

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

CHESHIRE BRIDGE HOLDINGS, LLC,	*	
and CHESHIRE VISUALS, LLC,	*	
	*	
Plaintiffs,	*	
	*	
-vs-	*	CIVIL ACTION FILE
	*	
CITY OF ATLANTA, GEORGIA,	*	NO. 1:15-cv-03148-AT
	*	
Defendant/Opposite Party,	*	
	*	
and	*	
	*	
DANITA M. BROWN, Chair, MARTHA	*	
PORTER HALL, Vice Chair, LINDA	*	
SESSLER, KARL BARNES, and EUGENE	*	
MILLER, all in their official	*	
capacity as members of the Board	*	
of Zoning Adjustment for the	*	
City of Atlanta,	*	
	*	
Respondents.	*	

**FIRST AMENDED COMPLAINT FOR DAMAGES AND REQUEST FOR**  
**DECLARATORY, INJUNCTIVE AND EQUITABLE RELIEF**  
**AND**  
**PETITION FOR WRIT OF CERTIORARI**

1.

This is a First Amendment case. The plaintiffs seek an order declaring the City's ordinances unconstitutional, both facially and as applied to them, and enjoining the City from threatening to stop their land use in adult entertainment.

PARTIES

2.

Plaintiff/Petitioner Cheshire Bridge Holdings, LLC

("CBH") is a Georgia limited liability company in good standing which owns the land and building at 1739 Cheshire Bridge Road, Atlanta, Georgia 30324.

3.

Plaintiff Cheshire Visuals, LLC ("CV") is a Georgia limited liability company in good standing which operates the adult entertainment business at 1739 Cheshire Bridge Road, Atlanta, Georgia 30324.

4.

Defendant/Opposite Party City of Atlanta ("the City") is a political subdivision of the State of Georgia, which has the capacity to sue and be sued.

5.

Respondents are members of the City's Board of Zoning Adjustment ("BZA"), and, in that role, served as the City's final decisionmaker on whether to grant CBH's appeal from an administrative officer's issuance of a correction notice.

#### VENUE

6.

All acts or omissions alleged in this complaint have occurred, or likely will occur, in the Northern District of Georgia and therefore venue is properly within this district under 28 U.S.C. § 1391(b)(2).

JURISDICTION

7.

Jurisdiction for this suit is conferred in part by 42 U.S.C. § 1983, which provides in part:

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

8.

Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 & 2202.

9.

Under 28 U.S.C. §§ 1331 and 1343(a)(3)&(4), the Court can entertain an action to redress a deprivation of rights guaranteed by the United States Constitution, and the Court has jurisdiction under 28 U.S.C. § 1367 to hear an action to redress a deprivation of rights guaranteed by the laws and the Constitution of the State of Georgia.

10.

Upon exercising supplemental jurisdiction, the Court can grant certiorari relief under O.C.G.A. § 5-4-1, et seq.

11.

Attorney's fees are authorized by 42 U.S.C. § 1988 and

Georgia law.

RELEVANT ORDINANCES

12.

"Nonconforming uses or major structures or of major structures and premises in combination" are regulated under City of Atlanta Code § 16-24.005, which reads in part:

If lawful use involving individual structures with a replacement cost of \$5000 or more, or of structures and premises in combination, exists at the effective date of adoption or amendment of this chapter that would not be allowed in the district under the terms of this chapter, the lawful use may be continued so long as it remains otherwise lawful, subject to the following provisions:

...

- (2) Any nonconforming use may be extended throughout any parts of a building which were manifestly arranged or designed for such use at the time of adoption or amendment of this chapter, but no such use shall be extended to occupy any land outside such building.

13.

Adult businesses are defined in two parts of the City's ordinances, the first being § 16-28.016, which reads:

Adult bookstores, adult motion picture theaters, adult mini-motion picture theaters, adult cabarets, and adult entertainment establishments are subject to the following locational requirements in all districts in which they are permitted: No adult bookstore, adult motion picture theater, adult mini-motion picture theater, adult cabaret, or adult entertainment establishment, as defined in section 16-29.001(3)(a)-(e), shall be located within 1,000 feet of any two (2) other adult bookstores, adult

