Case Number: 16-011-AA  
Subject Property: 4716 Devine Street (TMS#13814-09-02)  
Zoning District: C-3, -FP (General Commercial district within a Flood Protective Overlay)  
Applicant: Thomas R. Goldstein, attorney for Cricket Store 17, LLC (Taboo Adult Superstore)  
Property Owner: Restaurant Income Properties  
Council District: 3  
Summary Prepared: 3/30/16

Requested Action: Review for Administrative Appeal.

Applicable Sections of Zoning Ordinance:  
Division 11. Sexually Oriented Businesses  
§17-371, §17-372, §17-373, §17-374

§17-112(1) The Board of Zoning Appeals shall hear and decide appeals when it is alleged that there is error in any order, requirement, decision or determination made by the Zoning Administrator in the enforcement of this article.

§17-112(2)(a)(1) Powers and duties of the board of zoning appeals – special exception [duties].

§17-112(2)(b)(1) Powers and duties of the board of zoning appeals – special exception [procedures].

Case History: None.

Staff Comments:

The applicant does allege in their application for administrative appeal that the Zoning Administrator did err by:

Refusing to accept Taboo’s application for special exception, the granting of which the Board of Zoning Appeals is authorized under §6-29-800 (a)(3); and also by the Zoning Administrator’s refusal to schedule a pre-hearing conference, which is prerequisite to such applications, per his letter dated February 26, 2016: “Please be advised that neither a Variance nor a Special Exception is applicable in the case, and applications for same cannot be processed. City Code §17-374(a).” See also Zoning Administrator’s email dated February 26, 2016: “Your administrative appeal request before the Board of Zoning Appeals will be scheduled for April 12th 2016 at 10:00 at 1737 Main Street (Council Chambers). A pre-hearing conference is not required.”

South Carolina Code §6-26-800(A)(3) does authorize BOZA to permit uses by special exception subject to terms and conditions for the uses set forth for such uses in the zoning ordinance if the municipality so chooses. As permitted by State Code, the City of Columbia Zoning Ordinance does not permit a sexually oriented business by...
special exception, but instead outlines the zoning districts where permitted and other applicable regulations. A sexually oriented business is not a permitted use at 4716 Devine Street because it does not meet the applicable zoning regulations. Application for special exception for a sexually oriented business cannot be accepted as there is no section in the Zoning Ordinance for which the special exception may be obtained, and as such BOZA has no standing to hear and decide applications for special exceptions in this case.

As to the applicant’s allegation regarding the Zoning Administrator refusal to schedule a pre-hearing conference, the application for special exception states that: “You should schedule a pre-application conference with staff (803-545-3333) prior to the application deadline to discuss your specific case and its requirements.” The purpose of the optional meeting is so that staff can better understand the request if needed. In this case, the application for special exception could not be accepted and the reasoning for that decision was provided to the applicant in writing. We have an open public counter that anyone has the ability to speak to staff at any time during business hours.

S.C. State Code authorizes a board of appeals to:

- Permit uses by special exception subject to terms and conditions for the uses set forth for such uses in the zoning ordinance. South Carolina Code §6-29-800(A)(3)

The City of Columbia Zoning Ordinance states:

- No variance from any of the provisions of this section [Sexually Oriented Business – Location] may be granted by the zoning board of adjustment. No special exception regarding any of the requirements of this section may be granted by the zoning board of adjustment. City of Columbia Code §17-374 (a)

- The Board of Zoning Appeals shall: Hear and decide only the applications for special exceptions as the board of zoning appeals is specifically authorized to pass upon by terms of this article. City of Columbia Code §17-112(2)(a)(1)

- A written application for a special exception shall be submitted indicating the section of this article under which the special exception is sought and stating the grounds on which it is requested. City of Columbia Code §17-112(2)(b)(1)

- A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business outside of a designated M-1 or M-2 district. A sexually oriented business shall be located within an M-1 or M-2 district; however no sexually oriented business shall be permitted to operate within an M-1 or M-2 district appended with a -DD, -ID, -DP, -NC or -PD Overlay district. City of Columbia Code §17-374 (b)

- Any sexually oriented business lawfully operating as of the date of the ordinance from which this section is derived that is in violation of subsections (b), (c), (d), (e) or (f) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue until and through January 1, 2014, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming. City of Columbia Code §17-374 (i)

Based on the facts presented in this case summary, the Board of Zoning Appeals has no authority to accept or hear an application for special exception for the operation of a sexually oriented business at 4716 Devine Street, as the Zoning Ordinance does not grant authority, nor the use to be permitted as a special exception. The Zoning Administrator respectfully requests that the determination not to accept application for special exception be upheld.

Persons expressing support or concern about this application submitted the documents outlined below to staff. All documents are attached hereto and made a part of the record of the public hearing. -None
CITY OF COLUMBIA
BOARD OF ZONING APPEALS
APPLICATION FOR
ADMINISTRATIVE APPEAL

OFFICE USE ONLY:
Date Received 2/22/16
Receipt Number 16-01613
By COOK
Appeal Number 16-010-AA + 16-011-AA

APPLICATION MUST BE SUBMITTED AND COMPLETE BY 12:00 NOON ON DEADLINE DATE!

