It shall be a violation of this ordinance for a patron, employee, or any other person to knowingly or intentionally, in a sexually oriented business, appear in a state of nudity, regardless of whether such public nudity is expressive in nature.
>
> (b) It shall be a violation of this ordinance for a person to knowingly or intentionally, in a sexually oriented business, appear in a semi-nude condition unless the person is an employee who, while semi-nude, remains at least six (6) feet from any patron or customer and on a stage at least eighteen (18) inches from the floor in a room of at least one thousand (1,000) square feet.
>
> (c) It shall be a violation of this ordinance for any employee who regularly appears semi-nude in a sexually oriented business to knowingly or intentionally touch a customer or the clothing of a customer on the premises of a sexually oriented business.
>
> (d) it shall be a violation of this ordinance for any person to sell, use, or consume alcoholic beverages on the premises of a sexually oriented business.
>
> (e) It shall be a violation of this ordinance for any person to knowingly allow a person under the age of eighteen (18) years on the premises of a sexually oriented business.

(Ordinance § 18(a)-(e).)

Section 21 of the Ordinance, regarding the location of sexually oriented businesses, provides:

> (a) It shall be unlawful to establish, operate, or cause to be operated a sexually oriented business in Floyd County, unless said sexually oriented business is at least:
>
> (1) 1000 feet from any parcel occupied by another sexually oriented business or by a business licensed by the State of Georgia to sell alcohol at the premises; and
>
> (2) 1000 feet from any parcel occupied by a church, house of worship, public or private elementary or secondary school, public park, or from any parcel zoned S-R (Suburban Residential), LT-R (Low Density Traditional Residential), HT-R (High Density Traditional Residential), D-R (Duplex Residential), M-R (Multi-family Residential), and A-R (Agricultural Residential).
>
> . . .
>
> (c) Nonconforming Uses. Notwithstanding anything to the contrary in the Floyd County ordinances or the Unified Land Development Code of Floyd County and the City of Rome, a sexually oriented business that does not conform to this Section 21 but which was legally established and lawfully operating under local and state law prior to the effective date of this ordinance may continue to operate for two (2) years following that date in order to make a reasonable recoupment of its investment in the real property at the current location. At the conclusion of said two (2) years, the use will no longer be recognized as a lawful nonconforming use, and shall be terminated unless an extension of time has been granted, upon a showing of financial hardship, pursuant to the procedure set forth in the following subsection (d). An application for an extension based upon financial hardship ("hardship exception") shall be filed at least sixty (60)

days, and not more than one hundred eighty (180) days, before the conclusion of the initial two-year (2-yr.) period.

(d) Procedure for Seeking Hardship Extension. An application for a hardship extension shall be filed in writing with the Clerk and shall state the grounds for requesting an extension of time. Within ten (10) days after receiving the application, the Clerk shall schedule a public hearing on the application before the Hearing Officer, which public hearing shall be conducted within thirty (30) days after the Clerk's receipt of the application. Notice of the time and place of such public hearing shall be mailed to the applicant, shall be published at least ten (10) days before the hearing in a newspaper of general circulation published within the County, and shall contain the particular location for which the hardship extension is requested. At the hearing, all parties shall have the right to offer testimony, documentary and tangible evidence bearing on the issues; may be represented by counsel, and shall have the right to confront and cross-examine witnesses. The Hearing Officer shall issue a written decision within ten (10) days after the public hearing on the application for a hardship extension. An extension under the provisions of this Section 21 shall be for a reasonable period of time commensurate with the investment involved, and shall be approved only if the hearing officer makes all of the following findings or such other findings as are required by law.

(i) The applicant has made a substantial investment, including but not limited to lease obligations incurred in an arms-length transaction, in the property or structure on or in which the nonconforming use is conducted; such property or structure cannot be readily converted to another, conforming use; and such investment was made prior to the effective date of this ordinance; and

(ii) The applicant will be unable to recoup said investment as of the date established for termination of the use; and

(iii) The applicant has made good faith efforts to recoup the investment and to relocate the use to a location in conformance with this Section 21.

(Ordinance § 21 (emphasis in original).)

Additionally, Floyd County Code § 2-19-7, regarding zoning, states, in relevant part:

(8) *Nonconforming use.* Any lawful use of land or buildings existing on the effective date of this chapter, or on the effective date of any subsequent amendment thereto, and located within a zoning district in which it would not be permitted as a new use under this chapter, is hereby declared to be a nonconforming use. Continuance of a nonconforming use shall be subject to all of the following provisions.

a. *Change of use.* A nonconforming use shall not be changed to any use except a conforming use. When a nonconforming use has been changed to a conforming use, it shall not be changed again to any nonconforming use.

b. *Extension or structural alteration.* A nonconforming use of land and/or a structure housing a nonconforming use shall not be extended or enlarged except in conformity with this chapter. This provision shall not be construed as preventing normal maintenance and repairs.

c. *Destruction.* A building or property containing a nonconforming use which is damaged by fire, flood, explosion, wind or other catastrophe in any amount equal to or greater than sixty (60) percent of the total property value . . . shall not be reconstructed except in conformity with the provisions of this chapter.

> d. *Discontinuance.* When a nonconforming use of any land or building has been discontinued for a period of twelve (12) consecutive months, it shall not be reestablished or changed to any use not in conformity with the provisions of this chapter.

(Pl.'s [sic] Mot. Summ. J. Ex. 13 (Floyd County Code § 2-19-7(8)) (emphasis in original).)

5. McLaughlin Affidavits

The Court observes that Plaintiffs have filed four affidavits by their expert Robert Bruce McLaughlin. The Court has reviewed the relevant affidavits and their numerous exhibits. In the interest of judicial economy and producing a timely Order, the Court simply summarizes those affidavits below. As an initial matter, for the reasons set forth supra Part II, the Court will not consider those portions of Mr. McLaughlin's affidavits which contain inadmissible hearsay, speculation, legal conclusions, and legal arguments.

a. First McLaughlin Affidavit

In his first affidavit, Mr. McLaughlin discusses several of the predicate documents cited in the Ordinance and attached as exhibits to Defendant's Answer. (See generally McLaughlin Aff. I.) According to Mr. McLaughlin, the following three of those documents contain no first-hand research, but

rely on the findings of earlier documents and misrepresent those documents: the 1989 Report of the Attorney General's Working Group On the Regulation of Sexually Oriented Businesses, the 1996 Environmental Research Group Report, and the 1994 St. Cloud, Minnesota document. (Id. ¶ 34.)

Specifically, Mr. McLaughlin criticizes the 1989 Report of the Attorney General's Working Group On the Regulation of Sexually Oriented Businesses as misstating a 1978 St. Paul, Minnesota study, (id. ¶¶ 36-38), and criticizes the 1996 Environmental Research Group Report for summarizing the above Minnesota Attorney General's report and also mischaracterizing the 1978 study, (id. ¶¶ 40-41).[10] According to Mr. McLaughlin, the 1989 Minnesota Attorney General's report could not rely on the underlying study to conclude that adult businesses negatively impacted surrounding areas because the underlying study itself included both sexually oriented businesses and businesses serving alcohol, and determined that no conclusions could be drawn specifically addressing sexually oriented businesses. (Id. ¶¶ 36-38.)

[10] The Court observes that the Environmental Research Group Report is not cited as a predicate document in the Ordinance itself. (See generally Ordinance.)

Mr. McLaughlin avers that three additional documents cited in the Ordinance are studies prepared for an adult use or are academic articles, but does not explain why those studies are not applicable to the Ordinance or are inaccurate. (McLaughlin Aff. I ¶ 42.) Mr. McLaughlin also states that local government studies prepared through the mid 1980s would not have considered any off-site only adult uses. (Id. ¶ 44.)[11]

According to Mr. McLaughlin, the 1994 New York Times Square study and 1994 New York City study[12] did not find any evidence of harm caused by adult uses. (McLaughlin Aff. ¶ 46.) However, the Court has reviewed the 1994 Times Square study, and observes that the following findings were reported:

> • All survey respondents acknowledged the improvements in the area and voiced optimism about the future of Times Square even as they bemoaned the increase of adult establishments on Eighth Avenue. Many respondents felt that some adult establishments could exist in the area, but their growing number and their concentration on Eighth Avenue

[11] For the reasons set forth in the Court's March 5, 2007, Order, the Court declines to distinguish between on-site and off-site sexually oriented businesses in this case. (See Order of Mar. 5, 2007, at 74-76.)

[12] The Court observes that the 1994 New York City Study is not cited as a predicate document in the Ordinance itself. (See generally Ordinance.)

constitute a threat to the commercial prosperity and residential stability in the past few years.

• Although the study was unable to obtain data before the recent increase in adult establishments and, thus, unable to show if there's been an increase in actual complaints, there were, in fact, 118 complaints made on Eighth Avenue between 45th and 48th compared to 50 on the control blocks on Ninth Avenue between 45th and 48th. In addition, the study reveals a reduction in criminal complaints the further one goes north on Eighth Avenue away from the major concentration of these establishments.

• The rate of increase of total assessed values of the Eighth Avenue study blocks increased by 65% between 1985 and 1993 compared to 91% for the control blocks during the same period. Furthermore, acknowledging the many factors that lead to a property's increased value, including greater rents paid by some adult establishments, an assessment of the study blocks reveal that the rates of increases in assessed value for properties with adult establishments is greater than the increase for properties on the same blockfront without adult establishments.

• Many property owners, businesses, experts and officials provided anecdotal evidence that proximity (defined in various degrees) to adult establishments hurts businesses and property values.

(Answer Ex. B-26 at ii-iii (1994 Report on the Secondary Effects of the Concentration of Adult Use Establishments in the Times Square Area).)

Mr. McLaughlin also criticizes Dr. McCleary's Kennedale, Texas, analysis for failing to analyze the city's off-site adult video store, and for

instead analyzing crime before and after the opening of an adult bookstore in Montrose, Illinois. (McLaughlin Aff. I ¶ 48.) The Court observes that in his Kennedale report, Dr. McCleary reviews studies from several other cities in support of his theory that off-site sexually oriented businesses have the same crime-related secondary effects as similar on-site businesses. (Answer B-25 at 12-20.)[13] According to Mr. McLaughlin, he has come close to replicating Dr. McCleary's "post" Montrose analysis, but was unable to replicate Dr. McCleary's "pre" analysis. (McLaughlin Aff. I ¶ 49.) Mr. McLaughlin also criticizes the methodology used by Dr. McCleary in the above studies. (Id. ¶¶ 50-52, 57, 59.)

Mr. McLaughlin also criticizes the 2001 Spokane, Washington documents cited in the Ordinance as based on "self-selected comments and hearsay assertions." (McLaughlin Aff. ¶ 65.) The Spokane Documents include anecdotal evidence of criminal activity and negative impacts to the value of nearby businesses due to the opening of an adult bookstore. (Def.'s Answer Ex. B-15b (Minutes Spokane City Plan Commission) (including

[13] The Court observes that the Ordinance does not reference Dr. McCleary's Montrose, Illinois, or Kennedale, Texas studies. (See generally Ordinance.) Rather, those studies are referenced in Dr. McCleary's affidavit and expert report in this case. (See Aff. and Expert Report of Richard McCleary, Ph.D. ("McCleary Aff.").)

public testimony by neighboring business owners of female employees being rudely accosted, bookstore loiterers throwing rocks through windows or otherwise threatening people when asked to leave neighboring business premises, clientele with young children complaining, decrease in clientele, negative reactions from prospective business purchasers, increase in late-night activity in adult bookstore parking lot, possibly including prostitution, and exposure of children to pornography).) According to Mr. McLaughlin, he has studied the property values surrounding adult business in the Spokane, and determined that there is no evidence of decreased property values in the area around the four adult businesses at issue. (Id. ¶¶ 67, 69-74.) Mr. McLaughlin, however, did find a statistically significant higher overall percentage of occupant turnover in the area around those four businesses than in control group areas. (Id. ¶ 75-76.) Mr. Mclaughin also concluded that the subject areas are economically healthy based on the percentage of owner occupied properties and property turnover. (Id. ¶¶ 77-82.)

Finally, in Exhibits B and F to his first affidavit, Mr. McLaughlin discusses contradictory and inconclusive findings regarding local government adult use studies and summarizes secondary effects analyses

of take-home only adult video stores, respectively. (See generally McLaughlin Aff. I Exs. B & F.) The Court observes that Plaintiffs do not cite to or discuss those Exhibits in their combined summary judgment brief. It is not the responsibility of the Court to ferret through the extensive record in this case for support of Plaintiffs' position. Estate of Moreland v. Dieter, 395 F.3d 747, 759 (7th Cir. 2005) (stating that court will not scour record to locate evidence supporting party's legal argument and that perfunctory or undeveloped arguments are waived); Chattooga Conservancy v. Jacobs, 373 F. Supp. 2d 1353, 1376 (N.D. Ga. 2005) (stating that it is not court's responsibility to ferret out information contained in a massive record). Nevertheless, the Court has reviewed those documents and determines that they do not provide sufficient applicable evidence contradicting all of the rationales, findings, and studies set forth in the Ordinance. The Court observes that some of the studies reviewed in Exhibit B are inconclusive with regard to adverse secondary effects and thus do not contradict the Commission's findings or cited studies, examine sexually oriented businesses and businesses serving alcohol together and therefore are not applicable to the Ordinance at issue, or quote a mere paragraph from the

studies without summarizing the studies' overall findings in any meaningful fashion. (See McLaughlin Aff. I Ex. B.) The Court also observes that Exhibit F only addresses the issues of blight, "police data," and property values. (See Id. Ex. F.) Furthermore, for the reasons set forth in the Court's March 5, 2007, Order, the Court declines to distinguish between on-site and off-site sexually oriented businesses in this case. (See Order of Mar. 5, 2007, at 74-76.)

b. Second and Third McLaughlin Affidavits

In his second and third affidavits, Mr. McLaughlin discusses research and reports produced by Dr. McCleary, with regard to sexually oriented businesses in Los Angeles, California, and Sioux City, Iowa.[14] (See generally McLaughlin Aff. II; McLaughlin Aff. III.) Those affidavits and studies are discussed extensively in the Court's August 29, 2007, Order denying Plaintiffs' Motion to Strike Affidavit and Expert Report of Richard McCleary and for Sanctions Against Defendant. (Order of Aug. 29, 2007.) The Court adopts its discussion of those studies as if fully set forth herein.

[14] The Court observes that the Ordinance does not reference Dr. McCleary's studies of either city. (See generally Ordinance.) Rather, those studies are referenced in Dr. McCleary's affidavit and expert report in this case. (See McCleary Aff.)

c. Fourth McLaughlin Affidavit

In his fourth affidavit, Mr. McLaughlin discuses the location of Plaintiffs' store and alternative avenues of communication in Floyd County, the Ordinance's predicate documents, Dr. McCleary's affidavit and expert report and other work, and "foreign" studies and documents. (See generally McLaughlin Aff. IV.) For the reasons set forth supra Part II.C.1., the Court disregards the portions of Mr. McLaughlin's fourth affidavit discussing subject matter beyond possible adverse secondary effects of adult businesses, and those portions containing inadmissible hearsay, speculation, legal conclusions, and legal arguments.

According to Mr. McLaughlin, all of the studies cited in the Ordinance examine the alleged secondary effects of sexually oriented businesses located in urban environments and none of the studies examine businesses located in an entirely rural area. (McLaughlin Aff. IV ¶ 51.) Mr. McLaughlin criticizes Dr. McCleary's expert report with regard to the assumptions made by Dr. McCleary in his work. (Id. ¶¶ 60-66.) Mr. McLaughlin again criticizes Dr. McCleary's Montrose, Illinois, study. (Id. ¶¶ 69, 72, 92-94.) According to Mr. McLaughlin, Dr. McCleary also incorrectly stated in his affidavit and

expert report that the majority of adult uses in Greensboro, North Carolina, were take-out only businesses. (Id. ¶ 80-81.)[15] Similarly, Mr. McLaughlin avers that Dr. McLeary has not been consistent with regard to whether there are on-site or off-site adult uses in Garden Grove, California. (Id. ¶ 82-90.)[16] Mr. McLaughlin reiterates his objections to Dr. McCleary's Los Angeles work. (Id. ¶¶ 131, 133, 137.)[17]

Additionally, according to Mr. McLaughlin, a study of adult uses in St. Paul, Minnesota, published in April 1978 shows that there is no relationship between sexually oriented businesses and neighborhood deterioration. (McLaughlin Aff. IV ¶¶ 159, 162, 163, 166-167.)