motion picture theaters, adult mini-motion picture theaters, adult cabaret, or adult entertainment establishment, or located within 500 feet of the boundaries of any residential district, R-1 (Residential) to R-G (Residential-General), or within 1000 feet of any public park which exceeds three (3) acres in size, or within 1000 feet of any public or private elementary or secondary school, or within 1000 feet of any church, temple, mosque, synagogue or other religious establishment used primarily for worship purposes. Said distances shall be measured in all cases by a straight line from the closest point of the property line of the site occupied by the subject adult bookstore, adult motion picture theater, adult mini-motion picture theater, adult cabaret or adult entertainment establishment to the closest point of the property line of the site occupied by any other adult bookstore, adult motion picture theater, adult mini-motion picture theater, adult cabaret or adult entertainment establishment. Further, said distances shall be measured in all cases by a straight line from the closest point of the property line of the site occupied by the subject adult bookstore, adult motion picture theater, adult mini-motion picture theater, adult cabaret or adult entertainment establishment to the closest point of any residential R-1 (Residential) through R-G (Residential General) District or to the closest point of any public park exceeding three (3) acres in size or to the closest point of the property line of the site occupied by any public or private elementary or secondary school or to the closest point of the property line of the site occupied by any church, temple, mosque, synagogue or other religious establishment used primarily for worship purposes.

14.

Under § 16-29.001(3), an adult business is defined to include:

- (a) Adult bookstore: An establishment having a significant portion of its stock in trade, books, magazines, and other periodicals,

films, videos, or other media or items which are distinguished or characterized by their emphasis on matters depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined below. For purposes of this subsection, the aforementioned items shall be collectively referred to as "adult material." It shall be presumed that a business shall have a "significant portion of its stock in trade" in adult material if any one or more of the following criteria are satisfied:

1. More than 25 percent of the floor area is devoted to adult material (not including storerooms, stock areas, bathrooms, basements or any portion of the business not open to the public); or
2. More than 25 percent of the gross sales (including rentals) result from the sale or rental of adult material; or
3. Twenty-five percent or more of the dollar value of all merchandise displayed at any time is attributable to adult material; or
4. Twenty-five percent or more of all inventory consists of adult material at any time; or
5. Twenty-five percent or more of the merchandise displayed for sale consists of adult material; or
6. Twenty-five percent or more of the stock in trade consists of adult material at any time.

...

- (c) Adult mini-motion picture theater: An enclosed building, or enclosed or semi-enclosed room or booth within an enclosed building, with a capacity for less than 50 persons used for presenting material distinguished or characterized by emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined below, for

observation by patrons therein.

...

- (e) Adult entertainment establishment: Any place of business or commercial establishment wherein the entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy or masturbation, or wherein the patron directly or indirectly is charged a fee or required to make a purchase in order to view entertainment or activity which consists of persons exhibiting or modeling lingerie or similar undergarments, or where the patron directly or indirectly is charged a fee to engage in personal contact by employees, devices or equipment, or by personnel provided by the establishment. "Substantially nude" as used in this subsection shall mean dressed in a manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person's pubic hair, anus, cleft of the buttocks, vulva or genitals. The definition of "adult entertainment establishment" is to include, but not be limited to, bathhouses, massage parlors, lingerie modeling studios and related or similar activities. Establishments which have as their sole purpose the improvement of health and physical fitness through special equipment and facilities, rather than entertainment, as hereinabove described, are specifically excluded.
- (f) Specified sexual activities: (a) Human genitals in a state of sexual stimulation or arousal; (b) acts of human masturbation, sexual intercourse or sodomy; (c) fondling or other erotic touching of human genitals, pubic region, buttocks or female breasts.
- (g) Specified anatomical areas: (a) Less than completely and opaquely covered: (1) human genitals, pubic region, (2) buttocks, and (3)

female breasts below a point immediately above the top of the areola; and (b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

FACTS

15.

In November 1996, Cheshire Visuals ("CV") entered a lease agreement with Inman Park Properties, Inc., to lease the land and building located at 1739 Cheshire Bridge Road, Atlanta, Georgia, 30324 ("the Property"). The property has been zoned C-2 under the City's zoning ordinance at all times mentioned in this complaint.

16.

On the morning of December 2, 1996, CV applied to the City for a business license to operate an adult business at the Property.

17.

Shortly after CV filed that application, on the afternoon of December 2, the City adopted Ordinance 96-O-1012. Among other things, this ordinance purported to amend the City's zoning ordinance to prohibit adult businesses (as defined under § 16-29.001(3) of the City's Code of Ordinances) from operating in C-2 zoning districts.

18.

Based on the newly adopted Ordinance 96-O-1012, the City denied CV's business license application to operate an



adult business on the Property, reasoning that the ordinance prohibited a C-2 zoned business from offering adult entertainment as of December 2, 1996.

