UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

BBL INC. and **ALVA J. BUTLER,**

Plaintiffs/
Petitioners/
Appellants

and

SANDRA K. BUTLER,

Plaintiff,

Case No.: 1:13CV076 RLM

v.

CITY OF ANGOLA,

Defendant/
Respondent/
Appellee,

and

DEAN TWITCHELL, in his official capacity,

Respondent/
Appellee,

and

VIVIAN LIKES, in her individual Capacity,

Defendant.

PLAINTIFFS' COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, DAMAGES AND ATTORNEYS FEES AND COSTS;
AND
APPEAL OF ANGOLA HEARING OFFICER'S DECISION

INTRODUCTION

1. This is a civil action wherein Plaintiffs pray for a declaratory judgment and both a preliminary and permanent injunction to restrain and enjoin the Defendant City of Angola, as well as is agents, employees and representatives, from acting under color of state law to deprive the Plaintiffs of their rights, privileges and immunities secured to them by the Constitution of the United States. Specifically, Plaintiffs seek to have this Court declare as unconstitutional, both on their face and as applied, and to enjoin, certain ordinances pertaining to the "Sexually Oriented Business" and described particularly below. In short, the City targeted Plaintiffs' First Amendment protected business and took actions and passed ordinances specifically designed to preclude Plaintiffs from opening and operating. In their rush to censor Plaintiffs and mute their speech, Defendants enacted the ordinances improperly under state law and which are in violation of state law. Plaintiffs seek damages, declaratory and injunctive relief requested and, costs and attorney fees pursuant to U.S.C. § 1988. This matter also includes an Appeal of Angola, Indiana's Hearing Officer's Decision to Deny Alva Butler and BBL Inc.'s application for a Sexually Oriented Business license, presented pursuant to 28 U.S.C. § 1367 and City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997).

JURISDICTION AND VENUE

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions presented here by virtue of 28 U.S.C. §1331, 28 U.S.C. §1343(4), and 28 U.S.C. §1343(3), the latter of which provides, in pertinent part, that the district courts shall have original jurisdiction over any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . .

3. The Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. §1367(a), which provides, in part:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all the other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

4. The statutory law which further authorizes the institution of this suit is 42 U.S.C. §1983, which provides, in part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any state or territory 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 the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. The prayer for declaratory relief is founded on Rule 57 of the Federal Rules of Civil Procedure as well as 28 U.S.C. §2201, the latter of which provides that:

> . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .

6. The jurisdiction of the Court to grant injunctive relief is conferred upon this Court by Rule 65 of the Federal Rules of Civil Procedure, and by 28 U.S.C. §2202, the latter of which provides:

> Further necessary or proper relief on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

7. Further authority for the granting of the injunctive relief requested by the Plaintiffs is conferred upon this Court by Rule 65 of the Federal Rules of Civil Procedure.

8. Authorization for the request of attorney's fees and costs is conferred by 42 U.S.C. § 1988.

9. To the best of Plaintiffs' knowledge and belief, no other action, civil or criminal, is pending in any state court involving the Plaintiffs regarding the activities and events at issue here.

10. This suit is authorized by law to redress deprivations under color of state law of rights, privileges, and immunities secured by the First and Fourteenth Amendments to the United States Constitution, and for declaratory and injunctive relief.

11. Venue in this Court is appropriate pursuant to 28 U.S.C. § 1391(b) and (c), as the various acts complained of occurred, and Defendants are located, within the Northern District of Indiana.

PARTIES

12. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

13. Plaintiff Alva J. Butler ("Butler") is an adult resident of Pinellas County, State of Florida.

14. Plaintiff Sandra K. Butler (with Alva Butler, the "Butlers") is an adult resident of Pinellas County, State of Florida.

15. Plaintiffs Alva J. Butler and Sandra K. Butler, as husband and wife, own certain real property and improvements at or about the common address 310 W. Wendell Jacob Avenue, Angola, Indiana 46703, and designated as Parcel ID 760611000045000012 or 06-11-000-045.000-50 (the "Premises").

16. The Butlers also own other real property located adjacent to the Premises and between the Premises and W. Wendell Jacob Avenue, and designated as Parcel ID 760611000046000012 or 06-11-000-046.000-50 (the "Front Lot").

17. BBL, Inc. (with the Butlers, "Plaintiffs"), is an Indiana for-profit entity, duly authorized to do business in the State of Indiana.

18. Alva Butler is the sole officer of BBL Inc.

19. BBL Inc. desired and intended, and continues to desire and intend, to open and operate upon the Premises a food and beverage serving venue ("Showgirl") that presents to consenting adult patrons clothed female performance dance entertainment that is presumptively protected speech and/or expression.

20. BBL Inc., and Alva and Sandra Butler, had the mutual understanding and agreement that BBL Inc. would lease the Premises from Alva and Sandra Butler for the operation of Showgirl.

21. BBL Inc. is the owner of the State of Indiana Liquor Retailer's Permit duly issued for the operation of Showgirl.

22. Defendant City of Angola ("Angola" or the "City") is a municipal government located within and duly chartered under the laws of the State of Indiana.

23. Defendant City takes the position that Showgirl would be a "Sexually Oriented Business" under the City of Angola, Indiana Code of Ordinances ("CAICO").

24. Defendant Vivian Likes ("Likes") is currently employed as the Zoning Administrator and City Planner for the City of Angola.

25. Respondent/Appellee Dean Twitchell is employed as the Building Commissioner for the City of Angola, Indiana, and is an adult resident of Steuben County, Indiana. Mr.

Twitchell is only named herein in his official capacity for purposes of the appeal of the Hearing Officer's decision included below.