Finally, Mr. McLaughlin makes conclusory statements discounting the Ordinance's predicate documents as a whole and without providing details

---

[15] For the reasons set forth supra Part II.C.1, the Court does not consider Mr. McLaughlin's legal conclusion regarding whether the above discrepancy creates a genuine issue of material fact.

[16] For the reasons set forth in the Court's March 5, 2007, Order, the Court declines to distinguish between on-site and off-site sexually oriented businesses in this case. (See Order of Mar. 5, 2007, at 74-76.)

[17] The issues raised by Plaintiffs regarding Dr. McCleary's Los Angeles work are discussed extensively in the Court's August 29, 2007, Order denying Plaintiffs' Motion to Strike Affidavit and Expert Report of Richard McCleary and for Sanctions Against Defendant. (Order of Aug. 29, 2007.) The Court adopts its discussion of those studies as if fully set forth herein.

or more specific explanations with regard to the individual documents. For the reasons discussed supra Part II.C.1., the Court will not consider such conclusory statements. Likewise, for those same reasons, the Court will not consider Mr. McLaughlin's summaries of case law and other legal sources.

6. Floyd County's Parcel Analysis

There are at least thirty-eight parcels in Floyd County that contain enough land to accommodate a sexually oriented business that is at least 1,000 feet away from any parcel occupied by one of the land uses mentioned in Section 21 of the Ordinance and from any parcel zoned for residential use. (DSMF ¶ 9; PRSMF ¶ 9.)[18] There are at least approximately 760 acres in Floyd County that are eligible for a sexually oriented business in that they are at least 1,000 feet away from any parcel occupied by one of the land uses

[18] Plaintiffs do not state valid objections to the above fact, but rather respond with legal conclusions and speculation. Additionally, for the reasons set forth supra Part II.C.1., the Court does not consider those portions of Mr. McLaughlin's affidavits cited by Plaintiffs as valid evidentiary support for their objections. Consequently, Plaintiffs have not complied with Local Rule 56.1 and the Court deems the above fact admitted. The Court also concludes, however, that the results of this Order and the Court's determinations infra Part IV.D.2.b. would not change even if the Court accepted Plaintiffs' response as true and considered the portions of Mr. McLaughlin's fourth affidavit regarding alternative avenues of communication.

mentioned in Section 21 of the Ordinance and from any parcel zoned for residential use. (DSMF ¶ 10; PRSMF ¶ 10.)[19]

The total area of commercial and industrial zoned land in Floyd County is 11,767 acres. (DSMF ¶ 11; PRSMF ¶ 11.) The thirty-eight parcels and approximately 760 acres in Floyd County that are eligible for sexually oriented businesses under the Ordinance constitute approximately 6.5 percent of the commercial and industrial land in Floyd County. (DSMF ¶ 12; PRSMF ¶ 12.)[20]

Fourteen of the above parcels lack roadway frontage. (Plants Aff. ¶ 12.) However, twenty-four of the above parcels have roadway frontage and contain enough land to accommodate a sexually oriented business that is at least 1,000 feet away from any parcel occupied by one of the land uses mentioned in Section 21 of the Ordinance. (Id. ¶ 10.) Combined, those

[19] For the reasons set forth supra note 18, the Court also deems the above fact admitted and observes that the results of this Order and the Court's determinations infra Part IV.D.2.b. would not change even if the Court accepted Plaintiffs' response as true and considered the portions of Mr. McLaughlin's fourth affidavit regarding alternative avenues of communication.

[20] For the reasons set forth supra note 18, the Court also deems the above fact admitted and observes that the results of this Order and the Court's determinations infra Part IV.D.2.b. would not change even if the Court accepted Plaintiffs' response as true and considered the portions of Mr. McLaughlin's fourth affidavit regarding alternative avenues of communication.

parcels constitute approximately 227 acres, (id.), and approximately two percent of the commercial and industrial land in Floyd County, (id. ¶ 11).

Between March 2002 and May 2006, no sexually oriented or adult businesses operated in Floyd County. (DSMF ¶ 13; PRSMF ¶ 13.) Plaintiffs are the only operators of an adult business in Floyd County since May 2006. (DSMF ¶ 13; PRSMF ¶ 14.) Marshall Plants, the GIS Manager for Rome and Floyd County, does not know of any one else who has indicated an interest in operating a sexually oriented or adult business in Floyd County. (Plants Aff. ¶ 6.)

B. Procedural Background

On August 17, 2006, Plaintiffs filed their Verified Complaint for Declaratory Judgment, Preliminary and Permanent Injunction, Damages, and Attorneys Fees. (Compl.) Plaintiffs seek a judgment declaring O.C.G.A. § 36-60-3 unconstitutional, declaring the Ordinance unconstitutional, and awarding Plaintiffs damages, costs, and reasonable attorneys' fees. (Id.) Plaintiffs' Verified Complaint states the following counts: (1) count one alleges that the definitions of "adult bookstore," "explicit media outlet," and "sexual conduct" contained in O.C.G.A. § 36-60-3 are unconstitutionally

overbroad; (2) count two alleges that O.C.G.A. § 36-60-3 is an unconstitutional prior restraint of expression; (3) count three alleges that O.C.G.A. § 36-60-3 is an unconstitutional prior restraint of expression because it fails to assure sufficient alternative avenues of communication for sexually explicit expression; (4) count four alleges that Floyd County has no authority to enforce O.C.G.A. § 36-60-3; (5) count five alleges that O.C.G.A. § 36-60-3 is unconstitutionally vague; (6) count six alleges that the Ordinance is an unconstitutional prior restraint of expression; (7) count seven alleges that the Ordinance effectively denies adult businesses a reasonable opportunity to open and operate; (8) count eight alleges that the Ordinance cannot defeat Plaintiffs' vested property rights; (9) count nine alleges that the Ordinance violates Plaintiffs' rights to due process and just compensation under the Fifth Amendment and Plaintiffs' rights to just compensation under the Georgia Constitution; (10) count ten alleges that the Ordinance violates Plaintiffs' due process rights and allows Floyd County officials to act arbitrarily and with excessive discretion; and (11) count eleven alleges that Floyd County's licensing fees violate the Equal Protection Clause. (Id. ¶¶ 35-93.)

On October 2, 2006, Floyd County filed its Answer and multiple Exhibits. (Docket Entry Nos. 5-8.)

On October 27, 2006, Plaintiffs filed their Motion for Preliminary Injunction. (Docket Entry No. 9.)

On November 27, 2006, Defendant filed its initial Motion for Summary Judgment and opposition to Plaintiff's Motion for Preliminary Injunction. (Docket Entry Nos. 18 & 19.)

On March 5, 2007, the Court denied Plaintiffs' Motion for Preliminary Injunction and denied without prejudice Defendant's initial Motion for Summary Judgment, observing that Defendant could refile its Motion for Summary Judgment at the close of discovery. (Order of Mar. 5, 2007.)

On May 7, 2007, Defendant filed its Renewed Motion for Summary Judgment with regard to all of Plaintiffs' claims. (Docket Entry No. 59.) Defendant stated that its Renewed Motion for Summary Judgment is supported by previously-filed supporting materials and incorporated those materials by reference. (Id.)

On June 27, 2007, the Court granted in part Plaintiffs' Second Motion to Compel Discovery with regard to Plaintiffs' Interrogatories 1, 2, and 18,

and directed Plaintiffs to respond to Defendant's Renewed Motion for Summary Judgment following their receipt of those responses. (Order of June 27, 2007.)

On August 29, 2007, the Court denied Plaintiffs' Motion for Leave to File Motion to Strike Affidavit and Expert Report of Richard McCleary and for Sanctions Against Defendant, and directed Defendant to supplement Dr. McCleary's expert report and Plaintiff's Interrogatories 1, 2, and 18. (Order of Aug. 29, 2007.) The Court reopened discovery for twenty days after Defendant provided the above supplemental information to Plaintiff for the limited purpose of allowing Plaintiffs the opportunity of deposing Dr. McCleary and directed Plaintiffs to respond to Defendant's Renewed Motion for Summary Judgment following any such deposition or Plaintiffs' receipt of the above information. (Id.)

On November 19, 2007, Plaintiffs filed their cross-Motion for Summary and combined brief supporting Plaintiff's Motion and opposing Defendant's Renewed Motion for Summary Judgment. (Docket Entry No. 95.)

The briefing process for the parties' cross-Motions for Summary Judgment is complete and the Court finds that the parties' cross-Motions for Summary Judgment are ripe for resolution.

C. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) authorizes summary judgment when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party seeking summary judgment bears "the burden of demonstrating the satisfaction of this standard, by presenting 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' that establish the absence of any genuine, material factual dispute." Bochese v. Town of Ponce Inlet, 405 F.3d 964, 975 (11th Cir. 2005) (quoting Fed. R. Civ. P. 56(c)), cert. denied, 126 S. Ct. 377 (2005). Once the moving party has supported its motion adequately, the non-movant has the burden

of showing summary judgment is improper by coming forward with specific facts that demonstrate the existence of a genuine issue for trial. Castleberry v. Goldome Credit Corp., 408 F.3d 773, 786 (11th Cir. 2005).

When evaluating a motion for summary judgment, the Court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Harris, 433 F.3d at 811. The Court also must "construe 'all reasonable doubts about the facts in favor of the non-movant.'" Michael Linet, Inc. v. Vill. of Wellington, Fla., 408 F.3d 757, 761 (11th Cir. 2005) (quoting Browning v. Peyton, 918 F.2d 1516, 1520 (11th Cir. 1990)). Further, "[i]ssues of credibility and the weight afforded to certain evidence are determinations appropriately made by a finder of fact and not a court deciding summary judgment." McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1240 n.7 (11th Cir. 2003). Finally, the Court does not make factual determinations. Jones, 370 F.3d at 1069 n.1 (citing Wooden, 247 F.3d at 1271 n.9).

D. Discussion

1. Claims Under O.C.G.A. § 36-60-3

As an initial matter, the Court observes that Plaintiffs make the following observation and admission before stating their arguments with regard to O.C.G.A. § 36-60-3:

> The Court has not held that Entice is and [sic] "adult bookstore," and not an "explicit media outlet." Nothing prevents Floyd County or the State of Georgia, either during the course of this litigation, or at some future time, from asserting that Entice does, in fact, meet the definition of "explicit media outlet." And the store does meet the statutory definition of "explicit media outlet" just as readily as it meets the definition of "adult bookstore."

(Pls.' Resp. Opp'n Def.'s Renewed Mot. Summ. J. at 4.)

a. Plaintiffs' Overbreadth Claims

In count one of their Verified Complaint, Plaintiffs allege that O.C.G.A. § 36-60-3's definitions of "adult bookstore," "sexual conduct," and "explicit media outlet" are overbroad. (Compl. ¶¶ 35-38.)

O.C.G.A. § 36-60-3 (the "Statute") defines "adult bookstore" as, "any commercial establishment in which is offered for sale any book or publication, film, or other medium which depicts sexually explicit nudity or

sexual conduct." O.C.G.A. § 36-60-3(a)(1). "Explicit media outlet" is defined as "any commercial establishment which has an inventory of goods that is composed of at least 50 percent of books, pamphlets, magazines, or other printed publications, films, or other media which depict sexually explicit nudity or sexual conduct." Id. § 36-60-3(a)(3). The Statute defines "sexual conduct" as,

> acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is female, breast which, to the average person, applying contemporary community standards, taken as a whole, lacks serious literary, artistic, political, or scientific value and predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity or sex.

Id. § 36-60-3(a)(4). Similarly, the Statute defines "sexually explicit nudity" as,

> a state of undress so as to expose the human male or female genitals or pubic area with less than a full opaque covering or the depiction of covered or uncovered male genitals in a discernibly turgid state which, to the average person, applying contemporary community standards, taken as a whole, lacks serious literary, artistic, political, or scientific value and predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity or sex.

Id. § 36-60-3(a)(5).

The Statute then authorizes counties and municipal corporations "to enact for their respective jurisdictions, ordinances which shall have the effect of restricting the operation of adult bookstores, explicit media outlets, and adult movie houses to areas zoned for commercial or industrial purposes." O.C.G.A. § 36-60-3(b). The Statute, however, provides "that no explicit media outlet or adult movie house shall be located within 1,000 feet of any school building, school grounds, college campus, public place of worship, or area zoned primarily for residential purposes." Id.

A statute is unconstitutional under the First Amendment doctrine of overbreadth upon a showing that the law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" Virginia v. Hicks, 539 U.S. 113, 118-19 (2003). Such a showing "invalidates *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" Id. (emphasis in original).

In Virginia v. Hicks, the United States Supreme Court explained that it "provided this expansive remedy out of concern that the threat of

enforcement of an overbroad law may deter or 'chill' constitutionally protected speech-especially when the overbroad statute imposes criminal sanctions," and because "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech-harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." 539 U.S. at 119 (citations omitted).

While the First Amendment protects non-obscene sexually explicit speech, it provides no protection to obscene speech or material. Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). Where a law regulates protected speech, but also legitimately regulates unprotected speech, there comes a point at which the chilling effect of an overbroad law on protected speech cannot justify prohibiting all enforcement of a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." Hicks, 539 U.S. at 119. The Supreme Court also explained in Hicks that,

> there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally

> unprotected speech . . . . To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech 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.

Id. at 119-20. (emphasis in original) (citations omitted). Additionally, "the overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact," that substantial overbreadth exists. Id. at 122 (quoting N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988)).

The Court addresses each of Plaintiffs' overbreadth claims below.

i. "Adult Bookstore"

In their Verified Complaint, Plaintiffs simply allege that the Statute's definition of "adult bookstore" is "unconstitutionally overbroad." (Compl. ¶ 36.)

Defendant argues that the above claim fails as a matter of law for the reasons set forth in the Court's March 5, 2007, Order denying Plaintiffs' Motion for Preliminary Injunction. Defendant also argues that there is no

case or controversy before the Court on this issue, and that the Statute's 1,000-foot rule does not apply to "adult bookstores."

Plaintiffs argue that the Statute's definition of "adult bookstore" is overbroad because the Statute enables counties to prohibit stores from operating outside commercial or industrial districts if they stock one book depicting sexually explicit nudity or sexual conduct. Plaintiffs also state that the Entice store meets the Statute's definition of "explicit media outlet" and therefore "the fact that the Statute does not impose the 1,000 foot limitation on 'adult bookstore' is of no consequence here, in regard to whether the Statute can be enforced against Entice." (Pls.' Resp. Opp'n Def.'s Renewed Mot. for Summ. J. at 4.)

Plaintiffs cite Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974), for the proposition that "[o]ne obscene book on the premises of a book store does not make an entire store obscene." 231 Ga. at 613, 203 S.E.2d at 157. In Sanders, the trial court issued an injunction closing a book store as a public nuisance due to three obscene publications, thus halting the future sale and distribution of other material which may not have been obscene. Id. The Supreme Court of Georgia held that "any statute or ordinance which

seeks to impose criminal or civil sanctions for the exercise of expression that is not obscene cannot withstand a proper constitutional attack for overbreadth." Id. at 614, 202 S.E.2d at 157.

For the following reasons, the Court concludes that no factual issues remain with regard to the above claim, and that, as a matter of law, O.C.G.A. § 36-60-3's definition of "adult bookstore" is not unconstitutionally overbroad or impacts Plaintiffs. Here, the plain language of the Statute clearly does not apply O.C.G.A. § 36-60-3's 1,000-foot locational limitation to "adult bookstores." Indeed, Plaintiffs concede this point in their response brief. Unlike the laws at issue in Sanders, Plaintiffs have failed to show how O.C.G.A. § 36-60-3 places any limitation or sanction whatsoever on the location or operation of "adult bookstores." With regard to "adult bookstores," O.C.G.A. § 36-60-3 simply authorizes counties and municipalities to enact ordinances which have the effect of restricting such venues to certain areas, but does not itself restrict the location or operation of "adult bookstores." Likewise, the Ordinance at issue here does not use the Statute's definition of "adult bookstore." Plaintiffs therefore have failed to show that the Statute threatens or deters protected free speech with

regard to adult bookstores and Plaintiffs' themselves. The Court therefore concludes that Plaintiffs' claim that O.C.G.A. § 36-60-3's definition of "adult bookstore" is unconstitutionally overbroad and that the Statute limits the location of such venues fails. Consequently, the Court grants Defendants' Renewed Motion for Summary Judgment with regard to the above claim.

ii. "Sexual Conduct"

In their Verified Complaint, Plaintiffs allege that the Statute's definition of "sexual conduct" is unconstitutionally overbroad because "it includes fully clothes [sic] conduct, any part of the female breast, and any part of the buttocks." (Compl. ¶ 38.)