THE BOARD OF ZONING APPEALS CONDUCTS PUBLIC HEARINGS ON
THE SECOND TUESDAY OF EACH MONTH AT
CITY HALL, CITY COUNCIL CHAMBERS, THIRD FLOOR
1737 MAIN STREET (Southwest Corner of Main and Laurel Streets)
COLUMBIA, SOUTH CAROLINA, 29201

1. Address of affected property 4716 Devine Street
TMS# Page: Columbia, S.C. 29209 Block: R13814-09 Lot:

2. I (we) allege that the Zoning Administrator did err by □ granting □ denying an application to
□ use □ occupy □ alter □ erect □ add to □ move □ demolish for a certificate of
□ compliance □ temporary compliance □ compliance-nonconformity
□ other □ See attached.

affecting the above listed property.

3. The Zoning Administrator’s decisions and reasons therefore were:

□ See attached.

4. I (we) contend that the Zoning Administrator was IN ERROR in that: □ See attached.

5. I (we) have been aggrieved/affected by this decision in that: □ See attached.

Appellant (PLEASE PRINT CLEARLY)
Cricket Store 17, LLC by Thomas R. Goldstein
Address: P.O. Box 71121, N. Charleston, S.C. 29415-1121
City, State, ZIP: Home Telephone Number:
Office Telephone Number: 843-554-4291 Fax Number: 843-554-5566
Cellular Telephone Number:
Do you check email at least once per day? □ Y □ N Email Address: rgoldstein@coblaw.net

Appellant’s Signature ____________________________
City of Columbia
Board of Zoning Appeals
Application for Administrative Appeal

1. Address of affected property: 4716 Devine Street, Columbia, S.C. 29209
   a. TMS # Page: R13814 Block: 09 Lot: 02

2. We allege that the Zoning Administrator did err by: refusing to accept Taboo’s application for special exception, the granting of which the Board of Zoning Appeals is authorized under § 6-29-800(A)(3); and also by the Zoning Administrator’s refusal to schedule a pre-hearing conference, which is prerequisite to such applications, per his letter dated February 26, 2016: “Please be advised that neither a Variance nor a Special Exception is applicable in this case, and applications for same cannot be processed. City Code § 17-374(a).” See also Zoning Administrator’s e-mail dated February 26, 2016: “Your administrative appeal request before the Board of Zoning Appeals will be scheduled for April 12th 2016 at 10:00am at 1737 Main Street (Council Chambers). A pre-hearing conference is not required.”

3. The Zoning Administrator’s decisions and reasons therefore were: controlled by an error of law. The Zoning Administrator does not have the authority to prevent an aggrieved person from making an application for judicial relief under state law. Furthermore, the Zoning Administrator erred in failing to schedule a pre-hearing conference if, in fact, such a conference is a prerequisite to a successful Board of Zoning Appeals hearing.

4. We contend that the Zoning Administrator was IN ERROR in that: State law provides that any aggrieved party may apply for a special exception to the Board of Zoning Appeals. Under state law, only the Board of Zoning Appeals may permit uses by exception. § 6-29-800(A)(3): “...to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the Zoning Ordinance...”. State law provides that the Board of Zoning Appeals has the sole authority to consider an application for special exception with appeal to the Circuit Court. The City of Columbia’s ordinance § 17-374(a) provides: “No special exception regarding any of the requirements of this section may be granted by the zoning board of adjustment.” (emphasis added) Only the Board possesses the authority to grant or not grant a special exception, but the Zoning Administrator will not
permit the matter to be placed before the Board. This decision to not allow the applicant to appear and be heard in a meaningful manner exceeds the Zoning Administrator’s authority. Moreover, the governing body of a municipality cannot adopt an ordinance to contradict a statutory procedure and right created by the General Assembly. In addition, the governing body of a municipality cannot predetermine the outcome of a hearing before a quasi-judicial body pertaining to granting special exceptions.

5. We have been aggrieved/affected by this decision in that: The Zoning Administrator has unlawfully prevented the applicant from applying to and being heard by a quasi-judicial body. Taboo is being prevented by the City and its Zoning Administrator from participating in a statutory and constitutionally protected judicial process that is available to every citizen. (“No person shall be finally bound by a juridical or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; ...” Article I, §22, S. C. Constitution)

Respectfully submitted,

[Signature]

March 9, 2016

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein, S. C. Bar #2186
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
tgoldstein@cobblaw.net
Mr. K. Brian Cook,
Zoning Administrator
City of Columbia Zoning Division
1136 Washington Street
Columbia, S. C. 29201

Re: Zoning Administrator’s ruling dated February 26, 2016

Dear Mr. Cook,

I am in receipt of your electronic mail of March 8, 2016, in which you inform me that you have consolidated all our appeals for 10:00 a.m. on Tuesday, April 12. I first want to thank you for your courtesy in allowing both matters to be heard at the same time. I have not, however, provided you with the grounds for our second appeal, and I think fairness to the City requires me to do that. Therefore, I enclose our 5 grounds of appeal under cover of this letter. Please let me know if you require a second $75.00 filing fee to process this second appeal, and I will send it to you.