THE PRIOR PROVISIONS OF THE ANGOLA UNIFIED DEVELOPMENT ORDINANCE

26. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

27. The Angola Unified Development Ordinance ("AUDO"), as it existed on August 9, 2012, will be referred to herein as the Prior Angola Unified Development Ordinance or "PAUDO."

28. An accurate copy of PAUDO § 2.35 is attached hereto as Exhibit A and hereby incorporated by reference as though fully set forth herein.

29. Under PAUDO § 2.35, Sexually Oriented Businesses were a permitted use in Medium to Large General Commercial (C2) Districts.

30. Under PAUDO § 2.41, Sexually Oriented Businesses were not a permitted use in the Moderate Intensity Industrial (I2) District. An accurate copy of PAUDO § 2.41 is attached hereto as Exhibit B and hereby incorporated by reference as though fully set forth herein.

31. PAUDO § 5.66 read as follows:

> This Sexually Oriented Business Standards section applies to the following zoning districts:
>
> C2
>
> The intent of the Sexually Oriented Business Standards is to protect the health, safety and welfare of the residents of the zoning jurisdiction of the City by regulating the proximity of sexually oriented businesses to certain other current and future land uses. The following standards apply:
>
> A. Permits: Sexually oriented businesses shall obtain an Improvement Location Permit prior to establishing the business.

B. Measurement Rule: Separation distances shall be measured in a straight line form the closets points between property lines, without regard to intervening structures or objects.

C. Separation: Sexually oriented businesses shall have the following separation requirements:

1. Similar Business: Sexually oriented businesses shall be separated from other sexually oriented businesses by at least 1,000 feet.

2. Residential Districts: Sexually oriented businesses shall be separated from residential zoning districts by at least 1,000 feet.

3. Sexually oriented businesses shall be separated from public gathering places such as schools, parks, playgrounds, libraries, religious institutions, day-care centers, and public structures by at least 1,000 feet.

D. Design:

1. Parking:

A. Parking lots shall not accommodate tractor trailers.

B. Overnight parking shall not be permitted.

32. Under PAUDO § 5.66(A), a Sexually Oriented Business was required to obtain an Improvement Location Permit ("ILP") prior to opening or operating.

33. Improvement Location Permits were governed by PAUDO § 9.05, a true and accurate copy of which is attached hereto as Exhibit C, and hereby incorporated by reference as though fully set forth herein.

34. PAUDO § 9.05 (1) permits the Zoning Administrator to exercise discretion to determine if an application is "substantially complete."

35. PAUDO § 9.05(2)(a) permits the Zoning Administrator to exercise discretion to determine what additional information shall be requested of the applicant.

36. PAUDO § 9.05(2)(b), "Exercise Discretion," permits the Zoning Administrator to exercise discretion in determining whether a proposed project complies with the other provisions of the Unified Development Ordinance.

37. No provision of PAUDO § 9.05 or other provision of the PAUDO specifies any period of time in which the Zoning Administrator is to render a decision on an application for an ILP.

38. No provision of PAUDO § 9.05 or other provision of the PAUDO specifies any period of time in which the Board of Zoning Appeals must rule on on an appeal from the denial of an application for an ILP.

39. Under the PAUDO, a Sexually Oriented Business could open and operate on the Premises by right, subject to obtaining a certification of occupancy ("CO") and an improvement location permit ("ILP").

THE LICENSING AND REGULATORY ORDINANCE

40. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

41. Angola, Indiana, Ordinance No. 1418-2012, entitled, "An Ordinance Establishing Licensing Requirements and Regulations for Sexually Oriented Businesses Within the City of Angola, Indiana," will be referred to herein as the Licensing and Regulatory Ordinance ("LRO").

42. An accurate copy of the Licensing and Regulatory Ordinance is attached hereto as Exhibit D, and hereby incorporated by reference as though fully set forth herein.

43. No active drafting of the Licensing and Regulatory Ordinance was being undertaken by the City or on its behalf as of August 9, 2012.

44. On or about August 19, 2012, the City, via its officials, employees, consultants, or others working on its behalf, fort the first time, began drafting the Licensing and Regulatory Ordinance.

45. On or about September 4, 2012, a regular meeting of the Common Council of the City of Angola, Indiana was held at City Hall, 210 North Public Square.

46. A true and accurate copy of the Minutes of the September 4, 2012, Regular Meeting of the Common Council, as approved by the Common Council, is attached hereto as Exhibit E and hereby incorporated by reference as though fully set forth herein.

47. Agenda for the next Regular Meeting of the Common Council, held on September 17, 2012, is attached hereto as Exhibit F and hereby incorporated by reference as though fully set forth herein

48. Neither the City, nor its Plan Commission, nor its Common Counsel published public notice that the Licensing and Regulatory Ordinance would be considered at the September 17, 2012, meeting prior to the September 17, 2012, meeting itself.

49. On or about September 17, 2012, a regular meeting of the Common Council of the City of Angola, Indiana was held at City Hall, 210 North Public Square.

50. A true and accurate copy of the Minutes of the September 17, 2012, Regular Meeting of the Common Council, as approved by the Common Council, is attached hereto as Exhibit G and hereby incorporated by reference as though fully set forth herein.

51. The first reading of the Licensing and Regulatory Ordinance took place at an Angola Common Council Meeting on September 17, 2013.

52. Following the first Reading of the Licensing and Regulatory Ordinance, the Common Council voted, pursuant to Common Council Rule 22, to permit the second and third readings of the LRO at that same meeting.

53. Common Council Rule 22 provides:

> All ordinances shall be read by title and passed by the Common Council three times before they shall be deemed adopted. No ordinance shall be read and passed three times on the same day it is introduced, except by unanimous consent of the Common Council, two-thirds or four of the Councilmembers being present and voting.