Defendant argues that the Statue's definition of "sexual conduct" essentially defines obscenity under the test set forth by the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973). Defendant also asserts that the Statute does not prohibit depictions of the above conduct or any other speech, but simply sets forth a minimum state-wide standard for separating certain establishments from sensitive land uses. Defendants contend that the Statute does not affect protected speech and does not prohibit speech.

Plaintiffs argue that there is no applicable state law that defines the term "sexual conduct," as required by the Miller test, and state that the Statute's definitions of "sexual conduct" and "sexually explicit nudity" substantially track the Miller language.

Plaintiffs cite This That & The Other Gift & Tobacco, Inc. v. Cobb County, Georgia, 439 F.3d 1275 (11th Cir. 2006), for the proposition that there is no applicable State law defining sexual conduct because the United States Court of Appeals for the Eleventh Circuit held that O.C.G.A. § 16-12-80, regarding the distribution of obscene materials, was unconstitutional as written.[21] In the above case, the

[21] O.C.G.A. § 16-12-80 states, in relevant part:

(a) A person commits the offense of distributing obscene material when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so . . .

(b) Material is obscene if:

(1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;

(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and

(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E)

Eleventh Circuit held that O.C.G.A. § 16-12-80's complete ban on the advertising of sexual devices violated the First Amendment because it was

---

of this paragraph:

(A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(B) Acts of masturbation;

(C) Acts involving excretory functions or lewd exhibition of the genitals;

(D) Acts of bestiality or the fondling of sex organs of animals; or

(E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.

(c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.

. . .

(e) It is an affirmative defense under this Code section that dissemination of the material was restricted to:

(1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

(f) A person who commits the offense of distributing obscene material shall be guilty of a misdemeanor of a high and aggravated nature.

O.C.G.A. § 16-12-80.

more extensive than necessary, by including advertising to consumers lawfully entitled to purchase such products. Id. at 1280. The Eleventh Circuit's holding, however, did not turn on O.C.G.A. § 16-12-80's incorporation of the Miller test into its language. See generally 439 F.3d 1275.

For the following reasons, the Court concludes that no factual issues remain with regard to the above claim, and that, as a matter of law, O.C.G.A. § 36-60-3's definition of "sexual conduct" is not unconstitutionally overbroad. The Court is not persuaded by Plaintiffs' argument that there is no applicable law that defines the term "sexual conduct" as a result of the Eleventh Circuit's decision in This That & The Other Gift & Tobacco, Inc. O.C.G.A. § 36-60-3(a)(4) clearly defines that term. Additionally, in the above opinion, the Eleventh Circuit does not invalidate or even comment upon the use of the Miller language to define obscenity. Furthermore, the Statute's use of the Miller language to define "sexual conduct" and "sexually explicit nudity" limits the materials which meet those definitions to unprotected obscenity, and thus those terms do not include protected speech. The Court therefore concludes that Plaintiffs' claim that O.C.G.A. § 36-60-3's definition of "sexual

conduct" is unconstitutionally overbroad fails. Consequently, the Court grants Defendants' Renewed Motion for Summary Judgment with regard to the above claim.

iii. "Explicit Media Outlet"

In their Verified Complaint, Plaintiffs simply allege that the Statute's definition of "explicit media outlet" is "unconstitutionally overbroad." (Compl. ¶ 37.)

Defendant argues that the Statute's definition of "explicit media outlet" regulates unprotected speech--obscenity--and does not regulate a substantial amount of non-obscene speech. Defendant again cites the Court's March 5, 2007, Order to support its argument that Plaintiffs' overbreadth claim fails as a matter of law with regard to the above term.

Plaintiffs assert that the Statute's definition of "explicit media outlet" limits such establishments to those carrying materials meeting the definitions of "sexual conduct" or "sexually explicit nudity." According to Plaintiffs, the Statute limits its application exclusively to obscene materials and Defendants have not alleged or adduced evidence that Plaintiffs distribute obscene

materials. Plaintiffs assert that the Statute therefore is overbroad as to Plaintiffs' store and cannot be applied to Plaintiffs.

For the following reasons, the Court concludes that no factual issues remain with regard to the above claim, and that, as a matter of law, O.C.G.A. § 36-60-3's definition of "sexually explicit media" outlet is not unconstitutionally overbroad. For the reasons set forth supra Part IV.D.1.a.ii., the Court concludes that the Statute's definition of "sexual conduct" and "sexually explicit nudity" specifically refer to obscenity. The Court therefore agrees with Plaintiffs that the plain language of the Statute defines "explicit media outlet" as any commercial establishment with an inventory of at least fifty percent obscene media. In that respect, the Statute's 1,000-foot location restriction is limited to businesses with an inventory of at least fifty percent obscene goods; thus the Statute is only applicable to non-obscene goods to the extent that such goods are actually carried by "explicit media outlets." The Statute's 1,000-foot rule therefore does not punish a substantial amount of non-obscene, protected free speech when judged in relation to its legitimate application to unprotected obscenity. Nor have Plaintiffs shown that the Statute does not reflect legitimate state

interests in controlling constitutionally unprotected obscenity. Additionally, regardless of Defendant's allegations or evidence with regard to Plaintiffs' inventory, Plaintiffs have admitted that their store meets the statutory definition of "explicit media outlet," (Pls.'s Resp. Opp'n Def.'s Renewed Mot. for Summ. J. at 4), and therefore carries an inventory of at least fifty percent obscene media. The Court concludes that Plaintiffs have adduced no evidence either from the text of the Statute or from actual fact that O.C.G.A. § 36-60-3 limits a substantial amount of protected free speech with regard to "explicit media outlets," and Plaintiffs specifically. Consequently, Plaintiffs' claim that O.C.G.A. § 36-60-3's definition of "explicit media outlet" is unconstitutionally overbroad fails, and the Court grants Defendants' Renewed Motion for Summary Judgment with regard to the above claim.

b. The Statute Satisfies Constitutional Scrutiny

In count two of Plaintiffs' Verified Complaint, titled "O.C.G.A. § 36-60-3 Prior Restraint-Failure to Satisfy Constitutional Scrutiny," Plaintiffs allege that O.C.G.A. § 36-60-3 is content-based because its only purpose is to suppress speech, and that the Statute is not narrowly tailored to serve any compelling government interest. (Compl. ¶¶ 42-45.) In count two, Plaintiffs

further allege that, even if the Statute is not content-based, it is unconstitutional because it fails to satisfy the O'Brien test. (Id. ¶ 46.)

Defendant argues that the State has the authority to regulate the location of businesses to promote public health, safety, and welfare, and that the Statute's 1,000-foot location limitation regarding adult businesses serves a substantial government interest. Defendant also argues that the State's secondary effects interest in regulating the location of affected businesses is not related to the content of any protected speech that may be offered by such businesses. Defendant again contends that the Statute's location restriction is not overbroad because it does not regulate a substantial amount of protected free speech in relation to the legitimate regulation of unprotected obscenity. The Court observes that Plaintiffs fail to address Defendant's Renewed Motion for Summary Judgment with regard to count two of Plaintiffs' Verified Complaint.

As an initial matter, the Court observes that Plaintiffs label count two of their Verified Complaint as "prior restraint," but allege that the Statute is content-based and fails strict scrutiny. Such allegations are usually made under the First Amendment or the Fourteenth Amendment's Equal Protection

Clause. See R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 385 n.4 (1992); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-39 (1990). The Court therefore focuses on the actual issues alleged by Plaintiffs, rather than the label that Plaintiffs have assigned to count two.

The First Amendment protects non-obscene sexually explicit speech, but provides no protection to obscene speech or material. Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); Paris Adult Theatre I, 413 U.S. at 69. In R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, the Supreme Court observed that the First Amendment only imposes "a 'content discrimination' limitation upon a State's prohibition of proscribable speech." 505 U.S. 387. According to the Supreme Court, "[t]here is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be 'underinclusive,' it would not discriminate on the basis of content." Id. The R.A.V. Court then illustrated the above distinction as follows: "A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience-i.e., that which involved the most lascivious displays of sexual activity. But it may not prohibit, for example,

only that obscenity which includes offensive political messages." Id. at 388 (emphasis in original); see also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 576 (2001) (holding that, "[e]ven when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category. For example, a city may ban obscenity (because obscenity is an unprotected category), but it may not ban 'only those legally obscene works that contain criticism of the city government.'" (citation omitted)) .

Furthermore, where a law regulates protected speech, but also legitimately regulates unprotected speech, there comes a point at which the chilling effect of an overbroad law on protected speech cannot justify prohibiting all enforcement of a law that reflects "'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" Virginia, 539 U.S. at 119. According to the Supreme Court in Virginia v. Hicks,

> there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech . . . . To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we

> have insisted that a law's application to protected speech 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.

Id. at 119-120 (emphasis in original) (citations omitted). Additionally, "the overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact," that substantial overbreadth exists. Id. at 122 (quoting N.Y. State Club Ass'n, Inc., 487 U.S. at 14).

For the following reasons, the Court concludes that no genuine factual issues remain with regard to the above claim and that Plaintiffs have adduced no evidence showing that the Statute is a prior restraint or does not satisfy constitutional scrutiny.

First, Plaintiffs' failure to respond to Defendant's argument that it is entitled to summary judgment with regard to Plaintiffs' claim that O.C.G.A. § 36-60-3 is a prior restraint and fails to satisfy constitutional scrutiny constitutes Plaintiffs' abandonment of that claim. Under Local Rule 7.1 of the Northern District of Georgia, Defendant's Renewed Motion for Summary Judgment is unopposed on that ground. See N.D. Ga. R. 7.1; Welch v. Delta Air Lines, Inc., 978 F. Supp. 1133, 1137 (N.D. Ga. 1997) ("Plaintiff's failure

to respond to Defendant's argument alone entitles Defendant to summary judgment on these claims.").

Second, the Statute regulates obscenity, and does not discriminate against or in any way limit a content-defined subclass of obscenity. O.C.G.A. § 36-60-3's 1,000-foot rule applies to "explicit media outlets," such as Plaintiffs, and to "adult movie houses." Based on the Statute's definitions of those businesses, it is clear that such businesses deal in obscenity, but may also deal in non-obscene goods and films. However, an "explicit media outlet," by definition, has an inventory of at least fifty-percent obscene goods. O.C.G.A. § 36-60-3(a)(3). Similarly, an "adult movie house" shows "X" rated films on a regular, continuing basis. Id. § 36-60-3(a)(2). The Statute's 1,000-foot rule therefore only applies to those businesses dealing in a substantial amount of unprotected obscene media and films.

Furthermore, the Statute does not discriminate against or in any way limit a content-defined subclass of obscenity. Rather, O.C.G.A. § 36-60-3 simply limits the market where "explicit media outlets" and "adult movie houses" may peddle obscene goods and films--excluding such businesses from locating within 1,000 feet of any school building, school grounds,

college campus, public place of worship, or area zoned primarily for residential purposes. See O.C.G.A. § 36-60-3. Thus, O.C.G.A. § 36-60-3's 1,000-foot limitation on the location of such businesses near certain specific land uses is constitutional to the extent that the Statute regulates obscenity.

Fourth, Plaintiffs have not shown from the text of the Statute or from actual fact that O.C.G.A. § 36-60-3 limits a substantial amount of protected free speech. The Statute's 1,000-foot rule limits its definition of "explicit media outlets" and "adult movie houses" as discussed above; thus, the Statute is only applicable to non-obscene goods to the extent such goods are actually carried by those businesses. The Statute's 1,000-foot rule therefore does not punish a substantial amount of non-obscene, protected free speech when judged in relation to the 1,000-foot rule's legitimate application to unprotected obscenity. The Court agrees with Defendant that the State has the authority to regulate the location of businesses to promote public health, safety, and welfare, and Plaintiff has not shown that the Statute's 1,000-foot location limitation regarding adult businesses does not serve a substantial government interest. Consequently, O.C.G.A. § 36-60-3's 1,000-foot limitation on the location of "explicit media outlets" near certain

specific land uses is constitutional because the Statute does not regulate a substantial amount of protected free speech in relation to its legitimate regulation of unprotected obscenity.

For the above reasons, the Court concludes that no factual issues remain with regard to the above claim, and that O.C.G.A. § 36-60-3 is not a prior restraint and does not fail to satisfy constitutional scrutiny. Consequently, the Court grants Defendants' Renewed Motion for Summary Judgment with regard to the above claim.

c. County Enforcement of the Statute Does Not Violate Georgia Law

In count four of their Verified Complaint, Plaintiffs allege that Defendant "has no enforcement authority pursuant to O.C.G.A. § 36-60-3, and, therefore, cannot close Plaintiffs' business pursuant to said statute." (Compl. ¶ 52.)

Defendant cites the Court's March 5, 2007, Order denying Plaintiffs' Motion for Preliminary Injunction, to support its argument that the Statute authorizes local governments to enact regulations on the operation of certain adult businesses and confers on them the authority to punish violators of

such ordinances. Defendant also contends that it has not attempted to enforce the Statute, but merely maintains that the Statute forecloses Plaintiffs' claim that the operation of their store at its present location is or was lawful. Defendant argues that the lack of a specific enforcement provision in the Statute is not dispositive with regard to the State's ability to enforce the Statute, and that the Statute is not ambiguous. Defendants assert that there is no reason to look beyond the Statute's language or to draw inferences from the structure of the Georgia Code or the language of other Code sections.

Plaintiffs urge the Court to reconsider its Order of March 5, 2007, concluding that the Statute is enforceable by the State. Pursuant to Local Rule 7.2E., Motions for Reconsideration must be filed within ten days after entry of the order at issue. N.D. Ga. 7.2E. Plaintiffs did not file a Motion to Reconsider with regard to the Court's March 5, 2007, Order, and Plaintiffs' cross-Motion for Summary Judgment and brief were not filed until November 19, 2007. The Court therefore concludes that Plaintiffs' request for the Court to reconsider its March 5, 2007, Order is untimely. Nevertheless, the Court recognizes that the above issue impacts Plaintiffs' claim that they have a

vested right in their current use of the property and, in an abundance of caution, re-examines its prior ruling below.[22]

Plaintiffs argue that the Statute does not proscribe a penalty for violations of the Statute itself, but simply sets forth a penalty for violating an ordinance enacted pursuant to the Statute. Plaintiffs assert that the legislature clearly did not intend for the Statute itself to be enforced, and that neither the State nor Defendant can enforce the Statute itself. Plaintiffs point to the Statute's location in the Official Code of Georgia. According to Plaintiffs, no State powers are mentioned, referred to or granted by any other statutes set forth in Title 36, Chapter 60, and that those portions of the Georgia Code simply authorize local governments to enact ordinances. According to Plaintiffs, O.C.G.A. § 36-60-1 is the only statute in that Chapter directly enforceable by the State. Plaintiffs contend that, if the legislature had intended for the Statute itself to be enforced, then there would be no need for an ordinance to be enacted pursuant to the Statute, except for the purpose of enacting more stringent locational limitations.

---

[22] The Court will address Plaintiffs' claim that they have a vested right in their current use of the property infra Part IV.D.2.c.

Plaintiffs also argue that some Georgia communities have imposed less stringent restrictions than those required by the Statute and impose restrictions regarding uses not listed in the Statute. Plaintiffs then cite multiple ordinances enacted by other jurisdictions in Georgia, and note the differences between those ordinances and the Statute at issue. The Court observes that those ordinances are not before this Court, and are not implicated in this litigation. The Court therefore focuses only on the Statute and Ordinance at issue in this Order.