19.

The City's denial of the business license based on zoning prompted CV to sue the City. In that lawsuit, CV argued that the denial was improper because, at the time that CV applied for the business license to offer adult entertainment on the Property, the zoning ordinance did not prohibit that type of business in a C-2 zoning district.

20.

On September 17, 1997, the Superior Court of Fulton County ruled in favor of CV, holding that CV's application should have been considered under the zoning ordinance in place at the time it submitted the application, i.e., the zoning ordinance as it existed on the morning of December 2, 1996. The City sought discretionary review of superior court's order in the Georgia Supreme Court, but it was denied.

21.

Soon after obtaining the right to operate an adult business at 1739 Cheshire Bridge Road, CV installed video booths in the basement of that building. The sexually erotic media displayed in these booths is, and has always

been, non-obscene, constitutionally-protected erotic speech.

22.

Since 1997, the City, through its code enforcement officers and building inspectors, has inspected the Property on numerous occasions. For many years, the City has known that video booths have been operated in the basement of the Property.

23.

Then, in 2014, CBH (on behalf of CV and holding those rights) applied for building permits to renovate the facade of the building on 1739 Cheshire Bridge Road. The plan was to begin using an unoccupied portion of the building to operate a social club. (This social club would not offer adult entertainment or alcoholic beverage service.)

24.

CBH's building permit application sparked a neighborhood uproar. Presumably based on political pressure, the City's inspectors then visited the Property a number of times.

25.

As a result of those repeated visits, the City's administrative officers formed the (mistaken) belief that CV could not operate its adult business in the basement of the Property, but only in certain portions of the building that

were sketched on a crude floor plan and submitted to the City in 1997 during the planning review process.

26.

Nothing in the City's permitting process supports the notion that CBH or CV are limited to allowing or offering adult entertainment only in certain hallways, rooms, or other areas of the Property.

27.

The City has acted, and is acting, in full knowledge that its actions are oppressive and without authority of law.

28.

As a result of the City's actions, CBH has been unable to erect its proposed sign or operate without fear of prosecution.

29.

The plaintiffs have exhausted their administrative remedies.

30.

The plaintiffs have no adequate remedy at law.

COUNT 1

FREE SPEECH VIOLATIONS

(Defendant City)

31.

The plaintiffs reallege each fact set forth in paragraphs 1 through 29 of this complaint and incorporate them here by reference.

32.

The City's actions have deprived, and will continue to deprive, CBH and CV of their interests protected by the First Amendment to United States Constitution, and corresponding provisions of the Georgia Constitution (Art. I, § 1, ¶ 5), in that, inter alia:

- (a) Code § 15-28(b), as applied to a "Sexually Oriented Business," fails to mandate prompt decision-making by the licensing authority;
- (b) the City's definitions of adult business are unconstitutionally overbroad because any place where a patron is charged to view entertainment "which consists of persons exhibiting or modeling lingerie or similar undergarments" is an adult entertainment establishment; other places which are deemed adult entertainment establishments include any commercial establishment "wherein the

entertainment consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse ....”

- (c) the City’s ordinances defining and regulating adult entertainment fail to serve or further a compelling or substantial governmental interest, are not unrelated to the censorship of protected speech and expression, are not narrowly tailored to avoid unlawful infringement of speech or expression; and
- (d) the City’s ordinances defining and regulating adult entertainment confer unbridled discretion to the administrative officials to punish or stifle speech.

COUNT 2

O.C.G.A. § 5-4-1: PETITION FOR WRIT OF CERTIORARI

(Defendant and Respondents)

33.

CBH realleges each fact set forth in paragraphs 1 through 30 of this complaint and incorporates them here by reference.

34.

When entertaining a writ of certiorari, “[t]he

appropriate standard of review to be applied to issues of fact ... is whether the decision below was supported by any evidence." City of Atlanta Gov't v. Smith, 228 Ga. App. 864, 865 (1997). Of course "any evidence" means competent or admissible evidence. See Guntharp v. Cobb County, 168 Ga. App. 33, 35 (1983).

35.

Regarding issues of law, the Court must review whether the lower tribunal "(1) acted beyond the scope of its discretionary powers; (2) abused its discretion; (3) or acted in an arbitrary or capricious manner." Jackson v. Spalding County, 265 Ga. 792, 794 (1995) (citing O.C.G.A. § 5-4-12). The Court's function is not only to determine if the lower tribunal's interpretation of the ordinances was reasonable; its obligation is to construe the ordinances as a matter of law. See Northside Corp. v. City of Atlanta, 275 Ga. App. 30, 31 (2005).