In closing, I want to thank you again for letting both matters go forward at the same time. I have the matter set on my calendar, but, as you are aware, lawyers’ appearances are dictated by the courts, and it is possible that the circuit court may preempt the time set for these appeals. I will do my best to make sure that the courts honor your schedule, but if I am called to court, the final decision rests with a judge, not me.

Please let me know if you require anything further to perfect this appeal. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

TRG/
enclosure: Application for Administrative Appeal
cc:
Mr. Andrew Livengood
Deputy Zoning Administrator
City of Columbia Zoning Division
1136 Washington Street
Columbia, S. C. 29201
(with enclosure)
March 1, 2016

Mr. K. Brian Cook,
Zoning Administrator
City of Columbia Zoning Division
1136 Washington Street
Columbia, S. C. 29201

Re: Zoning Administrator’s ruling dated February 27, 2016

Dear Mr. Cook,

Let me try to bring some order to this case.

On February 2, 2016, I applied to the City of Columbia for a variance.

On February 15, 2016, I applied to the City of Columbia to appeal your decision of January 28, 2016, and February 1, 2016, and to request a special exception on the grounds provided by State law.

As to the February 2nd application for variance, I wish to withdraw that request. I was unfamiliar with the City’s on-line application process and mistakenly assumed the variance application was the general application for all requests, including administrative review and special exception. Please consider my application for variance withdrawn. My intention is: 1) to request a special exception as provided by State law, and 2) to appeal your decisions dated January 28 and February 2, 2016, through administrative review.

In addition, as I understand your most recent letter of February 26, the City is scheduling my appeal for administrative review on April 12th at 10:00 a.m. in Council Chambers. However, by your letter dated February 26, 2016, you are refusing to schedule a hearing on our application for special exception, a procedure afforded to us by State law. This creates a procedural dilemma. Your letter of February 26th does not offer any explanation as to why we are not permitted to apply for a special exception except to say: “... neither a Variance nor a Special Exception is applicable in this case, and applications for same cannot be processed. Columbia city Code § 17-374(a).” (Letter of February 26th, ¶ 1) The City’s code does not preclude our applying for a special exception. If you are deciding to refuse our application, then we must appeal that decision to the Board. I am sure you are aware, as Zoning Administrator, that Board of Zoning Appeals is a quasi-judicial body created by the General Assembly, and that, as a quasi-judicial body, it sits to hear appeals or applications from “any person aggrieved.”
§ 6-29-800 Powers of board of appeals; variances; special exceptions; stay; hearing; decisions and orders.

The board of appeals has the following powers:

(1) to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance.

(3) to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance; and

(4) appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county.

I do not think the City possesses the power to bar us from appearing before a quasi-judicial body created by the General Assembly to serve the citizens of South Carolina. If, after reconsideration, you fail to accept our application for a special exception hearing, then I ask that you state your reasoning in clear and concise language with a sufficiently particular explanation so that I can ask the Board to review your decision. Please also reconsider your decision that you will not schedule a pre-hearing meeting with staff since, according to your application instructions, meeting with staff prior to the Board hearing is a prerequisite. Finally, if you decline to reconsider your decision and you do issue a written decision that we are not permitted to appear before the Board on an application for Special Exception, then I ask that you allow us to appeal that decision in combination with the appeal of your previous decisions currently scheduled to be heard on April 12, 2016. Obviously, allowing us to address all the appellate issues at one time conserves judicial resources and makes efficient use of the time already set aside on the 12th. I look forward to hearing from you. With kind regards, I am

Very truly yours,

[Signature]

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

TRG/
cc:
Mr. Andrew Livengood
Deputy Zoning Administrator
City of Columbia Zoning Division
1136 Washington Street
Columbia, S. C. 29201
Mr. Andrew Livengood  
Deputy Zoning Administrator  
City of Columbia Zoning Division  
1136 Washington Street  
Columbia, S. C. 29201

Mr. K. Brian Cook,  
Zoning Administrator  
City of Columbia Zoning Division  
1136 Washington Street  
Columbia, S. C. 29201

Re: Zoning Administrator’s rulings dated January 28, 2016 and February 1, 2016

Dear Mr. Livengood,

I am enclosing one additional appeal and one additional application for special exception to be combined with the original February 2nd application for variance. I also enclose our firm’s check in the amount of $150.00 as the filing fee for each. I am enclosing extra copies so you can return clocked in copies to me in the envelope provided.