The preamble to O.C.G.A. § 36-60-3 states as follows:

> AN ACT to amend Code Section 36-60-3 of the Official Code of Georgia Annotated, relating to the restriction of adult bookstores and movie houses to certain areas, so as to define certain terms; to prohibit the location of an explicit media outlet or adult movie house within 1,000 feet of a school building, school grounds, college campus, public places of worship, or area zoned primarily for residential use; to provide for applicability; to authorize more stringent local restrictions; to provide an effective date; to repeal conflicting laws; and for other purposes.

1997 Ga. Laws 305, pmbl. Sections (b) and (c) of O.C.G.A. § 36-60-3 state that:

> (b) the governing authority of each county and municipal corporation is authorized to enact, for their respective jurisdictions, ordinances which shall have the effect of restricting the operation of adult bookstores, explicit medial outlets, and

> adult movie houses to areas zoned for commercial or industrial purposes; provided, however, that no explicit media outlet or adult movie house shall be located within 1,000 feet of any school building, school grounds, college campus, public place of worship, or area zoned primarily for residential purposes. As used in this subsection, the term "school building" shall apply only to public or private school buildings. The distance requirement provided in this subsection for explicit media outlets and adult movie houses shall not apply to said locations which hold lawful permits or business licenses on July 1, 1997. In determining the distance requirements provided for in this Code section, the measurement shall be from the closest property line on which the adult bookstore, explicit media outlet, or adult movie house is located to the closest property line on which the school, college, religious institution, public place of worship, or area zoned primarily for residential purposes is located. Nothing in this Code section shall be construed so as to prohibit the adoption by the governing authority of any county or municipality of restrictions relating to the location of adult bookstores, explicit media outlets, and adult movie houses which are more stringent than the requirements of this Code section.
>
> (c) Any person, firm, or corporation violating any ordinance enacted pursuant to subsection (b) of this Code section shall be guilty of a misdemeanor. Each day of operation in violation shall be deemed a separate offense.

O.C.G.A. § 36-60-3(b)-(c). Additionally, the Act indicates that the amended Statute shall become effective on July 1, 1997. 1997 Ga. Laws 305, § 2.

In Effingham County Board of Tax Assessors v. Samwilka, Inc., 278 Ga. App. 521, 629 S.E.2d 501 (2006), the Georgia Court of Appeals explained that,

> [w]ell-established principles of statutory construction require that the literal meaning of the words of a statute must be followed unless the result is an absurdity, contradiction, or such an inconvenience that it is clear that the legislature must have intended something else. We must seek to effectuate the intent of the legislature, OCGA § 1-3-1(a), and to give each part of the statute meaning and avoid constructions that make some language mere surplusage. All parts of a statute should be harmonized and given sensible and intelligent effect, because it is not presumed that the legislature intended to enact meaningless language.

278 Ga. App. at 522, 629 S.E.2d at 502; accord In re J.V., 282 Ga. App. 319, 321, 638 S.E.2d 757, 759 (2006).

For the following reasons, the Court concludes that no genuine factual issues remain with regard to the above claim, and Plaintiffs adduced no evidence that Defendant does not have authority to enforce an ordinance enacted under the Statute, that Defendant has attempted to enforce the Statute against Plaintiffs, or that the State may not enforce the Statute's 1,000-foot rule.

First, the Statute clearly authorizes counties and municipalities to enact restrictive ordinances regarding the operation of certain adult businesses, and then prescribes the appropriate punishment for violation of any such ordinance. The terms of O.C.G.A. § 36-60-3 are clear and manifest a

legislative intent to confer the authority to punish violators of such ordinances on the enacting counties and municipal corporations.

Second, according to Defendant, it has not attempted to enforce the Statute's provision that "no explicit media outlet or adult movie house shall be located within 1,000 feet of any school building, school grounds, college campus, public place of worship, or area zoned primarily for residential purposes," O.C.G.A. § 36-60-3(b), against Plaintiffs, and Plaintiffs have not shown otherwise.

Third, the State itself may lawfully enforce the above provision. The Court is not convinced that the legislature did not intend the Statute itself to be enforced, or that the State itself may not enforce O.C.G.A. § 36-60-3(b)'s 1,000-foot rule. The preamble to the Statute shows the clear intent of the legislature to amend O.C.G.A. § 36-60-3 to prohibit the location of "explicit media outlets" and "adult movie houses" within 1,000 feet of certain uses throughout the State, and to allow local authorities to enact more stringent restrictions, should they so choose. Section (b) of the Statute specifically sets forth how the distance requirement is to be measured and excludes businesses holding permits or licenses on July 1, 1997, the date the

amended Statute took effect. Plaintiffs urge the Court to construe the Statute in a way that would render the above provisions mere surplusage unless a local government enacts an ordinance restricting adult businesses to areas zoned for commercial or industrial purposes. The Court does not presume that the legislature intended to enact meaningless language, and observes that the State may seek to enjoin violators of the Statute regardless of whether the Statute provides for a specific penalty regarding the 1,000-foot rule. Additionally, the Court is not convinced that the Statue's location within the Official Code of Georgia or the contents of surrounding statutes require the Court to ignore the plain and literal meaning of O.C.G.A. § 36-60-3(b).

The Court therefore concludes that Plaintiffs have not shown that Defendant may not enforce an ordinance properly enacted under the Statute, that Defendant has attempted to enforce the Statute itself against Plaintiffs, or that the Statute's 1,000-foot rule is ineffective unless a county or municipality has enacted an ordinance pursuant to the Statute. Consequently, the Court grants Defendants' Motion for Summary Judgment with regard to the above count.

d. The Statute Does Not Fail to Assure Sufficient Alternative Avenues of Communication

In count three of their Verified Complaint, Plaintiffs allege that O.C.G.A. § 36-60-3 fails to assure sufficient alternative avenues of communication for sexually explicit expression and therefore is an unconstitutional prior restraint both facially and as applied to Plaintiffs. (Compl. ¶¶ 47-78.)

Defendant cites the Court's March 5, 2007, Order, denying Plaintiffs' Motion for Preliminary Injunction with regard to the above claim. Defendant argues that the above claim is irrelevant because the Statute's locational restrictions do not regulate a substantial amount of free speech in relation to the Statute's legitimate regulation of unprotected obscenity. Defendant also argues that the Statute's 1,000-foot rule applies State-wide and therefore the effect of the rule in one particular jurisdiction is not the measure of the Statute's facial constitutionality. Defendant also contends that there are numerous locations in Floyd County where adult businesses are permitted to operate. Finally, Defendants also argue that ordinances which are not at issue here are irrelevant to this litigation.

Plaintiffs assert that enforcement of the Statute itself would require all adult bookstores, explicit media outlets and adult movie houses in Georgia to be located only in areas zoned for commercial or industrial purposes, and also would require adult movie houses and explicit media outlets to be located 1,000 feet from other specified uses. Plaintiffs argue that the locational restrictions in the Statute cannot possibly leave alternative avenues of communication in every Georgia community. Thus, according to Plaintiffs, the Court must interpret the Statute to apply only to jurisdictions that choose to enact ordinances pursuant to the Statute.

For the following reasons, the Court concludes that no factual issues remain with regard to the above claim, and that Plaintiffs' claim that the Statute is an unconstitutional prior restraint and does not ensure sufficient alternative avenues of communication must fail.

First, the Court disagrees with Plaintiffs' interpretation of the Statute as requiring that all "adult bookstores," "explicit media outlets," and "adult movie houses" in Georgia be located only in areas zoned for commercial or industrial purposes. For the reasons discussed supra Part IV.D.1.c., the Court simply concludes that the Statute requires "explicit media outlets" and

"adult movie houses" be located 1,000 feet away from certain uses set forth in the Statute. While the Statute enables local authorities to pass ordinances restricting adult businesses to areas zoned for commercial or industrial purposes, it does not itself impose such a restriction.

Second, the Statute does not regulate a substantial amount of protected speech and need not assure sufficient alternative avenues of communication for the unprotected speech that it does regulate. Additionally, there is no evidence that the Statute's 1,000-foot rule discriminates against certain obscenity due to its content, and Plaintiffs have not alleged as much. For the reasons discussed supra Part IV.D.1.b, the Statute's 1,000-foot rule only applies to "explicit media outlets" and "adult movie houses"--businesses with an inventory of at least fifty-percent obscene media and films--and does not discriminate against that unprotected speech based on its content. Plaintiffs have not explained why the Statute, which regulates a majority of unprotected speech, must ensure that there are alternative avenues of communication for that unprotected speech.

Third, to the extent that the Statute impacts protected speech, the Court concludes that there are sufficient alternative avenues of

communication for the location of the businesses at issue in Floyd County. The Court observes that the Statute will only impact protected speech to the extent that such speech is present in the inventory carried by "explicit media outlets" and "adult movie houses," which by definition consists of at least fifty-percent obscene media and films. The Court is not persuaded that it must consider whether the Statute leaves alternative avenues of communication in every Georgia community. Rather, the Court adopts the approach used by other Courts ruling on similar state statutes and determines whether the Statute leaves sufficient alternative avenues of communication in the affected area--Floyd County. See Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180, 1213-13 (N.D. Ala. 2001) (stating that test is whether restrictions currently allow for alternative avenues of communication); Township of Saddle Brook v. A.B. Family Center, Inc., 156 N.J. 587, 596-97, 722 A.2d 530, 535 (1999) (examining whether state statute left alternative avenues of communication in relevant market area). For the reasons discussed infra Part IV.D.2.b, there are sufficient locations in Floyd County for the regulated businesses at issue. The Statute thus provides

sufficient alternative avenues of communication for adult businesses in Floyd County.

The Court therefore concludes that no factual issues remain with regard to the above claim, and that Plaintiffs claim that the Statute is an unconstitutional prior restraint and that there are not sufficient alternative avenues of communication in Floyd County for protected speech impacted by the Ordinance fails. Consequently, the Court grants Defendant's Motion for Summary Judgment with regard to the above claim.

e. The Statute is not Unconstitutionally Vague

In count five of their Verified Complaint, Plaintiffs allege that O.C.G.A. § 36-60-3 "contains terms that are so vague that persons of common intelligence must necessarily guess at their meaning and differ as to their application." (Compl. ¶ 53.)

Defendant argues that, based on the parties' briefs with regard to Plaintiffs' Motion for Preliminary Injunction, Plaintiffs' vagueness claim must fail. Defendant asserts that the Statute does not subject "adult bookstores" to any location limitation. Defendant also asserts that the terms "sexual conduct" and "sexually explicit nudity" permissibly incorporate the Miller test

within their definitions. The Court observes that Plaintiffs fail to address Defendant's Renewed Motion for Summary Judgment with regard to count five of Plaintiffs' Verified Complaint.

In Roth v. United States, 354 U.S. 476 (1957), the United States Supreme Court rejected arguments that federal and California obscenity statutes were imprecise and did not give adequate warning of the proscribed conduct where the statutes, respectively, made punishable the mailing of material that is "obscene, lewd, lascivious, or filthy," and the keeping for sale or advertising material that is "obscene or indecent." 354 U.S. at 491. Rather, the Supreme Court held that, where the above language applied to the materials according to their "impact upon the average person in the community" and whether it offended "the common conscience of the community by present-day standards," those statutes gave adequate warning of the proscribed conduct and marked sufficiently distinct boundaries for judges and juries to fairly administer the law. Id. at 490-491. The Roth Court also rejected the argument that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. Id. 491 n.30.

In Hamling v. United States, 418 U.S. 87 (1974), the Supreme Court restated its consistent holding that "the lack of precision is not itself offensive to the requirements of due process" and that the Constitution does not require impossible standards, but simply requires that the language "'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" 418 U.S. at 111 (citations omitted). The Hamling Court also repeated its statement in Roth that the fact that "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . ." Id. at 114-15 (quoting Roth, 354 U.S. at 491-92).

For the following reasons, the Court finds that no factual issues remain with regard to the above claim, and that the Statute is not unconstitutionally vague as a matter of law. Plaintiffs' failure to respond to Defendant's argument that it is entitled to summary judgment with regard to Plaintiffs' claim that O.C.G.A. § 36-60-3 is unconstitutionally vague constitutes Plaintiffs' abandonment of that claim. Under Local Rule 7.1 of the Northern District of Georgia, Defendant's Renewed Motion for Summary Judgment is

unopposed on that ground. See N.D. Ga. R. 7.1; Welch, 978 F. Supp. at 1137 ("Plaintiff's failure to respond to Defendant's argument alone entitles Defendant to summary judgment on these claims.").

Additionally, Plaintiffs leave the Court to simply guess as to which terms in the Statute Plaintiffs contend are unconstitutionally vague. In its March 5, 2007, Order, the Court interpreted Plaintiffs' brief with regard to their Motion for Preliminary Injunction as arguing that the Statute's use of the Miller language in its definitions of "sexual conduct" and "sexually explicit nudity" results in definitions that are so vague that vendors would not know whether their operations fall within the Statute and thus may be restricted to certain areas by the county or municipality in which their business is located. For the reasons set forth in the Court's March 5, 2007, Order, Plaintiffs have not shown that the Statute or its terms are so vague that persons of common intelligence must guess at their meaning. (See Order of March 5, 2007.) As discussed in Roth, the incorporation of the Miller test for obscenity into the above definitions and the possibility that reasonable juries could differ as to what materials appeal to a prurient interest do not make the definitions unconstitutionally vague on their face. Furthermore, Roth and Hamling

addressed due process notice requirements of statutes criminalizing the distribution of obscene materials, and Plaintiffs have not shown that, in a First Amendment context, the incorporation of the Miller test into a statute is substantially likely to result in unconstitutionally vague language.

For the reasons set forth above and in the Court's Order of March 5, 2007, the Court therefore concludes that no factual issues remain with regard to the above claim, and that Plaintiffs' claim that O.C.G.A. § 36-60-3 is unconstitutionally vague must fail. (See Order of Mar. 5, 2007.) Consequently, the Court grants Defendants' Renewed Motion for Summary Judgment with regard to the above claim.

2. Claims Regarding Floyd County Ordinance 2006-002A

a. The Ordinance Satisfies Constitutional Scrutiny

In count six of their Verified Complaint, titled "Unconstitutional Prior Restraint-Failure to Satisfy Constitutional Scrutiny," Plaintiffs allege that the Ordinance is a content-based restriction because Floyd County does not require business licenses for any businesses other than adult businesses. (Compl. ¶ 54.) Plaintiffs also contend that Defendant enacted the Ordinance in response to Plaintiffs' business, and thus the governmental interest was

related to suppressing free expression. (Id. ¶ 63.) Plaintiffs further allege that, if the Ordinance is not content-based, it fails the O'Brien intermediate scrutiny test because the studies cited in the Ordinance are not relevant to Defendant or Plaintiffs, and because the Ordinance is not narrowly tailored. (Id. ¶¶ 62, 64.) Plaintiffs contend that there is no evidence to support Defendant's rationale for enacting the Ordinance. (Id. ¶ 58.)

Defendant argues that the Ordinance is content-neutral and was adopted to combat the adverse secondary effects of sexually oriented businesses. Defendant adopts the discussion in the Court's March 5, 2007, Order regarding the level of scrutiny applicable to the Ordinance. Defendant also asserts that the Court should reject any effort by Plaintiffs to allege illicit motives on the part of legislators because such allegations do not support a determination that a regulation is content-based.

Defendant also argues that the Ordinance satisfies intermediate scrutiny. Defendant asserts that a regulatory licensing ordinance for conduct commonly associated with expression is constitutional if it requires a licensing decision in a brief period of time and allows for prompt judicial review of the decision. Defendant contends that it had authority to enact the

Ordinance under its police powers. Defendant also contends that it enacted the Ordinance based on legislative evidence reasonably believed to be relevant to the secondary effects of sexually oriented businesses. According to Defendant, Plaintiffs have failed to introduce evidence rebutting all the rationales and evidence upon which the Ordinance was based, and have only attempted to refute studies regarding crime and property values. Defendant argues that it did not require evidence which differentiated between off-site and on-site adult businesses, but that its evidence also supports the regulation of off-site adult bookstores due to adverse secondary effects. Defendant also contends that it has submitted additional documents supporting its rationale for regulating sexually oriented businesses, including off-site businesses. Defendant argues that its interest in preventing such adverse secondary effects is content-neutral, and that the Ordinance is narrowly tailored to serve that interest.