36.

Where, as here, the errors complained of are questions of law, any of which are dispositive of the case, if "the court is satisfied that there is no question of fact involved which makes it necessary to send the case back for a new hearing before the tribunal below, it shall be the duty of the judge of the superior court to make a final

decision in the case without sending it back to the tribunal below.” O.C.G.A. § 5-4-14(b); see also Longshore v. Collier, 37 Ga. App. 450, 452 (1927).

37.

In this case, the BZA committed clear legal error in upholding the administrative officer’s decision to issue a notice of correction citation. At the BZA hearing, CBH argued, among other things, that:

- (a) The correction notice operates as an adjudication of CBH’s liberty and property rights without meaningful notice or a meaningful opportunity to be heard before CBH loses its legal, non-conforming status and property right to operate an adult business;
- (b) The correction notice relies on cryptic, hand-written notes layered on hand-written sketches detailing the interior of an identifiable structure (with one address, i.e., 1739 Cheshire Bridge Road), and then goes on to delineate within that building the rooms and hallways where adult entertainment may be offered, which is an arbitrary and capricious application of the City’s ordinances (see, e.g., § 16-24.005(2)) and violates both the Georgia and Federal

Constitutions (e.g., § 16-30.006 which purports to limit structures and uses to those specified in the application, contains no objective standards on "any conditions or safeguards" which may be attached by the Director, and is therefore a prior restraint as applied to CBH);

- (c) The correction notice, which is predicated on City of Atlanta zoning and licensing (content-based) ordinances defining "adult entertainment" and restricting where those businesses offering "adult entertainment" may locate, is invalid because those other city ordinances violate the First Amendment (and Georgia's constitutional equivalent) in a number of ways (e.g., they are vague, overbroad, fail to serve a substantial or compelling governmental purpose);
- (d) The correction notice is a pretext to eliminate CBH and the other adult businesses on Cheshire Bridge Road based on a distaste for the erotic entertainment offered by them, which violates the First Amendment;
- (d) The correction notice relies on ordinances which, facially and as applied to CBH, vest the City with unbridled discretion to discriminate against



speech based on content and thus impose an illegal prior restraint; and

- (e) Because the City has inspected CBH, including its entire premises numerous times since 1997, and it has seen the video booth operation in the basement, and nonetheless reissued all licenses and permits needed for CBH to operate in its adult-entertainment format, the City is equitably estopped from pursuing the correction notice today.

38.

This Court has supplemental jurisdiction over this claim (or proceeding) under 28 U.S.C. § 1367. Because the state court would have jurisdiction over this claim under O.C.G.A. § 5-4-1, this Court's supplemental jurisdiction is also invoked under City of Chicago et al. v. Int'l College of Surgeons, 522 U.S. 156 (1997).

COUNT 3

ATTORNEY'S FEES

(All Defendants)

39.

The plaintiffs reallege each fact set forth in paragraphs 1 through 30 of this complaint and incorporate them here by reference.

40.

The City's actions in enforcing patently unconstitutional ordinances in an arbitrary and vindictive manner, and in being stubbornly litigious, entitle the plaintiffs to recover costs and reasonable attorney's fees in an amount to be determined at trial. See O.C.G.A. § 13-6-11.

**WHEREFORE**, the plaintiffs pray:

- (a) That as to Count 1 the Court grant them declaratory and injunctive relief and damages, prohibiting the City (through its agents, officials, and employees) from interfering with their ability to operate the adult business on the Property;
- (b) That as to Count 2 the Court grant the petition for writ of certiorari for the reasons stated herein;
- (c) That as to Counts 3 the Court award the plaintiffs their reasonable costs and attorney's fees for bringing this action in an amount to be determined at trial; and
- (d) That the plaintiffs be granted such other and further relief as the Court deems just and proper.

Respectfully submitted,

WIGGINS LAW GROUP

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**CERTIFICATE OF SERVICE**

I certify that on this date, I electronically filed this FIRST AMENDED COMPLAINT FOR DAMAGES AND REQUEST FOR DECLARATORY, INJUNCTIVE AND EQUITABLE RELIEF AND PETITION FOR WRIT OF CERTIORARI with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 21st day of November, 2016.

By: /s/ Cary S. Wiggins  
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