Please let me know if you require anything further, and I look forward to scheduling a “pre-application conference with your staff prior to the application deadline to discuss any additional specific requirements. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

TRG/
Application for Special Exception
Application for Appeal of Zoning Adminstrator
Check # 17209
Return envelope
Mr. Andrew Livengood  
Deputy Zoning Administrator  
City of Columbia Zoning Division  
1136 Washington Street  
Columbia, S. C.  29201

Mr. K. Brian Cook,  
Zoning Administrator  
City of Columbia Zoning Division  
1136 Washington Street  
Columbia, S. C.  29201

Re: Zoning Administrator’s rulings dated January 28, 2015 and February 1, 2015

Dear Mr. Livengood,

On February 2nd, I mailed a request for a variance along with a $75.00 filing fee for 4716 Devine Street to the Zoning Administrator, Brian Cook. I trust he, in turn, forwarded that submission to you. Since then, I have become more adept at using your on-line application system, and now I realize that there are separate applications for:

Variance  
Special Exception  
Appeal from Decision of Zoning Administrator.

Because of my unfamiliarity with your web page, I did not realize this last week when I submitted my application. Therefore, I want to let you know that I will be amending our application by sending you separate requests for Special Exception and a Request for Administrative Review of the Zoning Administrator’s decisions. I also telephoned your office (803-545-333) to schedule a “pre-application conference with staff prior to the application deadline to discuss your specific case and its requirements.” To date, I have not received a return call. I understand the filing deadline is Monday, February 29th (the 30th day falling on Saturday the 27th). Now that I know there is a separate application package for variance, for special exception, and for administrative appeal, I will file with your office next week two additional packages, one for special exception, and one for administrative appeal, to be considered with the application for variance previously submitted. I will look forward to hearing from your office to schedule a pre-application conference with staff. With kind regards,

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

TRG/
VIA EMAIL TO:
tgoldstein@cobblaw.net
jeffreyfromco@msn.com

February 26, 2016

Thomas Goldstein
Belk, Cobb, Infinger and Goldstein, P.A.
2344 Cosgrove Avenue
Charleston, SC 29405

Jeff White
Taboo Adult Superstore
4716 Devine St.
Columbia, SC 29209

RE: Taboo’s Continued Non-Compliance with Zoning Ordinance

Mr. Goldstein and Mr. White,

I am in receipt of Mr. Goldstein’s February 22, 2016 letter submitting an Administrative Appeal and an Application for Special Exception, and referencing Taboo’s Application for Variance. Please be advised that neither a Variance nor a Special Exception is applicable in this case, and applications for same cannot be processed. Columbia City Code § 17-374(a). Accordingly, I am enclosing the checks submitted with those applications.

Mr. White’s February 9, 2016 email to me stated that he “will make any change necessary to comply and to stay open for business.” While I would direct Mr. White to you, Mr. Goldstein, for legal advice, I note that our office’s observations reveal that Taboo is still operating as a sexual device shop in a prohibited location. If Taboo were to cease selling sexual devices, it would not be operating as a sexual device shop as defined in the zoning ordinance. Per that ordinance, a sexual device is any:

three dimensional object designed for stimulation of the male or female human genitals, anus, buttocks, female breast, or for sadomasochistic use or abuse of oneself or others and shall include devices commonly known as dildos, vibrators, penis pumps, cock rings, anal beads, butt plugs, nipple clamps, and physical representations of the human genital organs.

-PAGE 1 of 2-
Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy. Columbia City Code § 17-372.

Please govern yourself accordingly.

Sincerely,

K. Brian Cook
Zoning Administrator
From: Cook, K Brian
To: Cook, K Brian
Subject: FW: 4716 Devine Street (Taboo - 2-26-16)
Date: Wednesday, April 06, 2016 10:59:14 AM
Attachments: Devine St_4716 (Taboo-2-26-16).pdf
image001.png

From: Cook, K Brian
Sent: Friday, February 26, 2016 3:02 PM
To: tgoldstein@COBBLAW.NET; Jeffrey (jeffreyfromco@msn.com)
Subject: 4716 Devine Street (Taboo - 2-26-16)

Mr. Goldstein,

Good afternoon. Please find attached with this email a letter regarding 4716 Devine Street (Taboo).

Your administrative appeal request before the Board of Zoning Appeals will be scheduled for April 12th 2016 at 10:00am at 1737 Main Street (Council Chambers). A pre-hearing conference is not required.

Sincerely,

Brian Cook

K. Brian Cook, Zoning Administrator
Planning and Development Services

1136 Washington Street, Columbia, SC 29201
Phone: 803-545-3332
www.columbiaplanning.net

From: Thomas Goldstein [mailto:tgoldstein@COBBLAW.NET]
Sent: Friday, February 26, 2016 9:36 AM
To: Livengood, Andrew
Subject: 4716 Devine Street

Dear Mr. Livengood,

I have previously submitted an application for variance, special exception, and administrative appeal from a zoning decision. As directed by your rules, I telephoned your Department several times to schedule a pre-appeal conference with the staff. To date, I have received no response. Could you please advise me of the status of our applications and let me know who I should contact to schedule the pre-hearing conference?