Defendant also argues that the ordinance is narrowly tailored.[23] According to Defendant, the Ordinance regulates conduct in three ways: (1)

[23] The Court observes that Plaintiffs and Defendant address the issue of alternative avenues of communication separately in their briefs. The Court therefore also addresses that issue separately in this Order infra Part IV.D.2.b.

prohibiting people from appearing totally nude, requiring semi-nude persons to remain on a stage at least six feet from patrons, and prohibiting such employees from knowingly touching patrons; (2) prohibiting sexually oriented businesses from operation between midnight and 6:00 a.m.; and (3) regulating where such businesses may operate. Defendant asserts, however, that Plaintiffs do not have standing to contest the first regulation because Plaintiffs claim that they operate a retail store and do not intend to have persons appear nude or semi-nude on their property. Nevertheless, Defendant also asserts that the above regulations are narrowly tailored and constitutional.

The Court observes that Plaintiffs do not address Defendant's arguments that the Ordinance should be reviewed under the O'Brien intermediate scrutiny test, but immediately assert that Defendant has failed to demonstrate that the Ordinance meets the second O'Brien factor. Plaintiffs also do not address the first, third, and fourth O'Brien factors, or Defendant's arguments regarding those factors.[24] Rather, Plaintiffs argue

[24] The Court observes that Plaintiffs and Defendant address the issue of alternative avenues of communication separately in their briefs. The Court therefore also addresses that issue separately in this Order infra Part IV.D.2.b.

that Defendant failed to demonstrate that the Ordinance furthers a substantial government interest. Plaintiffs assert that the studies upon which Defendant relied cannot be reasonably believed to be relevant to Floyd County. Plaintiffs contend that their store is located miles out of town on a rural state highway and far from any other business or residential developments. Plaintiffs also contend that Defendant relied on studies that did not distinguish between off-site and on-site adult businesses, and that the one study cited by Defendant which makes the above distinction cannot be replicated. Plaintiff assert that the Commissioners therefore could not reasonably rely on the studies referenced in the Ordinance to regulate Plaintiffs' store. Plaintiffs claim that Defendant's expert report regarding Floyd County is internally inconsistent and question the reliability of Dr. McCleary's discussion of various studies, including his own studies.

Plaintiffs cite Flanigan's Enterprises, Inc. of Georgia v. Fulton County, 242 F.3d 976 (11th Cir. 2001), for the proposition that a local government must demonstrate that it reasonably relied upon evidence relevant to the problem addressed, and cannot reasonably rely on foreign studies when its own data demonstrate that those studies are not relevant to local conditions.

In the above case, a county commissioned study of sexually oriented businesses selling alcohol in the area found that such businesses caused little or no secondary effects as compared to other businesses selling alcohol. Id. at 979-80. The county then adopted an ordinance restricting location and operation of adult businesses selling alcohol based on the secondary effects studies of other cities. Id. at 980-81. The Eleventh Circuit held that the county could not rely upon those remote studies to support its interest in combating adverse secondary effects when the county's own study demonstrated that those foreign studies were not relevant to local conditions. Id. at 986. The Eleventh Circuit explained that a municipality is not required to perform empirical studies before enacting restrictions on adult entertainment, but, once it has conducted such studies, it may not ignore the results. Id.

Plaintiffs also cite Abilene Retail #30 v. Board of Commissioners of Dickinson County, Kansas, 492 F.3d 1164 (10th Cir. 2007), for the proposition that foreign studies of urban environments are not applicable to entirely rural areas. In Abilene Retail #30, the Tenth Circuit found that a dispute of material fact existed as to whether Dickinson County officials

could reasonably believe that the cases and studies cited in the ordinance at issue were relevant to the county's interests. 492 F.3d at 1174. The court noted that, although a lack of local evidence was not preclusive, the evidence cited in the ordinance consisted of secondary effects studies of urban areas and were not applicable to the entirely rural area regulated. Id. at 1174-75. The Tenth Circuit observed that the sole adult business in Dickinson County was located on a highway pullout far from any business or residential area, and thus the foreign studies cited in the ordinance did not establish a minimal connection to the secondary effects attendant to Dickinson County's existing sexually oriented business. Id. at 1176.

i. Applicable Level of Scrutiny

As an initial matter, the Court observes that Plaintiffs' failure to respond to Defendant's argument that the Ordinance is a content-neutral regulation of the secondary effects associated with sexually oriented businesses constitutes Plaintiffs' abandonment of their claim that the Ordinance is content-based. Under Local Rule 7.1 of the Northern District of Georgia, Defendant's Renewed Motion for Summary Judgment is unopposed on that ground. See N.D. Ga. R. 7.1; Welch, 978 F. Supp. at 1137 ("Plaintiff's failure

to respond to Defendant's argument alone entitles Defendant to summary judgment on these claims."). In an abundance of caution, however, the Court examines the Ordinance to determine whether the ordinance is content-based or content-neutral, and to determine the applicable constitutional analysis.

Regulations that restrict protected expression based on its content are subject to strict scrutiny. Artistic Entm't, Inc. v. City of Warner Robbins, 223 F.3d 1306, 1308 (11th Cir. 2000) (citing City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (plurality opinion)). "[R]egulations that target undesirable secondary effects of protected expression are deemed content-neutral, and courts review them with an intermediate level of scrutiny known as the O'Brien test." Id. (citing City of Erie, 529 U.S. 277.)

To determine whether a given regulation that potentially limits speech is content-based or content-neutral, courts primarily look to the government's purpose in enacting the regulation. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The government's purpose

is the controlling consideration, and a regulation that serves purposes that are unrelated to the content of the expression is deemed neutral. Id. In that regard, courts are hesitant to inquire into legislators' motives, and will "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." U.S. v. O'Brien, 391 U.S. 367, 383 (1968).

For the following reasons, the Court concludes that no factual issues remain with regard to Plaintiffs' claim that Defendant's licensing Ordinance is content-based, and that the Ordinance is a content-neutral regulation of the secondary effects associated with sexually oriented businesses and is therefore subject to intermediate scrutiny.[25] The Ordinance itself states that its purpose is to regulate sexually oriented businesses in order to promote the health, safety, moral, and general welfare of Floyd County's citizens, and to prevent negative secondary effects of such businesses, including crime, prostitution, negative property values, and urban blight. The Ordinance also states that it is not intended to suppress protected speech or activities. Additionally, the Court is not persuaded by Plaintiffs' allegations of illicit

[25] For the reasons set forth in its March 5, 2007, Order, the Court concludes that the Ordinance at issue is a licensing scheme and therefore applies the O'Brien intermediate scrutiny test. (See Order of Mar. 5, 2007.)

motives by one Commissioner. The Court therefore finds that the Ordinance is a content-neutral regulation. Consequently, the Court analyzes the Ordinance under the O'Brien intermediate scrutiny test below.

ii. The Ordinance Satisfies Intermediate Scrutiny

Under Georgia law, "[a] county may enact regulations to protect the health, safety, and general welfare of the public under its police powers." Board of Comm'rs of Atkinson County v. Guthrie, 273 Ga. 1, 3, 537 S.E.2d 329, 331-32 (2000). Additionally, O.C.G.A. § 36-60-3 authorizes the governing authority of each county to enact ordinances restricting the operation of adult businesses. O.C.G.A. § 36-60-3(b).

Under United States v. O'Brien, 391 U.S. 367 (1968), a content-neutral restriction on speech is valid

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

391 U.S. at 377.

A government need not conduct its own studies or produce new evidence before enacting an ordinance regulating adult businesses. City of Renton, 475 U.S. at 51-52. Rather, a government may rely on the evidence collected by other entities, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. That reasonable basis may be found in "the experiences of other cities, studies done in other cities, case law reciting findings on the issue, as well as their own wisdom and common sense." Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 997 (11th Cir. 1998); see also City of Erie, 529 U.S. at 297-98. Furthermore, it is not the Court's role to "apprise the wisdom" of legislative discretion or to serve as a "super legislature." Renton, 475 U.S. at 53 (quoting Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 71 (1976)). The Court may not simply substitute its judgment for the government's, even if the government might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses. Daytona Grand, Inc. v. City of Daytona Beach, Fla., 490 F.3d 860, 881-82 (11th Cir. 2007).

In City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002), the Supreme Court affirmed the principle that governments are permitted to rely upon studies of their choice and to experiment with their own regulation of secondary effects of adult businesses, and clarified the evidence a municipality could use to support its rationale for an ordinance as follows:

> 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.

535 U.S. at 438-39. A party challenging an ordinance also bears the burden of disproving each secondary effect interest that a regulation serves. See id. at 435-36 (holding that secondary effects evidence concerning crime was reasonably relied upon, even though evidence regarding relationship between property values and adult establishments was inconclusive).

As an initial matter, the Court observes that Plaintiffs failed to respond to Defendant's argument that the Ordinance satisfies the first, third, and

fourth prongs of the O'Brien test--that the regulation is within the constitutional power of the government, that the government interest is unrelated to the suppression of free expression, and that the incidental restriction of First Amendment freedoms is no greater than essential to further the government's interest. Plaintiffs' failure to respond constitutes an abandonment of their claim with regard to those factors, and, under Local Rule 7.1 of the Northern District of Georgia, Defendant's Renewed Motion for Summary Judgment is unopposed on those grounds. See N.D. Ga. R. 7.1; Welch, 978 F. Supp. at 1137 ("Plaintiff's failure to respond to Defendant's argument alone entitles Defendant to summary judgment on these claims."). The Court also concludes that the Ordinance satisfies the first, third, and fourth O'Brien factors.[26] With regard to the first factor, the Ordinance is within Defendant's police powers. The Ordinance itself states that its purpose is to regulate sexually oriented businesses in order to promote the health, safety, moral, and general welfare of Floyd County's

[26] The Court recognizes that the issue of alternative locations for sexually oriented businesses is relevant to the fourth O'Brien factor with regard to the Ordinance's regulation of the location of sexually oriented businesses. The parties address the issue of whether the Ordinance provides reasonable alternative avenues of communication separately in their briefs. The Court therefore also addresses that issue separately in this Order.

citizens, and to prevent negative secondary effects of such businesses, including crime, prostitution, negative property values, and urban blight. Likewise, for the reasons set forth supra Part IV.D.2.a.i., the third factor is satisfied because the above interests are unrelated to the suppression of free expression. With regard to the fourth factor, the Ordinance's restriction on nudity, performances, and touching does not affect Plaintiffs, nor do Plaintiffs contend as much. Consequently, the Court concludes that Plaintiffs' lack standing to challenge Section 18 of the Ordinance. See Tanner Adver. Group, L.L.C. v. Fayette County, Ga., 451 F.3d 777, 791 (11th Cir. 2006) (holding that plaintiff unaffected by Ordinance provision lacked standing to challenge that provision). Additionally, the Court observes that similar restrictions on nudity, performance stages, and touching have been upheld in other courts. See Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1308-09 (11th Cir. 2003); Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1365-66 (11th Cir. 1999); DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 412 (6th Cir. 1997). The Court also concludes that the hours of operation regulation, which does affect Plaintiffs, allows sexually oriented businesses to operate eighteen hours daily and therefore is not substantially

broader than necessary to further Defendant's interests. See Lady J. Lingerie, Inc., 176 F.3d at 1365 (upholding ordinance allowing adult entertainment establishment to operate only fourteen hours daily). The Court also observes that Plaintiffs present no argument to the contrary. Similarly, Plaintiffs present no argument contesting Defendant's assertion that the Ordinance is narrowly tailored. Plaintiffs simply focus on the issue of alternative avenues of expression with regard to Section 21. For the reasons set forth below, the Court concludes that the Ordinance also meets the fourth O'Brien factor, and addresses the issue of alternative avenues of expression with regard to Section 21 separately infra Part IV.D.2.b. The Court therefore focuses on the second O'Brien factor below, specifically with regard to the Alameda Books burden-shifting analysis.

For the following reasons, the Court concludes that no genuine factual issues remain with regard to the second O'Brien factor, that the documentary evidence cited in the Ordinance fairly supports Defendant's rationales for the regulation, and that Plaintiffs have not shown that the evidence relied upon by Defendant does not support the Ordinance's rationales and have not

furnished evidence disputing even a majority of Defendant's factual findings or showing that Defendant's interests are not furthered by the Ordinance.

There is no question that Defendant's interests in mitigating the above secondary effects "are both important and substantial." Young, 427 U.S. at 80; see also Alameda Books, 535 U.S. at 434-36. The appropriate inquiry then is whether Defendant reasonably relied on pre-enactment evidence to concluded that the Ordinance furthers those interests.

The Court concludes that it was reasonable for Defendant to rely on the studies and case law set forth in the Ordinance when reaching its conclusion that the Ordinance would further each of Defendant's legitimate interests in reducing the above negative secondary effects of sexually oriented businesses. The Ordinance limits the location of sexually oriented businesses by requiring such businesses to be 1,000 feet from other such businesses and from churches, elementary and secondary schools, and residential areas. As stated in the Ordinance, the Commission's rationales in enacting the legislation were to separate sexually oriented businesses from sensitive land uses in order to minimize the impact of the secondary effects of such businesses on those uses, and to separate sexually oriented

businesses from each other in order to minimize secondary effects and to prevent a concentration of such businesses in one area. In support of the above rationales, the Ordinance cites numerous studies by other cities and case law involving the regulation of adult businesses. Based on that documentary evidence, the Commission found that sexually oriented businesses are associated with adverse secondary effects, including crime, prostitution, the spread of disease, lewdness, public indecency, obscenity, illicit drug use and trafficking, reduced property values, urban blight, litter, and sexual assault and exploitation. As discussed in the Court's March 5, 2007, Order, those documents include evidence of criminal activity and other negative impacts on surrounding areas due to adult bookstores and sexually oriented businesses. (See Order of Mar. 5, 2007 at 77-79.)[27] Additionally, unlike the adult business in Abilene Retail #30, Plaintiffs' business is not located in an entirely rural area far from any business or residential area. Rather, the undisputed evidence shows that Plaintiffs' business is located less than 1,000 feet from three parcels zoned suburban residential, at least

[27] In the interests of brevity and issuing an Order in a timely fashion, the Court does not provide a separate analysis of each of Defendant's predicate documents in this Order. The Court, however, has considered all of that evidence and only directly addresses those issues that are essential to the above determination.

two of which are occupied by residences. (DSMF ¶¶ 6-9; PRSMF ¶¶ 6-8.) The Court therefore is not convinced that the evidentiary basis for the Ordinance is not minimally connected to the secondary effects the Ordinance seeks to reduce.

Given the wealth of documentary evidence cited in the Ordinance, including studies produced by other cities and case law, as well as the Commissioners' own wisdom and common sense, the Commission had an adequate basis for concluding that limiting the location of sexually oriented businesses would prevent crime, prostitution, negative property values, urban blight, and other social costs associated with such establishments. The Court therefore concludes that Defendant has met its initial burden under the second O'Brien factor.

In accordance with the Alameda Books burden-shifting analysis, the Court next examines whether Plaintiffs have cast direct doubt on Defendant's rationales for and interests in enacting the Ordinance. For the following reasons, the Court concludes that Plaintiffs have failed to cast direct doubt on the above rationales for the Ordinance.

First, Plaintiffs have not demonstrated that the evidence cited in the Ordinance does not support Defendant's rationales and interests. Unlike the county in Flanigan's Enterprises, Defendant did not commission or conduct its own study of sexually oriented businesses and then rely on foreign studies to support its legislation. Neither have Plaintiffs produced a local study demonstrating that sexually oriented businesses have little or no secondary effects in Floyd County. Without such a local study, Defendant was free to rely on the evidence collected by other entities.

Even viewing Mr. McLaughlin's critiques of several of the studies referenced in the Ordinance in a light most favorable to Plaintiffs, Plaintiffs have not refuted even a majority of the pre-enactment studies and relied upon by the Commission to enact the Ordinance, or shown that the cited studies consist of "shoddy" data and do not support the Commission's rationales and interests. Indeed, the Court previously determined that Mr. McLaughlin incorrectly represents the 1994 Times Square study's findings and fails to explain why other "academic" studies are not applicable to the Ordinance's rationales or are inaccurate. Additionally, Mr. McLaughlin's critiques of Dr. McCleary's work are not applicable at this stage in the

Alameda Books burden-shifting analysis, as those studies are not cited by the Ordinance. Finally, Mr. McLaughlin's critiques of the 2001 Spokane documents focus on the issue of property values and ignore the evidence in those documents regarding crime, loitering, harassment, vandalism, prostitution, and exposure of children to pornography. Mr. McLaughlin, however, acknowledged that those documents showed a statistically significant higher overall percentage of occupant turnover in the area around sexually oriented businesses.