54. The LRO was read a second time at the September 17, 2013, Angola Common Council meeting.

55. The LRO was read a third time at the September 17, 2013, Angola Common Council meeting.

56. The LRO was passed and adopted by the Common Council for the City of Angola, Indiana on September 17, 2013.

57. The City's purpose in reading the Ordinance three times and passing the ordinance all in the same meeting was to enact the ordinance prior to the time Butler or Plaintiffs applied of an Improvement Location Permit.

58. Despite its preambles and pretexts, the true purpose of the Licensing and Regulatory Ordinance is to prohibit Showgirl from opening and operating upon the premises.

59. Despite its preambles and pretexts, the true purpose of the Licensing and Regulatory Ordinance was to prohibit Showgirl and/or any other similar business from opening and operating in the City by, among other things, requiring such businesses to locate in areas and operate under restrictions that virtually assure that such business could not be operated in a cost effective manner.

THE UNIFORM DEVELOPMENT ORDINANCE AMENDMENTS

60. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

61. Angola, Indiana, Ordinance No. 1425-2012, entitled "An Ordinance Amending the Unified Development Ordinance with Respect to the Regulation of Sexually Oriented Business," will be referred to herein as the "UDO Amendments." Among other things, the UDO Amendments modified the Uniform Development Ordinance to change the previous zoning, which permitted Sexually Oriented Businesses to location in C2 District to a new zoning where Sexually Oriented Businesses are required to locate in I2 Districts. Prior to the UDO Amendments, Sexually Oriented Businesses were not permitted in the I2 District.

62. The Licensing and Regulatory Ordinance and the UDO Amendments will be jointly referred to herein as the "Ordinances."

63. An accurate copy of the UDO Amendments is attached hereto as Exhibit H and hereby incorporated by reference as though fully set forth herein.

64. Notice of the UDO Amendments was published on or about November 1, 2012.

65. On Monday November 12, 2012, a meeting of the Angola Plan Commission was held at City Hall, 210 North Public Square.

66. At the November 12, 2012, Plan Commission meeting, the Plan Commission considered the UDO Amendments.

67. At the November 12, 2012, Plan Commission meeting, Plan Commission Member Chuck Sheets stated that he spoke with an Angola Realtor familiar with businesses similar to Showgirl who agreed that such businesses belong in the C2 District.

68. At the November 12, 2012, Plan Commission meeting, Plan Commission Member Chuck Sheets stated that Showgirl is a use consistent with the C2 District zoning classification.

69. At the November 12, 2012, Plan Commission meeting, Plan Commission Member Chuck Sheets stated that it was his impression that City was pushing the zoning change, that a city employee was sitting on the Plan Commission, and that – in his option – this could be construed as a conflict of interest.

70. At the November 12, 2012, Plan Commission meeting, Plan Commission Member Carpenter asked what effect the UDO Amendment would have on a current business from "going in," referring to Showgirl.

71. City Attorney Shoup responded to Member Carpenter's question that the Plan Commission should not comment on the matter because the City is likely to face litigation on the issue.

72. Member Chuck Sheets then stated that Member Carpenter's question was a good question because it could be construed that the City and/or Plan Commission was changing its zoning to preclude a business from coming to Angola, referring to Showgirl.

73. Following Member Sheets comment immediately above, Plan Commission President Burd then closed the discussion.

74. The Plan Commission then recommended the Common Council Adopted the UDO Amendments on a 7-2 vote.

75. Despite its preambles and pretexts, the true purpose of the UDO Amendments is to prohibit Showgirl from opening and operating upon the premises.

76. Section 4(a)(3) of the UDO Amendments restates the requirement, that Sexually Oriented Businesses locate at least 750 feet from residences, contained in LRO § 19(a) because the City was aware that the LRO and Section 19(a) thereof was passed in violation of Indiana State law.

77. Showgirls operation and the operation of Sexually Oriented Businesses would be consistent with the District Intent for the C2 District outlined in PAUDO and AUDO § 2.35. Namely, it would be a moderate intensity (at most) eating and/or entertainment establishments.

78. Showgirls operation and the operation of Sexually Oriented Businesses would be consistent with the Permitted Uses for the C2 District set forth in PAUDO and AUDO § 2.35.

79. Prior to the enactment of the Ordinances, the Angola Common Council made the legislative finding that Sexually Oriented Businesses were most appropriately categorized as Permitted Uses in the C2 District.

80. Prior to the enactment of the Ordinances, the Angola Common Council made the legislative finding that Sexually Oriented Businesses were most appropriately categorized as Permitted Uses in the C2 District because the areas zoned C2 in Angola are in areas regularly patrolled by police.

81. The operation of Showgirl and the operation of Sexually Oriented Businesses is not consistent with the District Intent of the I2 District set forth in PAUDO and AUDO § 2.41. Namely, a) it is not a moderate intensity industrial use; b) it is not a business park, distribution operation, or industrial park; and c) the PAUDO and AUDO require Sexually Oriented Businesses to separate from one another.

82. Showgirls operation and the operation of Sexually Oriented Businesses is not consistent with the Permitted Uses set forth in PAUDO and AUDO § 2.41.

83. Angola's decision to move Sexually Oriented Businesses from the C2 District to the I2 District was arbitrary; contrary and in conflict with its prior decision that Sexually Oriented Businesses were most suited for the C2 district, and contrary to the District Intent of the

I2 and C2 Districts; inconsistent with the other Permitted Uses for the I2 and C2 Districts; and for the true reason of preventing Showgirl from opening and/or operating.

GENERAL ALLEGATIONS

84. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

85. The Premises are located in a Medium to Large General Commercial District (C2), as defined by both the AUDO and the PAUDO.