Tommy Goldstein
843 554-4291
Applications for Special Exception are due on or before 4:00pm on the due date (see attached calendar). Please review the following checklist to ensure that your application is complete. You should schedule a pre-application conference with staff (803-545-3333) prior to the application deadline to discuss your specific case and its requirements. Failure to submit a complete application or to provide requested documentation may result in your application being returned or your case scheduled for a later date.

- Completed and Signed Application
- Letter of Agency (if applicant is not the property owner)
- Calendar (included in this packet for your information)
- Application Fee
  - $50 for residential applications
  - $75 for commercial applications (projects valued under $50,000)
  - $125 for commercial applications (projects valued $50,000 or more)
- Supporting Materials, i.e.:
  - Site Plan
  - Plat of property
  - Photographs

Staff Contact:
**Andrew Livengood**  
Deputy Zoning Administrator  
City of Columbia Zoning Division  
1136 Washington Street  
Columbia, SC 29201  
803-545-3333  
www.columbiaplanning.net  
atlivengood@columbiasc.net
DIVISION 11. - SEXUALLY ORIENTED BUSINESSES

Footnotes:

--- (5) ---


Sec. 17-371. - Purpose; findings and rationale.

Purpose. It is the purpose of this division to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the city. The provisions of this division have neither the purpose nor 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 division 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 division to condone or legitimize the distribution of obscene material.


Imaginary Images, Inc. v. Evans, 612 F.3d 736 (4th Cir. 2010); D.G. Restaurant, Inc. v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1991); Giovani Carandola, Ltd. v. Fox, 470 F.3d 1074 (4th Cir. 2006); Independence News, Inc. v. City of Charlotte, 568 F.3d 148 (4th Cir. 2009); Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634 (4th Cir. 1999); Hart Bookstores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979); Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986); Restaurant Row Associates v. Horry County, 516 S.E.2d 442 (1999); Condor, Inc. v. Board of Zoning Appeals, 493 S.E.2d 342 (1997); Rothschild v. Richland County Bd. of Adjustment, 420 S.E.2d 853 (1992); Centaur, Inc. v. Richland County, 392 S.E.2d 165 (1990); and,

Ocello v. Koster, - S.W.3d -, 2011 WL 5547027 (Mo. Nov. 15, 2011); 84 Video/Newsstand, Inc. v. Sartini, 2011 WL 3904097 (6th Cir. Sept. 7, 2011); Plaza Group Properties, LLC v. Spencer County Plan Commission, 877 N.E.2d 877 (Ind. Ct. App. 2007); Flanigan's Enters., Inc. v. Fulton County, 596 F.3d 1265 (11th Cir. 2010); East Brooks Books, Inc. v. Shelby County, 588 F.3d 360 (6th Cir. 2009); En'tm't Prods., Inc. v. Shelby County, 588 F.3d 372 (6th Cir. 2009); Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291 (6th Cir. 2008); 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); Peek-a-Boo Lounge v. Manatee County, 630 F.3d 1346 (11th Cir. 2011); Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860 (11th Cir. 2007); Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007); Jacksonville Property Rights Ass'n, Inc. v. City of Jacksonville, 635 F.3d 1266 (11th Cir. 2011); H&A Land Corp. v. City of Kennedale, 480 F.3d 336 (5th Cir. 2007); Hang On, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995);

the city council 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. Alcohol consumption impairs judgment and lowers inhibitions, thereby increasing the risk of adverse secondary effects.

(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 city has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the city’s rationale for this division, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the city'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 city. The city finds that the cases and documentation relied on in this division are reasonably believed to be relevant to said secondary effects.

The city hereby adopts and incorporates herein its stated findings and legislative record related to the adverse secondary effects of sexually oriented businesses, including the judicial opinions and reports related to such secondary effects.

(Ord. No. 2012-093, 11-13-12)

Sec. 17-372. - Definitions.
The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

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

Adult bookstore or adult video store means a commercial establishment which, as one of its principal business purposes, 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." A "principal business activity" exists where the commercial establishment meets any one or more of the following criteria:

1. At least 30 percent of the establishment's displayed merchandise consists of said items; or
2. At least 30 percent of the wholesale value of the establishment's displayed merchandise consists of said items; or
3. At least 30 percent of the retail value (defined as the price charged to customers) of the establishment's displayed merchandise consists of said items; or
4. At least 30 percent of the establishment's revenues derive from the sale or rental, for any form of consideration, of said items; or
5. The establishment maintains at least 30 percent of its floor space for the display, sale, and/or rental of said items (aisles and walkways used to access said items shall be included in "floor space" maintained for the display, sale, or rental of said items); or
6. The establishment maintains at least 500 square feet of its floor space for the display, sale, and/or rental of said items (aisles and walkways used to access said items shall be included in "floor space" maintained for the display, sale, or rental of said items); or
7. The establishment regularly offers for sale or rental at least 1,000 of said items; or
8. The establishment regularly features said items and regularly advertises itself or holds itself out, by using "adult," "adults-only," "XXX," "sex," "erotic," "novelties," or substantially similar language, as an establishment that caters to adult sexual interests.