Second, Plaintiffs have not cited or furnished evidence that disputes all of the rationales, interests, and supporting factual findings set forth in the Ordinance. As discussed supra Part IV.A.5.a., Plaintiffs do not cite to or reference Mr. McLaughlin's discussion of allegedly contradictory and inconclusive findings regarding local government studies attached to his first affidavit in support of this argument. The Court again reiterates that it is not responsible for locating evidence in the record to support Plaintiffs' legal arguments. Nevertheless, the Court has reviewed those documents and determined that they do not provide sufficient applicable evidence to

contradict even a majority of the rationales, interests, and findings set forth in the Ordinance.

In his fourth affidavit, Mr. McLaughlin discusses an April 1978 St. Paul, Minnesota, study refuting a relationship between sexually oriented businesses and neighborhood deterioration. Viewing that evidence in a light most favorable to Plaintiffs, it may refute the Commission's findings and interests regarding the alleged negative impact of adult businesses on surrounding properties, such as urban blight; however, it is not enough to dispute the Commission's findings and interests with regard to the Commissions's other stated interests--crime, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, litter, and sexual assault and exploitation.

Third, for the reasons discussed above, the Court also is not convinced that the studies and case law cited in the Ordinance are inapplicable to Plaintiffs or Floyd County. There is no genuine factual dispute that Plaintiffs' store is located near residential developments, and thus Plaintiffs' arguments that the store is located in an entirely rural area simply are not persuasive. As discussed above, the Court is not convinced that the studies and case

law relied on by Defendant are irrelevant to Floyd County or to Plaintiff, as a off-site adult business. Furthermore, for the reasons set forth in its March 5, 2007, Order the Court declines to distinguish between on-site and off-site sexually oriented businesses in this case. (See Order of Mar. 5, 2007, at 74-76.)

The Court therefore concludes that Plaintiffs have failed to demonstrate that Defendant's evidence does not support its rationales for the Ordinance, or by furnishing evidence disputing the factual findings and showing that even a majority of Defendant's interests are not furthered by the Ordinance. Plaintiffs therefore have failed to cast direct doubt on Defendant's rationales for the Ordinance, and the Court need not proceed to the third prong of the Alameda Books burden-shifting analysis. Consequently, the Court concludes that the Ordinance satisfies the second O'Brien factor.

In sum, the Court concludes that the Ordinance is within Defendant's constitutional power, that Defendant reasonably believed that the evidence set forth in the Ordinance was relevant to the problems the Ordinance seeks to address, that the majority of the cited evidence fairly supports Defendant's

rationales for and interests in the Ordinance, that Plaintiff failed to cast direct doubt in those rationales and interests, that Defendant's interests are unrelated to the suppression of free expression, and that the Ordinance is narrowly tailored. Consequently, for the reasons set forth above, the Court determines that the Ordinance satisfies the four O'Brien factors. The Court separately addresses the issue of alternative avenues of communication with regard to Section 21 of the Ordinance infra Part IV.D.2.b.

b. The Ordinance Leaves Sufficient Alternative Avenues of Communication

In count seven of their Verified Complaint, Plaintiffs allege that the Ordinance "effectively denies adult businesses a reasonable opportunity to open and operate." (Compl. ¶ 66.)

Defendant argues that it has demonstrated that sufficient alternative avenues of communication exist under the Ordinance as a matter of law. Defendant contends that the Ordinance's 1,000-foot rule leaves at least thirty-eight parcels in Floyd County available for use by sexually oriented businesses, totaling approximately 760 acres, or 6.46 percent, of the land in Floyd County. Defendant also contends that Plaintiffs are the only adult or

sexually oriented business that has sought to operate in Floyd County since at least March 2002.

Plaintiffs argue that there are no alternative avenues of communication for adult uses under the Ordinance. Alternatively, Plaintiffs argue that there is a question of fact as to whether sufficient alternative avenues of communication are available under Floyd County's regulatory scheme. Plaintiffs dispute Defendant's contention that there are thirty-eight sites available for relocation by adult businesses and argue that, due to the Ordinance's requirement that adult businesses be located at least 1,000 feet from each other, there actually are only twelve to sixteen available sites. (Pl.'s Mot. Summ. J. at 37.) According to Plaintiffs, Defendant admits that fourteen of the thirty-eight identified sites are landlocked with no road frontage. Plaintiffs argue that the remaining twenty-four sites are not suited for any generic commercial use, and that the sites are zoned industrial and do not have street lights or sidewalks. Plaintiffs contend that most of the sites with existing industrial buildings could not provide sufficient parking for a retail establishment. Plaintiffs also contend that many of those sites are contaminated by hazardous waste or have deed restrictions precluding adult

uses. Plaintiffs assert that, in order to use the sites, Floyd County would be required to issue generic permits and that the codes governing the issuance of such permits are non-discretionary. According to Plaintiffs, the generic permit processes required for the development of raw land or the remodeling of an industrial facility are devoid of procedural safeguards and specific, brief time limits. Plaintiffs cite Lady J. Lingerie, Inc. v, City of Jacksonville, 176 F.3d 1358 (11th Cir. 1999), in support of the above argument permits.

In Lady J. Lingerie, Inc., the city's ordinance required adult entertainment establishments to obtain an exception to operate in a particular area. 176 F.3d at 1361. The Eleventh Circuit observed that the city did not have a separate licensing procedure for adult establishments and therefore treated the required zoning exception as if it were a licensing scheme. Id. The Eleventh Circuit noted that licensing schemes are a form of prior restraint and give public officials the power to decide whether to permit expressive activity. Id. at 1361-62. The city's zoning laws permitted the board, at its discretion, to impose more restrictive requirements on certain applicants, lacked precise and objective criteria, failed to put any real time limits on the board's decision, and did not provide for prompt judicial

review. The Eleventh Circuit concluded that the city's land use code did not sufficiently limit the zoning board's discretion, but rather allowed it to covertly discriminate against such establishments. Id. at 1362.

As an initial matter, the Court notes that the inquiry into whether a regulatory scheme leaves reasonable alternative avenues of expression is part of the intermediate scrutiny analysis. Plaintiffs, however, have chosen to address this issue separately in their brief, and the Court therefore also addresses this issue separately.

Under Renton, an ordinance that restricts the location of adult entertainment establishments not only must serve a substantial government interest, but also must "leave open ample alternative avenues of communication." 475 U.S. at 50. Renton requires that an adult entertainment ordinance "refrain from effectively denying [adult businesses] a reasonable opportunity to open and operate . . ." Id. at 54.

The question of whether an ordinance leaves open reasonable alternative avenues of expression depends on how many sites are available. Lady J. Lingerie, 176 F.3d at 1361. Although the number of sites available under an ordinance is a factual question, whether a particular site is

available for use by an adult business and whether the sites available provide reasonable avenues for communicating a business' message is a question of law. Daytona Grand, Inc., 490 F.3d at 870-71.

Although the Supreme Court has not thoroughly explained what factors to consider when determining whether particular sites are reasonable for relocation, it suggested in Renton that adult entertainment establishments should be "on an equal footing with other prospective purchasers and lessees." David Vincent, Inc. v. Broward County, 200 F.3d 1325, 1333-34 (11th Cir. 2000) (quoting City of Renton, 475 U.S. at 54.); see also Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1253-54 (11th Cir. 1999). However, commercial viability is not an appropriate consideration in making the above determination, and land deemed available in Renton included "'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space.'" David Vincent, Inc., 200 F.3d at 1334 (quoting Renton, 475 U.S. at 53.)

The Eleventh Circuit has set forth the following general rules for determining whether land is available to adult businesses for First Amendment purposes:

> First, the economic feasibility of relocating to a site is not a First Amendment concern. Second, the fact that some development is required before a site can accommodate an adult business does not mean that the land is, per se, unavailable for First Amendment purposes. The ideal lot is often not to be found. Examples of impediments to the relocation of an adult business that may not be of a constitutional magnitude include having to build a new facility instead of moving into an existing building; having to clean up waste or landscaping a site; bearing the costs of generally applicable lighting, parking, or green space requirements; making due [sic] with less space that one desired; or having to purchase a larger lot than one needs. Third, the First Amendment is not concerned with restraints that are not imposed by the government itself or the physical characteristics of the sites designated for adult use . . . . It is of no import under Renton that the real estate market may be tight and sites currently available for sale or lease, or that property owners may be reluctant to sell to an adult venue.

David Vincent, Inc., 200 F.3d at 1334-35 (emphasis in original). Although the physical characteristics of a site or its current development could render relocation there unreasonable, examples of such unavailable sites include land under the ocean, airstrips of international airports, and sports stadiums. Id. at 1334.

The Eleventh Circuit also has "consistently recognized the importance of 'the correlation of available sites to existing adult businesses,'" Fly Fish, Inc., 337 F.3d at 1310, and has cited with approval the opinions of other Circuits holding that the number of sites available for adult businesses must

be greater than or equal to the number of adult businesses in existence at the time new regulations take effect, id. at 1310-11. Factors to be considered in that regard include, "'the community's population and size, the acreage available to adult businesses as a percentage of the overall size, the location of available sites, *the number of adult businesses already in existence*, and the number of adult businesses wanting to operate in the community in the future.'" Id. at 1311 n.21 (emphasis in original) (quoting Boss Capital, Inc., 187 F.3d, at 1254).

For the following reasons, the Court finds that no genuine issue of material fact remains as to the number of sites available under the Ordinance, and concludes as a matter of law that the available sites in Floyd County provide sufficient reasonable alternative avenues for sexually oriented and adult businesses to convey their message.

First, viewing the evidence in a light most favorable to Plaintiffs, the Court concludes that Defendant has produced evidence that at least twenty-four sites are available for use by sexually oriented businesses under the Ordinance, and that Plaintiffs have failed to meet their burden of coming forward with specific facts that demonstrate the existence of a genuine issue

in that regard. Plaintiffs' assertion that the Ordinance's requirement that such businesses must be located at least 1,000 feet apart, thus reducing the actual number of sites, is entirely speculative at this time. At present, Plaintiffs are the only sexually oriented or adult business in Floyd County, and Plaintiffs have adduced no evidence indicating that other such businesses are seeking to locate in Floyd County. As Plaintiffs are the only sexually oriented business in Floyd County, there is no reason why the number of sites would be limited by the Ordinance's restriction on two such businesses locating within 1,000 feet of each other. Furthermore, Plaintiffs' argument that fourteen of the thirty-eight sites are landlocked also is irrelevant. The existing case law is clear that acreage in all stages of development, including industrial land, may be deemed available, and thus considered as a site for relocation, and that the First Amendment is not concerned with a site's physical characteristics. Renton, 475 U.S. at 53-54; David Vincent, Inc., 200 F.3d at 1334. Plaintiffs do not contend that those sites are on par with the Eleventh Circuit's examples of sites to which relocation is unreasonable, including land under the ocean, airstrips of international airports, and sports stadiums. Nevertheless, and keeping in

mind that the Court must view the evidence in a light most favorable to Plaintiffs as the non-movants, the Court excludes the fourteen landlocked sites from its analysis regarding whether the sites identified by Defendant are reasonable alternative avenues of communication. The Court therefore now must determine whether the remaining twenty-four sites are legally available for relocation and whether there are sufficient available sites to provide reasonable avenues for sexually oriented businesses to communicate their message in Floyd County.

Second, the Court concludes that the remaining twenty-four sites are available for use by sexually oriented and adult businesses as a matter of law. Plaintiffs' argument that the sites identified by Defendant are not suited for any commercial use is irrelevant, as the case law is clear that commercial viability is not an appropriate consideration in making the above determination. Renton, 475 U.S. at 53-54; David Vincent, Inc., 200 F.3d at 1334. Additionally, the Court is not convinced that a lack of street lights, sidewalks, and sufficient parking, or the presence of hazardous waste and deed restrictions, make the sites unavailable. The fact that some development of a site is required, that a site may require the clean up of

hazardous waste, or that Plaintiffs would have to bear the costs of installing lighting and sidewalks or increasing parking are not impediments of constitutional magnitude. David Vincent, Inc., 200 F.3d at 1334-35 (citing cleaning up waste and installing lighting and parking as impediments that may not be of constitutional magnitude). Similarly, the First Amendment is not concerned with restraints that are not imposed by the government. See id. There is not enough evidence in the record, even considering the entirety of Mr. McLaughlin's fourth affidavit, to conclude that the physical obstacles to developing the sites are prohibitive. Nor does the record show that it would be impossible to fashion a lot to meet Plaintiffs' needs as a retail store through the purchase and division of the identified parcels. See id. at 1335.

Furthermore, Plaintiffs' concerns about obtaining the necessary permits to develop the sites for adult businesses are entirely speculative at this time. See David Vincent, Inc., 200 F.3d at 1335. Plaintiffs' citation to Lady J. Lingerie is not applicable to this case. Here, Defendant has enacted a licensing scheme for sexually oriented businesses which sets forth precise and objective criteria for the issuance of such licenses, (Ordinance § 5), gives officials a twenty day deadline within which to issue their decision

regarding licensing applications, (id.), requires a hearing to be held within twenty days after the denial, revocation, or suspension of such licenses, (id. § 11), requires written hearing decisions within five days, (id.), and provides for prompt judicial review of those decisions, (id.). For the reasons set forth above, the Court is not convinced that Defendant's generic permitting process is comparable to the unconstitutional zoning regulations in Lady J. Lingerie, Inc. The Court therefore concludes that the twenty-four sites identified by Defendant are "available" as a matter of law. The Court next determines whether the twenty-four available sites provide sufficient reasonable alternative avenues of communication.

Third, the Court concludes that the twenty-four sites available for use by sexually oriented and adult businesses provide reasonable avenues of communication for such businesses to convey their message. Plaintiffs admit that, as of May 2006, they are the only adult business that has operated in Floyd County. Additionally, as discussed above Plaintiffs have adduced no evidence to counter Defendant's assertion that no other such businesses have sought to locate in Floyd County or to show that other adult businesses are seeking to relocate to Floyd County. The number of sites

available to adult businesses in Floyd County therefore greatly exceed the number of adult businesses--here, only Plaintiffs' store--in existence at the time the Ordinance took effect and also clearly exceeds the number of adult businesses seeking to operate in the community--none. Additionally, those twenty-four available sites constitute approximately 227 acres, or approximately two percent, of the commercial and industrial land in Floyd County. (Plants Aff. ¶¶ 10-11). The Court therefore concludes that, as a matter of law, the twenty-four available sites identified by Defendant provide reasonable alternative avenues for Plaintiffs to convey their message.

For the reasons set forth above, the Court finds that there is no genuine factual issue that twenty-four sites are available for the location of sexually oriented businesses under the Ordinance, and concludes as a matter of law that those sites are legally available and provide more than sufficient reasonable alternative avenues of communication for sexually oriented and adult businesses to convey their message in Floyd County. Consequently, the Court grants Defendant's Motion for Summary Judgment with regard to the above claim.

c. Plaintiffs Do Not Have Vested Property Rights in Their Current Use

In count eight of their Verified Complaint, Plaintiffs allege that the "locational requirements contained in [the Ordinance] constitute zoning regulations subject to [Floyd County's] non-conforming use provisions contained in §2-19-7." (Compl. ¶ 69.) Plaintiffs also allege that their "substantial change in position by expenditure in reliance upon land use regulations in effect at the time they procured their building permit and opened for business conferred vested rights to continued use of Plaintiffs' property as an adult store." (Id. ¶ 73.)

Defendant argues that Georgia law compels the conclusion that the Ordinance is not a zoning ordinance. Defendant asserts that, pursuant to Georgia law, the Ordinance is not a zoning regulation because it does not regulate general uses of land through zones or districts, but rather applies to the particular activity of operating a sexually oriented business anywhere in Floyd County. Defendant contends that it has never changed the zoning designation of Plaintiffs' property, but rather simply enacted a licensing ordinance. According to Defendant, the Ordinance establishes a licensing

requirement and other regulations for sexually oriented businesses, including a requirement that such businesses not operate within 1,000 feet of certain uses.