86. On or about August 9, 2012, at auction, the Butlers agreed to purchase the Premises for approximately $175,000.00.

87. On or about August 9, 2012, at auction, the Butlers agreed purchase the Front Lot for approximately $90,000.00.

88. On or about August 9, 2012, at auction, the Butler, on behalf of BBL Inc., agreed purchase the liquor license previously associated the Premises for approximately $85,000.00.

89. As of August 9, 2012, the Premises was appropriately zoned under the AUDO for the establishment of Showgirl or a "Sexually Oriented Business," as defined by the AUDO.

90. As of August 9, 2012, there were no other nearby uses or zoning classification which would have precluded of Showgirl or a Sexually Oriented Business from lawfully opening and operating upon the Premises

91. Angola's Economic Development and Planning Director, Vivian Likes, was informed of Plaintiffs' intention to open a gentleman's club on August 14, 2012 when attorney for Alva Butler, Paul Sauerteig, placed a phone call to Ms. Likes inquiring as to whether the premises would be suitable for a "gentlemen's club/business."

92. On or about August 15, 2012, kpcnews.com, published a story by Mike Marturello entitled, "Slider's sale sparks rumors," and a true and accurate copy of the same is attached hereto as Exhibit I and hereby incorporated by reference as though fully set forth herein.

93. The "Slider's sale sparks rumors" news article reported that the August 9, 2012, auction sale of the Premises was stirring rumors as to identity of the buyer, with a gentlemen's club being identified as one of the rumored buyers.

94. The Star is a print newspaper serving DeKalb County.

95. The Star's content is also available online at kpcnews.com.

96. On August 16, 2012, the Star published an article by Mike Marturello entitled "Restaurant's mystery buyer causing stir," and a true and accurate copy of the article is attached hereto as Exhibit J and hereby incorporated by reference as though fully set forth herein.

97. The "Restaurant's mystery buyer causing stir" article identified "Showgirls" as one of the optional buyers of the Premises at the August 9, 2012 auction.

98. Also on August 16, 2012, Paul Sauerteig, of Snow & Sauerteig, LLP, issued a correspondence to Kim Shoup, a true and accurate copy of which is attached hereto as Exhibit K and hereby incorporated by reference as though fully set forth herein.

99. The August 16, 2012, correspondence of Paul Sauerteig to Kim Shoup generally sought to verify that the Premises were appropriately zoned for a gentleman's club/bar.

100. On, or about August 20, 2012, City Attorney Kim Shoup was instructed to begin researching the legalities of regulating sexually oriented business by the Common Council at the Common Council meeting held that day.

101. On or about August 20, 2012, in direct response to learning that a "gentlemen's club/or" or similar business may seek to open and operate on the Premises, the City, via its

officers, appointees, consultants, and/or agents, began work on ordinances and/or modification to the City's Uniform Development Code for the purpose of preventing such a business from opening or operating upon the Premises.

102. On or About August 23, 2012, Angola Zoning Administrator/Planning Director Vivian Likes issued a letter to Paul Sauerteig, an accurate copy of which is attached hereto as Exhibit L, hereby incorporate by reference as through fully set forth herein.

103. In the August 23, 2012, letter, the City, via Ms. Likes, informed Mr. Butler, via Mr. Sauerteig, of the City's position that the Premises was not appropriately situated for a Sexually Oriented Business for the reason that "the proposed business" is less than 1,000 feet from a "Public Gathering Places."

104. On August 24, 2012, Mr. Sauerteig issued correspondence to Ms. Likes, an accurate copy of which is attached hereto as Exhibit M and hereby incorporated by reference as though fully set forth herein.

105. The August 24, 2012, correspondence of Mr. Sauerteig to Ms. Likes generally asked Ms. Likes to specifically indentify the public gathering places referred to in her August 23, 2012, correspondence.

106. On August 24, 2012, Mr. Sauerteig also issued a correspondence to City attorney Kim Shoup, an accurate copy of which is attached hereto as Exhibit N and hereby incorporated by reference as though fully set forth herein.

107. On or before September 6, 2012, Mr. Sauerteig spoke with Ms. Likes by telephone. Ms. Likes instructed Mr. Sauerteig that the Premises were located less than 1000 from the Steuben County Multi-Use Trail, which she regarded as a Public Gathering Place under PAUDO § 5.66(C)(3).

108. Ms. Likes representation to Mr. Sauerteig, that the Steuben County Multi-Use trail was a Public Gathering Place less than 1000 feet from Premises, was false, and knowingly false when made.

109. On September 10, 2012, Ms. Likes issued correspondence to Mr. Sauerteig, an accurate copy of which is attached hereto as Exhibit O and hereby incorporated by reference as though fully set forth herein.

110. The September 10, 2012, correspondence of Ms. Likes to Mr. Sauerteig generally confirmed Ms. Likes' previous representations to Mr. Sauerteig, including that the Premises was less than 1000 feet from the Steuben County Multi-Use trail.

111. Construction on the Steuben County Multi-Use Trial and/or associated amenities such as bike racks, seating areas, etc., is not set to begin in September 2013.

112. The position stated by Ms. Likes on behalf of the City in her September 10, 2012, correspondence to Mr. Sauerteig that the Premises was within 1000 feet of a public gathering place was false and known by Ms. Likes to be false when made.

113. The position announced by Ms. Likes on behalf of the City, that the Premises was within 1000 feet of a public gathering place, was asserted for the purposes of delaying permitting, licensing, and/or construction of Showgirl upon the Premises until such time as the City could put in place ordinances and/or Uniform Development Code amendments precluding Showgirl from Operating upon the Premises.