Adult cabaret means a nightclub, bar, restaurant, bottle club, or similar commercial establishment which regularly features live conduct characterized by semi-nudity. No establishment shall avoid classification as an adult cabaret by offering or featuring nudity.

Adult motel means a hotel, motel or similar commercial establishment which:

1. Offers accommodations to the public for any form of consideration; provides patrons with closed circuit television transmissions, films, motion pictures, videocassettes, slides or other photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas; and has a sign visible from the public right-of-way which advertises the availability of this adult type of photographic reproductions;
2. Offers a sleeping room for rent for a period of time that is less than ten hours; or
3. Allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten hours.

Adult motion picture theater means a commercial establishment where films, motion pictures, videocassettes, slides, or similar photographic reproductions which are characterized by their emphasis upon the display of "specified sexual activities" or "specified anatomical areas" are regularly shown to more than five persons for any form of consideration.
Characterized by means describing the essential character or quality of an item. As applied in this division, no business shall be classified as a sexually oriented business by virtue of showing, selling, or renting materials rated NC-17 or R by the Motion Picture Association of America.

Escort means a person who, for consideration, agrees or offers to act as a companion, guide or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

Escort agency means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes for a fee, tip or other consideration.

Establish or establishment means and includes any of the following:

1. The opening or commencement of any sexually oriented business as a new business;
2. The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;
3. The addition of any sexually oriented business to any other existing sexually oriented business; or
4. The relocation of any sexually oriented business.

Floor space means the floor area inside an establishment that is visible or accessible to patrons for any reason, excluding restrooms.

Influential interest means any of the following: (1) the actual power to operate the sexually oriented business or control the operation, management or policies of the sexually oriented business or legal entity which operates the sexually oriented business, (2) ownership of a financial interest of 30 percent or more of a business or of any class of voting securities of a business, or (3) holding an office (e.g., president, vice president, secretary, treasurer, managing member, managing director, etc.) in a legal entity which operates the sexually oriented business.

Licensee means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual or individuals listed as an applicant on the application for a sexually oriented business license.

Nudity means the showing of the human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.

Operator means any person on the premises of a sexually oriented business who causes the business to function or who puts or keeps in operation the business or who is authorized to manage the business or exercise overall operational control of the business premises. A person may be found to be operating or causing to be operated a sexually oriented business regardless of whether that person is an owner, part owner, or licensee of the business.

Person means an individual, proprietorship, partnership, corporation, association, or other legal entity.

Premises means the real property upon which the sexually oriented business is located, and all appurtenances thereto and buildings thereon, including, but not limited to, the sexually oriented business, the grounds, private walkways, and parking lots and/or parking garages adjacent thereto, under the ownership, control, or supervision of the licensee, as described in the application for a sexually oriented business license.

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

Semi-nude or semi-nudity means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.
Semi-nude model studio means a place where persons regularly appear in a state of semi-nudity for money or any form of consideration in order to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons. This definition does not apply to any place where persons appearing in a state of semi-nudity did so in a class operated:

(1) By a college, junior college, or university supported entirely or partly by taxation;

(2) By a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or

(3) In a structure:
   a. Which has no sign visible from the exterior of the structure and no other advertising that indicates a semi-nude person is available for viewing; and
   b. Where, in order to participate in a class a student must enroll at least three days in advance of the class.

Sexual device means any three dimensional object designed for stimulation of the male or female human genitals, anus, buttocks, female breast, or for sadomasochistic use or abuse of oneself or others and shall include devices commonly known as dildos, vibrators, penis pumps, cock rings, anal beads, butt plugs, nipple clamps, and physical representations of the human genital organs. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

Sexual device shop means a commercial establishment that regularly features sexual devices. This definition shall not be construed to include any pharmacy, drug store, medical clinic, any establishment primarily dedicated to providing medical or healthcare products or services, or any establishment that does not limit access to its premises or a portion of its premises to adults only.

Sexually oriented business means an "adult arcade," an "adult bookstore or adult video store," an "adult cabaret," an "adult motel," an "adult motion picture theater," "escort agency," a "semi-nude model studio," or a "sexual device shop."

Specified anatomical areas means and includes:

(1) Less than completely and opaquely covered: human genitals, pubic region; buttock; and female breast below a point immediately above the top of the areola; and

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

Specified sexual activity means and includes any of the following:

(1) Intercourse, oral copulation, masturbation or sodomy; or

(2) Excretory functions as a part of or in connection with any of the activities described in (1) above.

Substantial enlargement of a sexually oriented business means the increase in floor areas occupied by the business by more than 25 percent, as the floor areas exist on July 1, 1990.

Transfer of ownership or control of a sexually oriented business means any of the following:

(1) The sale, lease or sublease of the business;

(2) The transfer of securities which constitute an influential interest in the business, whether by sale, exchange, or similar means; or

(3) The establishment of a trust, gift or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

(Ord. No. 2012-093, 11-13-12)
Sec. 17-373. - Classification.

Sexually oriented businesses are classified as follows:

(1) Adult arcade;
(2) Adult bookstore or adult video store;
(3) Adult cabaret;
(4) Adult motel;
(5) Adult motion picture theater;
(6) Escort agency;
(7) Semi-nude model studio; and
(8) Sexual device shop.