Defendant also argues that they are entitled to summary judgment because Plaintiffs were not issued a building permit or certificate of occupancy for any adult business and because the Statute at issue prohibits Plaintiffs' store at its present location. Defendant asserts that the building permit and certificate of occupancy issued to Plaintiffs only indicate that Plaintiffs would operate a bookstore or video tape rental store, that the Ordinance does not prohibit those specific uses, and that neither document was issued for an adult bookstore or sexually oriented business. Defendant contends that Plaintiffs and their representatives did not disclose any plan or intent for an adult use during their interactions with the Rome/Floyd County Building Inspection Department, and that, regardless, Floyd County officials are required to issue or deny permits based on the information contained on permit application forms. Defendant also argues that Plaintiffs' building was ineligible for a sexually oriented business due to the Statute's 1,000-foot rule. Defendant argues that, as a result, any permit from Floyd

County to operate an adult business at Plaintiff's location would be void and would not confer any right to continue operating such a business.

Plaintiffs argue that they have a vested right to continue the present use of their property. Plaintiffs contend that their right is not contingent upon the Ordinance's characterization as a zoning or licensing regulation. Plaintiffs argue that they acquired vested zoning rights despite any ordinance enacted subsequent to their permit because they made substantial expenditures, incurred a total financial liability of over $594,000, and their use was allowable at the time their building permit was issued. Plaintiffs also contend that they were not required to designate their use as an adult business because, at the time Plaintiffs submitted their building permit application and zoning form, Floyd County did not require that adult businesses be identified as such, did not place any restrictions on the location of such businesses, and did not require such businesses to be licensed. According to Plaintiffs, their building permit was in compliance with Defendant's zoning ordinance and other ordinances at the time it was issued, Floyd County did not require them to designate what kind of bookstore or video tape rental store that they intended to open, and County

Commission Chairman John Mayes, Floyd County Manager Kevin Poe, and Rome/Floyd County Building Inspection Department Director Mike Ashley all were aware that Plaintiffs were planning to open an adult store. Plaintiffs argue that their right to use the property for an adult business therefore was vested because of the nonexistence of a restrictive ordinance at the time.

Plaintiffs also argue that the Statute, standing alone and absent an ordinance enacted thereunder, is not enforceable by Defendant and is not meant to apply directly to cities and counties. Plaintiffs also assert that neither the State nor Defendant can enforce the Statute against Plaintiffs because they have not been convicted or accused of obscenity, and because the Statute does not restrict the location of adult bookstores.

Plaintiffs cite an unpublished Eleventh Circuit case, Augusta Video, Inc. v. Augusta-Richmond County, 249 F. App'x 93 (11th Cir. 2007) (per curiam), for the proposition that a vested right is acquired in a particular property use despite any restrictions contained in an ordinance enacted subsequent to the issuance of a permit for the use. In Augusta Video, Inc., an adult bookstore's application for a special exception required by the city's zoning ordinance was denied. 249 F. App'x at 95. The bookstore did not

seek a licensing permit because the above application had been denied and proof of the special exception was required under the city's adult entertainment ordinance. Id. A district court enjoined the enforcement of the adult entertainment and zoning ordinances after holding that the special exception requirement violated the First Amendment because it gave the county commission too much discretion. Id. The county commission later amended the ordinances to eliminate the requirement and to change the zoning law to prohibit adult businesses from locating in the area at issue. Id. at 95-96. The new ordinances retained the requirement that applicants obtain business tax certificates and a licensing permit to operate an adult business. Id. at 96. The Eleventh Circuit held that because the special exception requirement was unconstitutional and because the adult bookstore met all of the other requirements of the zoning ordinance, the adult bookstore was entitled to have its use authorized by the county commission and was a lawful existing use that should be grandfathered into the location because it had taken substantial steps to open its business. Id. at 97-99. The Eleventh Circuit, however, also held that the above ruling did not allow the bookstore to open immediately for business. Rather, the Eleventh Circuit

explained that the bookstore must comply with the remaining valid zoning requirements of the original zoning ordinance and must obtain a business tax certificate and adult entertainment permit under the current adult entertainment ordinance. Id. at 99.

For the reasons set forth in its March 5, 2007, Order the Court applies Georgia law to Plaintiffs' vested property rights claim. (See Order Mar. 5, 2007.) Under Georgia law, "laws enacted pursuant to the police power for the public's protection may be modified without violating a constitutional prohibition against retrospective statutes." Goldrush II v. City of Marietta, 267 Ga. 683, 694, 482 S.E.2d 347, 358 (1997). Such modifications, however, cannot impinge upon vested rights. The Supreme Court of Georgia has explained vested rights as follows: "'To be vested, in its accurate legal sense, a right must be complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent.'" Goldrush II, 267 Ga. at 694, 482 S.E.2d at 358. (quoting Hayes v. Howell, 251 Ga. 580, 584, 308 S.E.2d 170, 175 (1983)); accord Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (stating that "[t]o have a property interest .

. ., a person must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.")

With regard to zoning, the Supreme Court of Georgia has stated that

> [i]t is a tenant of zoning law that a property owner may acquire a vested right under a zoning ordinance which precludes retroactive application of zoning ordinances:
>
> "A landowner will be held to have acquired a vested right to continue in the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance, where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he had, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations."

Goldrush II, 267 Ga. at 698, 482 S.E.2d at 360 (citations omitted) (quoting Barker v. County of Forsyth, 248 Ga. 73, 75-76, 281 S.E.2d 549, 552 (1981)). However, "[t]he issuance of a building permit results in a vested right only when the 'permit has been legally obtained and is valid in every respect.'" Union County v. CGP, Inc., 277 Ga. 349, 351, 589 S.E.2d 240, 242 (2003). "Where a permit is issued by a governing body in violation of an ordinance, even under a mistake of fact, it is void, and its holder does not acquire any rights; even a substantial expenditure in reliance on a void permit does not raise an estoppel." Id.

With regard to licenses, the Court has explained that, "[w]hile we have acknowledged the existence of 'constitutionally protected vested zoning rights,' of a property owner, under certain conditions, so as to preclude retroactive application of a *zoning* ordinance, the same is not applicable to *licenses* to conduct a business." Goldrush II, 267 Ga. at 698, 482 S.E.2d at 360 (citations omitted) (emphasis in original). In Goldrush II v. City of Marietta, adult business owners filed declaratory judgment actions against the city to prevent enforcement of a new ordinance prohibiting businesses from obtaining both a liquor license and an adult entertainment license for the same establishment. Id. at 683, 482 S.E.2d at 350-51. For several years, the adult businesses had obtained both licenses and had provided adult entertainment and served alcoholic beverages at the same locations. Id., 482 S.E.2d at 350. The businesses argued that they had spent substantial sums of money in reliance on the licenses and therefore had vested property rights in the renewal of both licenses which prevented the city from enacting retrospective laws that adversely affect their ability to provide both liquor and adult entertainment at the same locations. Id. at 693-97, 482 S.E.2d at 357-60. The Georgia Supreme Court held that the adult

businesses did not have vested rights to remain in business under the licensing regulations in existence at the time they received their initial licenses and that the businesses must meet the requirements in effect at the time they filed their annual licensing applications. Id. at 698, 482 S.E.3d at 361. The Goldrush II court explained that building permits are devices for ensuring compliance with zoning ordinances and create a vested right in existing zoning ordinances, but that business licenses do not typically serve such a function and do not bestow vested rights. Id. at 698, 482 S.E.2d at 360-61.

Additionally, due process requires that any licensing scheme enacted pursuant to the government's police power provide sufficient objective criteria to control the discretion of the governing authority and provide applicants with adequate notice of the criteria for issuance of a license. 267 Ga. at 693, 482 S.E.2d at 357. If a license is denied, revoked, or suspended, due process also requires notice and an opportunity to be heard. Id.

As an initial matter, the Court observes that Plaintiffs do not address Defendant's arguments that the Ordinance is a licensing ordinance and that summary judgment in favor of Defendant therefore is proper in that regard.

Rather, Plaintiffs simply state that the characterization of the Ordinance as a zoning or licensing law is irrelevant to their alleged vested rights. Plaintiffs' response and failure to respond to Defendant's argument that it is entitled to summary judgment with regard to Plaintiffs' claim that the Ordinance is a zoning ordinance results in Plaintiffs' abandonment of that claim. Under Local Rule 7.1 of the Northern District of Georgia, Defendant's Renewed Motion for Summary Judgment is unopposed on that ground. See N.D. Ga. R. 7.1; Welch, 978 F. Supp. at 1137 ("Plaintiff's failure to respond to Defendant's argument alone entitles Defendant to summary judgment on these claims."). Additionally, the Court addressed this issue in-depth in its March 5, 2007, Order. For the above reasons and those set forth in its March 5, 2007, Order, the Court concludes that the Ordinance constitutes a licensing ordinance under Georgia law. Consequently, the Court grants Defendant's Motion for Summary Judgment with regard to that claim. The Court next examines Plaintiffs' claim that they have a vested property right in their use of the property at issue.

For the following reasons, viewing the evidence in a light most favorable to Plaintiffs, as the non-movants, the Court concludes that, while

Plaintiffs may have acquired a vested right in their current zoning, Plaintiffs did not acquire a vested property right in their current use in light of Floyd County's licensing Ordinance and O.C.G.A. § 36-60-3.

First, viewing the evidence in a light most favorable to Plaintiffs, the Court concludes that Plaintiffs have not acquired a vested right to operate an adult bookstore or an adult video tape rental store in violation of Defendant's constitutional licensing Ordinance. For the purposes of this Order, the Court accepts Plaintiffs' assertions that they obtained a building permit and certificate of occupancy to build and operate an adult bookstore or adult video tape rental store.[28] Such permits, however, do not mean that Plaintiffs have a vested right in those uses in contravention of Defendant's valid licensing Ordinance. Rather, Plaintiffs' building permit and certificate of

[28] The parties disagree as to what Floyd County officials knew about the nature of Plaintiffs' store and whether the building permit and certificate of occupancy issued to Plaintiffs specifically authorized them to open an adult business. The Court concludes that the issue of what officials knew is a question of fact, and, given that Plaintiffs are the non-movant with regard to Defendant's Motion for Summary Judgment, the Court must view the facts in a light most favorable to Plaintiffs at this stage in the litigation. Additionally, Defendant has provided no case law in support of its argument that such documents must specifically state the type of business they authorize and that Floyd County officials' alleged knowledge about the store's purpose prior to issuing such documents is irrelevant. Consequently, for the purpose of ruling on Defendant's Motion for Summary Judgment, the Court accepts Plaintiffs' assertion that their building permit and certificate of occupancy were issued for an adult business.

occupancy simply mean that Plaintiffs are properly zoned to operate an adult bookstore or adult video tape rental store on their property and Plaintiffs therefore only have a vested right in the zoning ordinance existing at the time their permit was issued. As was required of the adult businesses in Augusta Video Inc. and Goldrush II, however, Plaintiffs still must obtain a license to operate their adult business under Defendant's valid licensing Ordinance.[29] This is true even though Defendant's licensing Ordinance was enacted after Plaintiffs began operating their business and even though Plaintiffs made substantial expenditures in their business under the ordinances in effect at the time.

In Goldrush II, prior to the city's new licensing ordinance, the plaintiff adult businesses were able to use their properties to provide adult entertainment and to serve alcoholic beverages. The Supreme Court of Georgia held that, unlike vested rights granted by zoning ordinances, the businesses did not obtain vested rights in those uses free from other regulations regardless of their substantial investments in reliance upon using

[29] For the reasons set forth supra Parts IV.D.2.a.-b., and infra Part IV.D.2.e., the Court concludes that the Ordinance is constitutional.

their properties for adult entertainment and to sell alcohol. Similarly, here, any vested rights Plaintiffs have in their present zoning, which both parties agree did not change, does not give Plaintiff a vested right to use their property free from future valid licensing schemes that may apply to Plaintiffs, such as the Ordinance at issue.[30] Furthermore, unlike the ordinance in Augusta Video, Inc., for the reasons set forth supra Part IV.D.2.a-b, the Court concludes that Defendant's licensing Ordinance is constitutional.

Second, the Court therefore concludes that no genuine factual dispute remains regarding the nature of Plaintiffs' store or its proximity to land zoned primarily for residential purposes, and that Plaintiffs consequently have no vested right in their present use pursuant to the Statute's 1,000-foot rule regarding explicit media outlets. The Court agrees with Plaintiffs that the Statute does not prohibit their functioning simply as an adult bookstore. Here, however, Plaintiffs have admitted that they are an explicit media outlet under the Statute, (Pls.'s Resp. Opp'n Def.'s Renewed Mot. for Summ. J. at

[30] For the reasons discussed above and in the Court's March 5, 2007, Order, the Ordinance is a licensing scheme and is not a device for ensuring compliance with zoning in Floyd County. (See Order of Mar. 5, 2007.) The Court also observes that the Ordinance provides specific criteria for the issuance of adult business licenses and provides notice, an opportunity to be heard, and an appeals process in the event that a license is denied, suspended, or revoked. (See Ordinance §§ 5, 11.)

4 ("the store does meet the statutory definition of 'explicit media outlet' just as readily as it meets the definition of 'adult bookstore.'")), and there is no genuine dispute that Plaintiffs are located less than 1,000 feet from several residences and areas zoned suburban residential. For the reasons set forth supra Part IV.D.1., the Court concludes that the Statute is not unconstitutional, that the Statute's 1,000-foot rule regarding explicit media outlets applied to Plaintiffs at the time their permit and certificate of occupancy were issued regardless of whether Defendant had enacted an ordinance pursuant to the Statute, and that the State can enforce the Statute against Plaintiffs.[31] The Court therefore concludes that, even assuming Plaintiffs' permit gives them a vested right to operate an adult bookstore or an adult video tape rental store, Plaintiffs do not have a vested right in their current operation as an explicit media outlet because any such right granted by a Floyd County permit was void in light of existing State law at the time.

For the reasons set forth above, the Court concludes that Plaintiffs did not acquire a vested property right to use their property in violation of valid

[31] The Court observes, and Plaintiffs do not argue otherwise, that the undisputed facts show that Plaintiffs' current use of the property at issue does not predate the Statute's 1,000-foot rule.

future licensing ordinances or as an explicit media outlet in violation of O.C.G.A. § 36-60-3. Consequently, the Court grants Defendant's Motion for Summary Judgment with regard to the above claim.

d. The Ordinance Does Not Effect an Unconstitutional Taking

In count nine of their Verified Complaint, titled "O.C.G.A. §2006-002A Violates Due Process-Unconstitutional Taking," Plaintiffs allege that Defendant enacted the Ordinance for improper motive and without rational basis, that the Ordinance's amortization provision cannot compensate Plaintiffs for their investments, that the Ordinance will result in a substantial diminution of the value of Plaintiffs' property, and that Plaintiffs' property is unsuited for other profitable uses. (Compl. ¶¶ 78-81.)

Defendant argues that the Ordinance does not effect an actual taking or the total destruction of all economically beneficial use of Plaintiffs' property. Defendant asserts that nothing in the Ordinance imposes an actual physical invasion of Plaintiffs' building or land, a destruction of all economically beneficial uses of the land, or an interference with the property that is tantamount to a physical invasion.

The Court observes that Plaintiffs fail to address Defendant's Renewed Motion for Summary Judgment with regard to count nine of Plaintiffs' Verified Complaint. Plaintiffs' failure to respond to Defendant's argument that it is entitled to summary judgment with regard to Plaintiffs' claim that the Ordinance violates the Due Process Clause and effects an unconstitutional taking results in Plaintiffs' abandonment of that claim. Under Local Rule 7.1 of the Northern District of Georgia, Defendant's Renewed Motion for Summary Judgment is unopposed on that ground. See N.D. Ga. R. 7.1; Welch, 978 F. Supp. at 1137 ("Plaintiff's failure to respond to Defendant's argument alone entitles Defendant to summary judgment on these claims.").