114. After delaying the application, permitting, licensure and/or construction of Showgirl long enough for the Licensing and Regulatory Ordinance to be enacted, neither Ms. Likes nor the City again asserted the existence of a public gathering place within 1000 feet of the premises, knowing such assertion to be false.

115. On or about September 11, 2012, the Butlers closed the sale for the Premises and the Front Lot, and are the fee owners of record for each.

116. Immediately thereafter, the City's building commissioner, Dean Twitchell, inspected Plaintiffs' premises and verbally permitted plaintiffs to make renovations while in the presence of Mr. Butler and a state inspector.

117. Shortly thereafter, Mr. Twitchell informed Mr. Butler at that time that he should be begin the process of applying for an Improvement Location Permit and a Certificate of Occupancy.

118. Following Mr. Twitchell's initial visit, he visited the premises multiple times per week.

119. During Mr. Twitchell's subsequent visits, he never instructed any Plaintiff or other person to stop work on the Premises, prior to approximately November 20, 2012.

120. On or about September 17, 2012, the City adopted the Licensing and Regulatory Ordinance, as pled above.

121. On or about October 10, 2012, an electrician visited the City to obtain an electrical permit to perform work at the Premises.

122. On or about October 10, 2012, the City refused to issue an electrical permit to the electrician and instructed the electrician that he would be fined for each day he performed electrical work at the Premises.

123. On or about October 10, 2012, Dean Twitchell instructed Butler's workers to stop renovating the Premises until their permits were issued. This was a stark change from his otherwise routine visits.

124. On or about October 18, 2012, Butler, through Kenneth Nord of CE&M, Inc., submitted an application for construction design release to the State of Indiana for Showgirl.

125. Attached hereto as Exhibit P is and accurate copy the application for construction design release, which is hereby incorporated by reference as through fully set forth herein.

126. Attached hereto as Exhibits Q, are accurate copies of the site plans submitted with Butler's application for construction design release to the State of Indiana.

127. On November 7, 2012, Mr. Butler, together with his attorney Sara Seibert, traveled to the City offices to Apply for an Improvement Location Permit and a Sexually Oriented business License for BBL Inc.

128. Ms. Likes refused to meet with Mr. Butler or Ms. Seibert to accept the Improvement Location Permit or Sexually Oriented Business license applications.

129. Eventually, on November 7, 2012, City attorney Mr. Shoup accepted the Improvement Location Permit application and Sexually Oriented Business Application on behalf of the City.

130. On November 8, 2012, Mr. Butler and/or Ms. Seibert returned to the city offices and paid all necessary application fees associated with the application for an Improvement Location Permit and the application for Sexually Oriented Business License.

131. On November 8, 2012, Mr. Butler and/or Ms. Seibert also provided Dean Twitchell with a copy of the Improvement Location Permit Application. Mr. Twitchell then advised that a decision on the improvement location permit would only take a few days.

132. As of November 8, 2012, Mr. Butler's Improvement Location Permit application and Sexually Oriented Business application were submitted to the City and all appropriate fees were paid for those applications.

133. An accurate copy of Butler's November 7/8, 2012, application for an Improvement Location Permit is attached hereto as Exhibit R and hereby incorporated by reference as though fully set forth herein.

134. An Accurate copy of Butler and BBL Inc.'s application for a Sexually Oriented Business licenses is attached hereto as Exhibit S and hereby incorporated by reference as though fully set forth herein.

135. As of November 8, 2012, if not earlier, Mr. Butler's application for an Improvement Location Permit was ripe for initial consideration by the City.

136. As of November 8, 2012, if not earlier, Mr. Butler's application for a Sexually Oriented Business license was ripe for initial consideration by the City.

137. Sometime around November 8, 2012, if not before, Chris McComb, a building contractor for Mr. Butler came into to Mr. Dean Twitchell's office and duly applied for a building permit for improvements at the Premises.

138. Chris McComb has since passed away.

139. On or about November 9, 2012, the State of Indiana issued a Request for Additional Information regarding Butler's application for construction design release for Showgirl, an accurate copy of which is attached hereto as Exhibit T and hereby incorporated by reference as though fully set forth herein.

140. On or about November 12, 2012, the City's Plan Commission held a meeting and issued a recommendation that the City's Common Council adopt the UDO Amendments, as pled above.

141. On or about November 14, 2012, Butler, through Kenneth Nord of CE&M, Inc., submitted an revised application for construction design release to the State of Indiana for

Showgirl, an accurate copy of which is attached hereto as Exhibit U and hereby incorporated by reference as though fully set forth herein.

142. An accurate copy of the site plan submitted with the November 14, 2012, revised application for construction design release for Showgirl is attached hereto as Exhibit V and hereby incorporated by reference as though fully set forth herein.

143. On or about November 15, 2012, upon review of the Plans and Application submitted for Butler's intended improvements to the Premises, the State of Indiana, via its State Building Commissioner and State Fire Marshall, issued a Construction Design Release.

144. An accurate copy of the November 15, 2012, Construction Design Release relative to the Premises is attached hereto as Exhibit W and hereby incorporated by reference as though fully set forth herein.

145. On or about November 15, 2012, Ms. Seibert, emailed Vivian Likes to check the status of Mr. Butler's Improvement Location Permit application.

146. A true and accurate copy of Ms. Seibert's email to Ms. Likes is attached hereto as Exhibit X and hereby incorporated by reference as though fully set forth herein.

147. On or about November 19, 2012, the City's Common Council held a meeting and adopted the UDO Amendments, as pled above.

148. On or about November 20, 2012, Ms. Seibert issued correspondence by certified mail to Ms. Likes inquiring as to whether the Mr. Butler's application for an Improvement Location Permit had been approved or denied.