(Ord. No. 2012-093, 11-13-12)

Sec. 17-374. - Location.

(a) No variance from any of the provisions of this section may be granted by the zoning board of adjustment. No special exception regarding any of the requirements of this section may be granted by the zoning board of adjustment.

(b) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business outside of a designated M-1 or M-2 district. A sexually oriented business shall be located within an M-1 or M-2 district; however no sexually oriented business shall be permitted to operate within an M-1 or M-2 district appended with a -DD, -ID, -DP, -NC or -PD Overlay district.

(c) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within 900 feet of:

(1) A church;
(2) A boundary of any residential district;
(3) Any outdoor recreational facility at which minors are likely to congregate;
(4) A lot devoted to residential use;
(5) A day care facility;
(6) A cemetery.

(d) A person commits a misdemeanor if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.

(e) A person commits a misdemeanor if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,250 feet of a public or private elementary or secondary school.

(f) A person commits a misdemeanor if he causes or permits the operation, establishment or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(g) For purposes of subsections (c) and (e), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure where a sexually oriented business is conducted, to the nearest boundary of a residential district, or to the
nearest property line of the premises of a church, day care facility, cemetery, outdoor recreational facility at which minors are likely to congregate, a lot devoted to residential use, or a public or private elementary or secondary school.

(h) For purposes of subsection (d) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(i) Any sexually oriented business lawfully operating as of the date of the ordinance from which this section is derived that is in violation of subsections (b), (c), (d), (e) or (f) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue until and through January 1, 2014, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(j) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a land use within the distances set forth in subsection (c), (d), or (e) above. This provision applies only to the renewal of a valid license, and does not apply when a completed application for a license is filed after a license has expired or has been revoked.

(Ord. No. 2012-093, 11-13-12)

Sec. 17-375. - Adult motels.

(a) Evidence that a sleeping room in a hotel, motel or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than ten hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this division.

(b) For purposes of subsection (a) of this section, the terms "rent" and "subrent" mean the act of permitting a room to be occupied for any form of consideration.

(Ord. No. 2012-093, 11-13-12)

Secs. 17-376—17-400. - Reserved.
Sec. 17-112. - Powers and duties of the board of zoning appeals.

The board of zoning appeals shall have the following powers and duties:

(1) Administrative review. The board of zoning appeals shall hear and decide appeals when it is alleged that there is error in any order, requirement, decision or determination made by the zoning administrator in the enforcement of this article, provided that those appeals must be taken within 30 days after the order, requirement, decision or determination which is alleged to be in error is made.

(2) Special exceptions.
   a. Duties. Duties of the board are as follows:
      1. Hear and decide only the applications for special exceptions as the board of zoning appeals is specifically authorized to pass upon by terms of this article;
      2. Decide the questions as are involved in determining whether special exceptions should be granted; and,
      3. Prescribe appropriate conditions and safeguards in conformity with this article including, but not limited to items like the following: (1) hours of operation; (2) landscaping; and (3) screening of activities or structures.

   b. Procedures in consideration of special exception applications.
      1. A written application for a special exception shall be submitted indicating the section of this article under which the special exception is sought and stating the grounds on which it is requested.
      2. Notice of public hearing shall be posted on the property for which special exception is sought and shall be published at least 15 days prior to the public hearing in a newspaper of general circulation in the city.
      3. The public hearing shall be held. Any party may appear in person, or by agent or attorney.
      4. The board of zoning appeals shall not vary the conditions and/or provisions of sections 17-259 through 17-274 and 17-283 that establish specific standards that must be met prior to the establishment of several principal uses that require a special exception.
      5. The board of zoning appeals may prescribe a time limit within which the action for which the special exception is required shall be begun or completed, or both.

   c. Criteria for special exceptions. In addition to definitive standards applicable to the proposed use in this article, the board of zoning appeals shall approve an application for special exception only upon a finding that the following criteria are met:
      1. The proposed special exception will not have a substantial adverse impact on vehicular traffic or vehicular and pedestrian safety and adequate provisions are made in the proposed exception for parking and for loading and unloading.
      2. The proposed special exception will not have a substantial adverse impact on adjoining properties in terms of environmental factors such as noise, lights, glare, vibration, fumes, odors, obstruction of air or light, and litter;
      3. The proposed special exception will not have a substantial adverse impact on the aesthetic character of the area, to include a review of the orientation and spacing of buildings.
4. The proposed special exception will not have a substantial adverse impact on public safety or create nuisance conditions detrimental to the public interest or conditions likely to result in increased law enforcement response;

5. The establishment of the proposed special exception does not create a concentration or proliferation of the same or similar types of special exception use, which concentration may be detrimental to the development or redevelopment of the area in which the special exception use is proposed to be developed;

6. The proposed special exception is consistent with the character and intent of the underlying district as indicated in the zoning district description, with any applicable zoning overlay district goals and requirements;

7. The proposed special exception is appropriate for its location and compatible with the permitted uses adjacent to and in the vicinity of the property; and

8. The proposed special exception will not adversely affect the public interest.

d. Effect of failure to meet conditions.