In any event, the Court is not persuaded by Plaintiffs' takings claim. The takings clause of the Fifth Amendment prohibits Floyd County from condemning "private property . . . for public use, without just compensation." U.S. Const. amend. V. The clause applies whenever government action renders property worthless. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-16 (1992) (government action effectively condemns landowner's property if it denies him "all economically beneficial or productive use" of his

property."). Similarly, the Georgia constitution provides that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Ga. Const. art. 1, § 3, ¶ I(a). Plaintiffs have not alleged that the Ordinance prevents all beneficial uses of their property. Viewing the evidence in a light most favorable to Plaintiffs, their allegations that a taking has occurred because their chosen use of the property may no longer be permitted and the Ordinance's amortization clause cannot compensate them for their investments simply do not constitute a taking under the United States or Georgia Constitutions. See Rymer v. Douglass County, 764 F.2d 796, 801 (11th Cir. 1985) ("an otherwise valid exercise of the police power is not a taking simply because the regulation deprives the owner of the most beneficial use of his or her property"); Nasser v. City of Homewood, 671 F.2d 432, 438 (11th Cir. 1982) (holding that neither deprivation of most beneficial use of land nor severe decrease in property value is taking); Threatt v. Fulton County, 266 Ga. 466, 470, 467 S.E.2d 546, 550 (1996) (rejecting plaintiffs' argument that land and water use plan requiring buffer zone around river banks effected taking where there was no showing that regulation deprived plaintiffs of any or all economially viable or

beneficial use of their property); see also SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1278 (5th Cir. 1988) (holding that police power of municipality is broad and includes restricting uses of property and rejecting claim that ordinance constituted taking because amortization provisions were inadequate and because ordinance did not prevent all reasonable uses of plaintiff's property); Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288, 1307-08 (M.D. Fla. 1997) (holding that city ordinance limiting location of adult establishments did not effect taking of businesses that were prevented from operating because property was not deprived of all beneficial use).

The Court therefore concludes that no material factual issues remain with regard to the above claim, and that Plaintiffs' claim that the Ordinance violates the Due Process Clause and effects an unconstitutional taking on Plaintiffs must fail. Consequently, the Court grants Defendants' Renewed Motion for Summary Judgment with regard to the above claim.

e. The Ordinance's Amortization Provision Does Not Violate Due Process

In count ten of their Verified Complaint, Plaintiffs allege that the Ordinance "provides no definition or standards for 'financial hardship'," and thus "allows county officials to act arbitrarily and with excessive discretion." (Compl. ¶¶ 85-86.) According to Plaintiffs, the Ordinance directly contradicts Floyd County zoning code § 2-19-7, regarding nonconforming uses. Plaintiffs also allege that disparities in the Ordinance "render [the Ordinance] violative of due process in that a reasonable person is not on notice of whether he can continue to operate his business" and "allows county officials to act arbitrarily and with excessive discretion." (Id. ¶ 89-90.)

Defendant argues that the Ordinance's amortization provision does not apply to Plaintiffs. According to Defendant, Plaintiffs admit that they operate an explicit media outlet, as defined by the Statute, within 1,000 feet of an area zoned suburban residential violates state law, and therefore Plaintiffs did not legally operate their business prior to the date that the Ordinance took effect. Alternatively, Defendant argues that the Ordinance is valid because it requires Floyd County to permit any lawful nonconforming use for

at least two years, requires Floyd County to grant an extension for a reasonable period of time commensurate with the investment if the business demonstrates financial hardship, and sets forth the criteria to be considered when a business seeks a hardship extension. Defendant also asserts that the Ordinance is not a zoning regulation, does not conflict with the Floyd County zoning code, and does not change the zoning code or the zoning districts in which any use is allowed. Defendant also contends that Plaintiffs' store is not an lawful nonconforming use, and, regardless, amortization of nonconforming uses is permissible.

Plaintiffs argue that, although locational restrictions may be validly imposed in a licensing ordinance, nonconforming uses are only created through rezoning and have never been created by a licensing ordinance. According to Plaintiffs, Defendant's arguments that Plaintiffs are a nonconforming use that can be amortized must fail. Plaintiffs reason that, if Defendant is correct with regard to the Statute's 1,000-foot rule, Plaintiffs never operated legally and therefore cannot be a nonconforming use, and, if their operation was legal, Plaintiffs cannot be a nonconforming use because there has been no change in the zoning of the property at issue.

Plaintiffs also argue that Floyd County cannot amortize the use of its property through a licensing ordinance, and that their vested interest in the property at issue proscribes amortization.

The Supreme Court of Georgia explains nonconforming uses as follows:

> Nonconforming uses are uses of structures which were existing prior to the enactment of an ordinance rendering them nonconforming. However, our courts have been very careful to distinguish between *legal* nonconforming uses and *illegal* nonconforming uses. For example, the court in Troutman v. Aiken, 231 Ga. 55, 96 S.E.2d 585 (1957), stated that a nonconforming use for drag races on Sundays was not legally nonconforming, because the Sunday races were illegal without a special permit, and the property owner had never secured the necessary permit. And in Ralston Purina Co. v. Acrey, 220 Ga. 788, 791, 142 S.E.2d 66 (1965), the court stated: "Hence, even a nonconforming use would not be protected unless it appeared that it was lawful at its inception." Similarly, the court affirmed the trial court in Tucker v. City of Atlanta, 211 Ga. 157, 84 S.E.2d 362 (1854), in holding that, even though a permit for general repairs had been issued to the Tuckers, it could not be used to illegally enlarge a nonconforming use, because such construction was in violation of the zoning laws regarding nonconforming uses.

Corey Outdoor Adver., Inc. v. Board of Zoning Adjustments of City of Atlanta, 254 Ga. 221, 226-27, 327 S.E.2d 178, 184 (1985) (emphasis in original). Additionally, as discussed supra Part IV.D.2.c., due process requires that

licensing schemes provide sufficient objective criteria to control the discretion of the governing authority.

For the following reasons, the Court concludes that no genuine factual issue remains with regard to the above claim, and that Plaintiffs' claim that the Ordinance violates their due process rights must fail.

First, the Court agrees with Defendant that Section 21 of the Ordinance, referred to by the parties as the Ordinance's amortization provision, is not applicable to Plaintiffs. For the reasons set forth supra Parts IV.D.1, and IV.D.2.c., Plaintiffs' operation as an explicit media outlet was not a legal use of their property under the Statute's 1,000-foot rule. Plaintiffs therefore were not lawfully operating their business prior to the effective date of the Ordinance; thus, their business was not a legal nonconforming use under the Ordinance, and Plaintiffs acquired no vested property rights in that use.

Second, the Ordinance's amortization provision does not conflict with Floyd County's zoning code. For the reasons set forth in the Court's March 5, 2007, Order, the Court concludes that the Ordinance is a licensing scheme and is not a zoning regulation. (See Order of Mar. 5, 2007.) The

Ordinance also does not change section 2-19-17 of the Floyd County zoning code, or affect the zoning of property under that code. Additionally, the Court is not convinced that a licensing regulation cannot create or amortize a nonconforming use. The case law cited by Plaintiffs clearly defines nonconforming uses as "structures which were existing prior to the enactment of an ordinance rendering them nonconforming." Corey Outdoor Adver., Inc., 254 Ga. at 226, 327 S.E.2d at 184; see also BBC Land & Dev., Inc. v. Butts County, 281 Ga. 472, 473, 640 S.E.2d 33, 34 (2007) (quoting Corey Outdoor Adver., Inc., 254 Ga. at 226, 327 S.E.2d at 184, for above proposition). Furthermore, as the Supreme Court of Georgia explained in BBC Land & Development, Inc. v. Butts County, although vested rights cannot be divested without the consent of the person to whom it belongs, "[a] nonconforming use is not so indefeasible since '[a] governing authority can require a nonconforming use to be terminated in a reasonable time. [Cits.]'" BBC Land & Dev., Inc., 281 Ga. at 473, 640 S.E.2d at 34 (citations omitted in original); cf. David Vincent, Inc., 200 F.3d at 1332 & n.11 (holding that the Constitution does not require either waiver provision or grandfather clause for existing nonconforming businesses and noting that courts frequently

uphold action of new zoning regulations to existing adult businesses with amortization period). Therefore, even if Plaintiffs were legally operating an adult bookstore on the site, Plaintiffs would simply be a legal nonconforming use and subject to the Ordinance's amortization provision.

Third, the Court concludes that Section 21 of the Ordinance does not allow officials to act arbitrarily and with excess discretion. The Court observes that Plaintiffs do not address Defendant's argument that the amortization provision is not vague and sets forth criteria for hearing officers considering hardship extensions. Indeed, section 21(d)(i) through (iii) sets forth the findings the hearing officer must make in order to approve the extension, including: that the applicant made a substantial investment,[32] that the property or structure cannot be readily converted to another conforming use, that the investment was made prior to the effective date of the Ordinance, that the application will be unable to recoup the investment by the date established for termination of the use, and that the applicant made a good faith effort to recoup the investment and to relocate the use to a

[32] The Court observes that subsection (d)(i) further defines substantial investment as including but not limited to lease obligations. (Ordinance § 21(d)(i).)

conforming location. (Ordinance §21(d)(i)-(iii).) The Court also observes that subsection (d) of that section requires the clerk to schedule a hearing within ten days of receiving an application for a hardship extension, requires that the hearing be held within thirty days after the application is received, and requires the hearing officer to issue an opinion within ten days after the hearing. (Id. § 21(d).) That section also provides for notice to the applicant, as well as public notice, and allows all parties to offer testimony and other evidence, to be represented by counsel, and to confront and cross-examine witnesses. (Id.) Given the above criteria, the Court is not convinced that the Ordinance allows Floyd County officials to act arbitrarily and with excessive discretion. Rather, the Court concludes that the above provision is adequately precise and sufficiently limits the hearing officer's discretion.

Fourth, the Court is not convinced that Sections 17 and 21 of the Ordinance conflict and thus do not provide a reasonable person with notice that the Ordinance is applicable to his business. Section 17 clearly states that sexually oriented businesses and employees are granted a defacto license for a period of ninety days after the Ordinance takes effect and must conform to the Ordinance at the end of that period. (Ordinance § 17.)

Section 21(c) then sets forth the procedures to be taken in the event that a sexually oriented business does not conform to the requirements set forth in Section 21(a) of the Ordinance. (Id. § 21(c).)

The Court therefore concludes that no genuine factual issues remain with regard to the above claim, and Plaintiffs' claim that the Ordinance violates their due process rights must fail. Consequently, the Court grants Defendant's Motion for Summary Judgment with regard to the above claim.

f. The Ordinance Does Not Violate the Equal Protection Clause

In count eleven of their Verified Complaint, Plaintiffs allege that the Ordinance imposes fees based on the content of expression and violates the Equal Protection Clause. (Compl. ¶ 92.)

Defendant argues that the Ordinance imposes minimal license and renewal fees on sexually oriented businesses and that those fees are content-neutral and serve Defendant's interest in preventing and abating the negative secondary effects of sexually oriented businesses by supporting the administration of Defendant's regulations on those businesses. The Court observes that Plaintiffs fail to address Defendant's Renewed Motion for

Summary Judgment with regard to count eleven of Plaintiffs' Verified Complaint.

In Cox v. State of New Hampshire, 312 U.S. 569 (1941), the Supreme Court held that licensing fees were not unconstitutional where such fees were collected to meet administrative expenses incident to the regulation of the licensed activity. 312 U.S. at 577; accord I.D.K., Inc. v. Ferdinand, 277 Ga. 548, 551, 592 S.E.2d 673, 675-76 (2004). The Supreme Court also has held that local governments may regulate adult entertainment establishments differently than other businesses if the regulation is content-neutral and aimed at ameliorating the secondary effects caused by such establishments. See Young, 427 U.S. at 70-71.

For the following reasons, the Court concludes that no material factual issues remain with regard to the above claim, and that the Ordinance does not violate Plaintiffs' rights under the Equal Protection Clause.

First, Plaintiffs' failure to respond to Defendant's argument that it is entitled to summary judgment with regard to Plaintiffs' claim that the Ordinance violates Plaintiffs' rights under the Equal Protection Clause constitutes Plaintiffs' abandonment of that claim. Under Local Rule 7.1 of

the Northern District of Georgia, Defendant's Renewed Motion for Summary Judgment is unopposed on that ground. See N.D. Ga. R. 7.1; Welch, 978 F. Supp. at 1137 ("Plaintiff's failure to respond to Defendant's argument alone entitles Defendant to summary judgment on these claims.").

Second, Plaintiffs have not alleged or shown that the Ordinance has been administered in a discriminatory manner, or that the fees imposed exceed the amount necessary to enforce the Ordinance.

Third, for the reasons set forth supra Part IV.D.2.a., the Ordinance is content-neutral, and Plaintiffs have not shown that Defendant's interest in preventing the secondary effects of adult businesses does not adequately support the Ordinance, or that the Ordinance is not aimed at combating the adverse secondary effects associated with adult businesses.

The Court therefore concludes that no genuine factual issues remain with regard to the above claim, and that Plaintiffs' claim that the Ordinance violates their rights under the Equal Protection Clause must fail. Consequently, the Court grants Defendants' Renewed Motion for Summary Judgment with regard to the above claim.

V. Plaintiffs' Motion for Summary Judgment

A. Factual Background

The Court incorporates the factual background discussion set forth supra Part IV.A. into the discussion of the facts relevant to Plaintiffs' cross Motion for Summary Judgment.

B. Procedural Background

The Court incorporates the procedural background discussion set forth supra Part IV.B. into the procedural background discussion for purposes of Plaintiffs' cross Motion for Summary Judgment.

C. Summary Judgment Standard

The Court applies the same standard as set forth supra Part IV.C. when evaluating Plaintiffs' cross Motion for Summary Judgment.

D. Discussion

In their cross Motion for Summary Judgment, Plaintiffs specifically seek summary judgment with regard to their claims that the Ordinance violates Plaintiffs' vested property rights and that the Ordinance's amortization provision cannot divest Plaintiffs of those alleged rights. (Pls.' Mot. Summ. J. at 1.) In their supporting brief, however, Plaintiffs argue that they are

entitled to summary judgment with regard to the two claims set forth above and with regard to their claims that the Ordinance fails to provide reasonable alternative avenues of communication and fails to serve a substantial government purpose. (Pls.' Resp. Opp'n Def.'s Renewed Mot. for Summ. J. at 1-2.)

The Court observes that Plaintiffs filed a combined brief opposing Defendant's Motion for Summary Judgment and supporting of their cross Motion for Summary Judgment. Plaintiffs' arguments addressed supra Part IV.D.2 with regard to Defendant's Motion for Summary Judgment on the above claims are the same as those Plaintiffs proffered in support of their cross Motion for Summary Judgment. For the reasons set forth supra Part IV.D.2., and, even viewing the facts in the light most favorable to Plaintiffs, the Court concludes that Plaintiffs' cannot prevail on their claims that the Ordinance violates Plaintiffs' vested property rights, that the Ordinance's amortization provision cannot divest Plaintiffs of those alleged rights, that the Ordinance fails to provide reasonable alternative avenues of communication, and that the Ordinance fails to serve a substantial government purpose.

Consequently, the Court denies Plaintiffs' cross Motion for Summary Judgment.

VI. Conclusion

ACCORDINGLY, the Court **GRANTS** Defendant's Renewed Motion for Summary Judgment [59], **DENIES** Plaintiffs' Motion for Leave to File Motion for Sanctions for Filing Affidavit in Bad Faith [94], **DENIES** Plaintiffs' cross Motion for Summary Judgment [95], and **GRANTS IN PART AND DENIES IN PART** Defendant's Notice of Objection to Evidence and Motion to Disregard [114], as set forth in the above Order. The Court **DISMISSES** this case, and **DIRECTS** the Clerk to **CLOSE** the case.[33]

IT IS SO ORDERED, this the 14th day of March, 2008.

UNITED STATES DISTRICT JUDGE

[33] For the reasons set forth in the above Order, all of Plaintiffs' claims fail on the merits. Consequently, the Court may properly dismiss this case, as Plaintiffs therefore cannot obtain the declaratory judgments, injunctions, damages, and fees that they seek. Additionally, Defendant has a pending Motion to Compel Payment. (Docket Entry No. 125.) The Court will address that Motion in due course.