149. An accurate copy of Ms. Seibert's November 20, 2012, correspondence to Ms. Likes is attached hereto as Exhibit Y, and hereby incorporated by reference.

150. On or about November 20, 2012, Ms. Seibert issued correspondence by certified mail to Mr. Dean Twitchell inquiring as to whether the Mr. Butler's application for an Improvement Location Permit had been approved or denied and whether the request for a building permit for the Premises had been approved or denied.

151. An accurate copy of Ms. Seibert's November 20, 2012, correspondence to Mr. Twitchell is attached hereto as Exhibit Z, and hereby incorporated by reference.

152. On November 26, 2012, Dean Twitchell issued correspondence to Mr. Butler informing him of the City's intent to deny his and BBL Inc.'s application for a Sexually Oriented Business License (the "Notice of Intent to Deny").

153. An accurate copy of Mr. Twitchell's November 26, 2012, Notice of Intent to Deny is attached hereto as Exhibit AA, and hereby incorporated by reference at though fully set forth herein.

154. The sole reason stated in Mr. Twichell's Notice of Intent to Deny was that the premises were located within 750 feet of "multiple parcels containing residences."

155. Mr. Twichell's Notice of Intent to Deny did not identify the existence of a Public Gathering Place within 1000 feet of the Premises as a reason for the application could not be approved.

156. As of August 9, 2012, there existed no Public Gathering Place, within the meaning of PAUDO § 5.66(C)(3), within 1000 feet of the Premises, measured in accordance with PAUDO § 5.66.

157. As of November 26, 2012, there existed no Public Gathering Place, within the meaning of PAUDO § 5.66(C)(3), within 1000 feet of the Premises, measured in accordance with PAUDO § 5.66.

158. Upon further inquiry, the City specified, in a November 29, 2012, correspondence from Dean Twichell its position that the residences at the following Angola, Indiana addresses are within 750 feet of the Premises:

a. 3095 North Wayne Street,

b. 470 West Wendel Jacob Avenue,

c. 595 Eyster Drive,

d. 380 Eyster Drive, and

e. 360 Eyster Drive.

159. The addresses in the Paragraph immediately above, identified by street number, are depicted on the map attached hereto as Exhibit BB ("Map 1"), which is hereby incorporated by reference as though fully set forth herein.

160. The addresses in Paragraph 158 above, identified by street number, are depicted on the map attached hereto as Exhibit CC ("Map 2"), which is hereby incorporated by reference as though fully set forth herein.

161. Prior to the Licensing and Regulatory Ordinance becoming effective, none the structures or associated (situs) parcels identified in Paragraph 158 above disqualified or otherwise rendered the Premises to be legally unavailable for a Sexually Oriented Business.

162. On or about December 3, 2012, Vivian Likes issued a Correspondence to Sara Siebert indicating that an Improvement Location Permit could not be issued to Mr. Butler for the Premises for the reason that the application was incomplete. The correspondence further advised that a completed application would likely be denied because of the location restrictions contained in the UDO Amendments.

163. A true and accurate copy of the Mr. Likes December 3, 2012, correspondence to Ms. Seibert is attached hereto as Exhibit DD, and hereby incorporated by reference as though fully set forth herein.

164. On or about December 5, 2012, BBL Inc., and Butler timely requested a hearing on Building Commissioner Dean Twitchell's Notice of Intent to Deny.

165. On or about February 12, 2013, Mr. Butler's appeal of the intent to deny his application for a SOB proceeding was held before a Hearing Officer pursuant to Section 10(a) of the Licensing and Regulatory Ordinance.

166. The Hearing Officer issued his initial decision on February 15, 2013, which denied Butler and BBL Inc.'s application for a Sexually Oriented Business license

167. The Hearing Officer issued his final opinion on February 17, 2013, which denied Butler and BBL Inc.'s application for a Sexually Oriented Business license (the "Final Denial"), an accurate copy of which is attached hereto as Exhibit EE and hereby incorporated by reference as though fully set forth herein.

168. The Hearing Officer's Final Denial represents the final Decision of the City with Respect to Mr. Butler's application for a Sexually Oriented Business license.

169. On or about March 7, 2013, Ms. Seibert, on behalf of Mr. Butler submitted a Request for Reconsideration and/or Clarification (the "Request for Reconsideration"), an accurate copy of which is attached hereto as Exhibit FF, and hereby incorporated by reference as though fully set forth herein.

170. On or about March 8, 2013, Scott Bergthold of the Law Office of Scott D. Bergthold, P.L.L.C., as an attorney for the City, issued a response to the Request for Reconsideration ("Response to Request for Reconsideration"), arguing that the Hearing Officer

was only required to notify the applicant of the right to appeal and not the mechanism or method of appeal.

171. A true and accurate copy of the Response to Request for Reconsideration is attached hereto as Exhibit GG and hereby incorporated by reference as though fully set forth herein.

172. On March 8, 2013, Hearing Officer James A. McEntarfer issued a correspondence and/order correcting typographical errors in the Final Decision, but refusing to provide further instruction on the method or mechanism of appeal.

173. An accurate copy of Hearing Officer James A. McEntarfer's March 8, 2013, correspondence and/order are attached hereto as Exhibit HH and hereby incorporated by reference.

COUNT I – DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES THE IMPROPER ENACTMENT OF THE LICENSING AND REGULATORY ORDINANCE

174. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

175. As set forth above, the Licensing and Regulatory Ordinance restricts the ability of Sexually Oriented Businesses to open and operate in Angola, Indiana by reference to the location of the Sexually Oriented Business and other uses.

176. Because the Licensing and Regulatory Ordinance restricts the ability of Sexually Oriented Businesses to open and operated based on upon location restrictions contained in the LRO itself, it is, in substance an amendment to the Angola, Indiana, Unified Development ordinances.