1. Violation of conditions and safeguards prescribed in conformity with this article, when made a part of the terms under which a special exception is granted, shall be deemed a violation of this article, punishable under the penalties established in this article.

2. Failure to begin or complete, or begin and complete, an action for which a special exception is required, within the time limit specified, when such time limit is made a part of the terms under which the special exception is granted, shall void the special exception.

(3) Variances.

a. Duties. Duties of the board are as follows:

1. It shall be the duty of the board to authorize upon appeal in specific cases a variance from the terms of this article as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this article will, in an individual case, result in unnecessary hardship, so that the spirit of this article shall be observed, public safety and welfare secured, and substantial justice done. Such variance may be granted in such individual case of unnecessary hardship upon a finding by the board of appeals that the conditions listed under subsection (3)b. of this section have been met.

2. No nonconforming use of neighboring lands, structures or buildings in the same district, and no permitted use of lands, structures or buildings in other districts, shall be considered grounds for the issuance of a variance.

3. In granting any variance, the board may prescribe conditions and safeguards in conformity with this article.

b. Procedures in consideration of request for variance.

1. A written application for a variance shall be submitted demonstrating that:

   (i) There are extraordinary and exceptional conditions pertaining to the piece of property;

   (ii) These conditions do not generally apply to other property in the vicinity;

   (iii) Because of these conditions, the application of this division to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

2. The board may not grant a variance the effects of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land, or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably should a variance be granted, may not be considered grounds for a variance.

3. Notice of public hearing shall be given as described in subsection (2)b.2. of this section.

4. The hearing shall be held. Any party may appear in person, or by agent or by attorney.

5. The board of zoning appeals shall make findings that the requirements of subsection (3)b.1. of this section have been met by the applicant for a variance.

6. The board of zoning appeals shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building or structure.

7. The board of zoning appeals shall further make a finding that the granting of the variance will be in harmony with the general purpose and intent of this article, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

8. The board of zoning appeals may prescribe a time limit within which the action for which the variance is requested shall be begun or completed, or both.

c. Effect of failure to meet conditions.

1. Violation of conditions and safeguards prescribed in conformity with this article, when made a part of the terms under which the variance is granted, shall be deemed a violation of this article, punishable under penalties established in this article.

2. Failure to begin or complete, or begin and complete, an action for which a variance is granted, within the time limit specified, when such time limit is made a part of the terms under which the variance is granted, shall void the variance.

(4) Joint applications for special exception and variance(s). Whenever in conjunction with an application for special exception, an applicant files an application for variance, the board of zoning appeals may combine the applications and consider them simultaneously, provided that the procedures established for special exceptions and variances within this section 17-112 shall not be varied.

(Ord. No. 2012-096, 10-16-12; Ord. No. 2013-110, 10-1-13)
SECTION 6-29-800. Powers of board of appeals; variances; special exceptions; remand; stay; hearing; decisions and orders.

(A) The board of appeals has the following powers:

1. to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance;

2. to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:
   a. there are extraordinary and exceptional conditions pertaining to the particular piece of property;
   b. these conditions do not generally apply to other property in the vicinity;
   c. because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
   d. the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

   i. The board may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.

   A local governing body by ordinance may permit or preclude the granting of a variance for a use of land, a building, or a structure that is prohibited in a given district, and if it does permit a variance, the governing body may require the affirmative vote of two-thirds of the local adjustment board members present and voting. Notwithstanding any other provision of this section, the local governing body may overrule the decision of the local board of adjustment concerning a use variance.

   ii. In granting a variance, the board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety, or general welfare;

3. to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance; and

4. to remand a matter to an administrative official, upon motion by a party or the board’s own motion, if the board determines the record is insufficient for review. A party’s motion for remand may be denied if the board determines that the record is sufficient for review. The board must set a rehearing on the remanded matter without further public notice for a time certain within sixty days unless otherwise agreed to by the parties. The board must maintain a list of persons who express an interest in being informed when the remanded matter is set for rehearing, and notice of the rehearing must be mailed to these persons prior to the rehearing.

(B) Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. If no time limit is provided, the appeal must be taken within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken. The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(C) An appeal stays all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In that case, proceedings may not be stayed other than by a restraining order which may be
granted by the board or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown.

(D) The board must fix a reasonable time for the hearing of the appeal or other matter referred to the board, and give at least fifteen days’ public notice of the hearing in a newspaper of general circulation in the community, as well as due notice to the parties in interest, and decide the appeal or matter within a reasonable time. At the hearing, any party may appear in person or by agent or by attorney.

(E) In exercising the above power, the board of appeals may, in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit. The board, in the execution of the duties specified in this chapter, may subpoena witnesses and in case of contempt may certify this fact to the circuit court having jurisdiction.

(F) All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board which must be delivered to parties of interest by certified mail.

This page intentionally left blank.