177. Amendments to municipal zoning ordinances in the State of Indiana, such as Angola's Unified Development Ordinance, must Comply with Indian Code § 36-7-4-602(b).

178. Indian Code § 36-7-4-602(b) provides:

> (b) After the zoning ordinance for a jurisdiction has been adopted as described in subsection (a), the following procedure applies to a proposal to amend or partially repeal the text (not zone maps) of the ordinance:
>
> (1) The plan commission may initiate the proposal. (Under the advisory planning law or the area planning law, any participating legislative body also may initiate the proposal and require the plan commission to prepare it.)
>
> (2) The plan commission must prepare the proposal so that it is consistent with section 601 of this chapter.
>
> (3) The plan commission and the legislative body both must comply with section 603 of this chapter.
>
> (4) The plan commission must give notice and hold a public hearing under section 604 of this chapter.
>
> (5) The plan commission must certify the proposal to the legislative body under section 605 of this chapter.
>
> (6) The legislative body must consider the proposal under section 607 of this chapter, and section 607 governs whether the proposal is adopted or defeated.
>
> (7) If the proposal is adopted under section 607 of this chapter, the plan commission must print the amendments to the zoning ordinance under section 610 of this chapter.

179. With respect to the Licensing and Regulatory Ordinance, the Angola Plan Commission failed to initial the proposal as required by IC § 36-7-4-602(b)(1).

180. With respect to the Licensing and Regulatory Ordinance, the Angola Plan Commission did not prepare the proposal so that it is consistent with IC § 36-7-4-601, as required by IC § 36-7-4-602(b)(2).

181. With respect to the Licensing and Regulatory Ordinance, the Angola Plan Commission and the Angola Common Council failed to failed to comply with IC § 36-7-4-603, as required by IC § 36-7-4-602(b)(3).

182. With respect to the Licensing and Regulatory Ordinance, the Angola Plan Commission failed give notice and hold a public hearing under IC § 36-7-4-604, as required by IC § 36-7-4-602(b)(4).

183. With respect to the Licensing and Regulatory Ordinance, the Angola Plan Commission failed to certify the proposal to the Common Council under IC § 36-7-4-605, as required by IC § 36-7-4-602(b)(5).

184. With respect to the Licensing and Regulatory Ordinance, the Angola Common Council failed to failed to consider the proposal under IC § 36-7-4-607, as required by IC § 36-7-4-602(b)(6).

185. With respect to the Licensing and Regulatory Ordinance, the Angola Plan Commission did not print the amendments under IC § 36-7-4-610, as required by IC § 36-7-4-602(b)(7).

186. Because the Licensing and Regulatory Ordinance was not adopted in accordance with state law, the LRO and the locational restrictions therein are invalid *ab initio*, and could now lawfully serve as the basis to deny either Mr. Butler and BBL Inc.'s application for a Sexually Oriented Business license or Butler's application for an Improvement Location permit.

187. The notice of intent to deny Mr. Butler and BBL Inc.'s application for a Sexually Oriented Business licenses was without justification under state law and therefore restricted the exercise of First Amendment rights without adequate justification.

188. The foregoing acts pled in this Count were taken by the City and its agents under color of state law.

189. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendant, and should do so here.

190. Because of the questioned validity of the Licensing and Regulatory Ordinance, which has been applied against the Plaintiffs to restrict their First Amendment rights, Plaintiffs are entitled to a declaration by this Court in regard to their validity.

191. The infringement of constitutional rights, especially First Amendment rights, even for minimal periods of time, constitutes irreparable injury.

192. Because the Licensing and Regulatory Ordinance is invalid, the public interest weighs in favor of protecting constitutional rights, and Angola has no valid interest in enforcing or applying an unconstitutional ordinance, the Court should enter an order preliminarily and/or permanently restraining Angola from applying the LRO against Defendants.

193. As a direct and proximate result of the City's unconstitutional and unlawful application of the facially invalid ILP requirement against Defendants, Defendants have been unable to operate Showgirl upon the premises and has suffered monetary damages including but not limited to lost profits, loss of good will, remodeling costs, and maintenance costs.

194. The foregoing acts pled in this count were undertaken by Angola under color of state law.

195. Pursuant to 42 U.S.C. § 1983 and common law, Plaintiffs are entitled to an award damages for the deprivations of their constitutional rights and for the other losses sustained in amounts to which they are found to be entitled at trial.

COUNT II – DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES VIOLATION OF LOCAL GOVERNMENT PROVISIONS OF THE INDIANA CODE

LICENSING AND REGULATORY ORDINANCE

196. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

197. Indiana Code § 36-1-6-9 provides, in part:

> (a) The legislative body of a county or municipality may adopt an ordinance providing that certain other ordinances may be enforced through a proceeding before an administrative body of the county or municipality.
>
> (b) An ordinance adopted under subsection (a) must designate the following:
>
> (1) The ordinances that may be enforced through an administrative proceeding.
>
> (2) The administrative body before which the proceeding may be brought.
>
> (c) An ordinance may not be designated under subsection (b) for enforcement through an administrative proceeding unless the ordinance restricts or prohibits actions harmful to the land, air, or water, governs use of the public way, or governs the standing or parking of vehicles.

198. The Licensing and Regulatory Ordinance does not restrict or prohibit actions harmful to the land, air, or water, governs use of the public way, or govern the standing or parking of vehicles, within the meaning of IC § 36-1-6-9.

199. Indiana Code § 36-1-6-9 further provides, in part:

> (d) In a proceeding to enforce an ordinance brought before an administrative body designated under subsection (b):
>
> (1) a violation of the ordinance must be proven by a preponderance of the evidence; and
>
> (2) the administrative body may not impose a penalty other than a fine in an amount within the limit set forth in IC 36-1-3-8(10).

200. LRO § 8 provides that, absent an appeal being interposed under LRO § 10, the Building Commissioner may suspend a Sexually Oriented Business license for up to thirty days by issuing a notice.

201. LRO § 9 provides that, absent an appeal being interposed under LRO § 10, the Building Commissioner may revoke a Sexually Oriented Business license.

202. LRO § 10 permits the "Hearing Officer" may affirm or reverse the decision of the Building Commissioner.

203. LRO §§ 8-9 violate to Indiana Code § 36-1-6-9(d)(1) because the permit a penalty to be imposed without requiring a hearing where the City bears the burden of proof.

204. LRO §§ 8-10 are contrary to Indiana Code § 36-1-6-9(d)(2) because they permit the administrator to impose penalty that is not a monetary fine.

205. LRO § 10 violates Indiana Code § 36-1-6-9(e) by providing an appeal to the "Hearing Officer" rather than a Court.

206. LRO § 10 violates Indiana Code § 36-1-6-9(f) by requiring appeals to be taken within thirty days rather than within 60 days.

207. Indiana Code § 36-7-4-918.1(1) requires that a City's board of zoning appeals hear "any order, requirement, decision, or determination made by an administrative official, hearing officer, or staff member under the zoning ordinance. . . ."

208. Because the LRO is in substance a zoning ordinance, LRO §§ 8-10 are contrary to IC § 918.1 because they permit the Hearing Officer, rather than the zoning board of appeals, to hear and determine appeals from and review decisions and determinations made by the Building Commissioner.

209. The City of Angola applied LRO §§ 4 and 10 against Mr. Butler contrary to IC § 36-7-4-918.1(1) by allowing a "Hearing Officer" hear the land use/zoning decision to deny Mr. Butler a Sexually Oriented Business license for the stated reason that the Premises is not at least 750 feet from a residence as required by LRO § 19.

210. The foregoing acts pled in this Count were taken by the City and its agents under color of state law.

211. The decision to deny Mr. Butler's application for a Sexually Oriented Business licenses was without adequate and valid justification under state law and therefore restricted the exercise of First Amendment rights without adequate justification.

212. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendant, and should do so here.

213. Because of the questioned validity of the Licensing and Regulatory Ordinance, which has been applied against the Plaintiffs to restrict their First Amendment rights, Plaintiffs are entitled to a declaration by this Court in regard to their constitutionality.

214. The infringement of constitutional rights, especially First Amendment rights, even for minimal periods of time, constitutes irreparable injury.

215. Because the Licensing and Regulatory Ordinance is invalid, the public interest weighs in favor of protecting constitutional rights, and Angola has no valid interest in enforcing or applying an unconstitutional ordinance, the Court should enter an order preliminarily and/or permanently restraining Angola from applying the LRO against Defendants.

216. At the direct and proximate result of the City's unconstitutional and unlawful application of the invalid Licensing and Regulatory Ordinance against Defendants, Defendants have been unable to operate Showgirl upon the premises and has suffered monetary damages

including but not limited to lost profits, loss of good will, remodeling costs, and maintenance costs.

217. Pursuant to 42 U.S.C. § 1983 and common law, Plaintiffs are entitled to an award damages for the deprivations of their constitutional rights and for the other losses sustained in amounts to which they are found to be entitled at trial.

COUNT III – DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES VIOLATION OF INDIANA LIQUOR LAWS

218. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

219. Indiana Code § 7.1-3-9-6, entitled "Certain local ordinances proscribed," provides in full:

> Certain Local Ordinances Proscribed. A city or town shall not enact an ordinance which in any way, directly or indirectly, regulates, restricts, enlarges, or limits the operation or business of the holder of a liquor retailer's permit as provided in this title. A city or town shall not enact an ordinance covering any other business or place of business for the conduct of it in such a way as to prevent or inhibit the holder of a liquor retailer's permit from being qualified to obtain or continue to hold the permit, or operate to interfere with or prevent the exercise of the permittee's privileges under the permit.

220. The Licensing and Regulatory Ordinance restricts the operation of liquor-licensed establishments, such as Showgirl, contrary to IC § 7.1-3-9-6, in numerous and various manners, including:

a. Restricting the ability of a holder of a liquor retailer's permits (a "Holder") to present female performance entertainment protected by the First Amendment of the United States Constitutions;

b. Restricting how a Holder may present protected speech and expression;

c. Restricting when a Holder may operate.

d. Restricting who may be Holder;

e. Restricting where a Holder may operate; and

f. Otherwise estricting the Holder's operation of their premises;

221. The City has applied the LRO against Defendants and will continue to apply the LRO against them, contrary to IC § 7.1-3-9-6.

222. The decision to deny Mr. Butler's application for a Sexually Oriented Business licenses was without adequate and valid justification under state law and therefore restricted the exercise of First Amendment rights without adequate justification.

223. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendant, and should do so here.

224. The Honorable Court can and should declare that the LRO is completely and entirely invalid *ab initio*, for the reason that its provision are contrary to IC § 7.1-3-9-6.

225. Because of the questioned validity of the Licensing and Regulatory Ordinance, which has been applied against the Plaintiffs to restrict their First Amendment rights, Plaintiffs are entitled to a declaration by this Court in regard to their constitutionality.

226. The infringement of constitutional rights, especially First Amendment rights, even for minimal periods of time, constitutes irreparable injury.

227. Because the Licensing and Regulatory Ordinance is invalid, the public interest weighs in favor of protecting constitutional rights, and Angola has no valid interest in enforcing or applying an unconstitutional ordinance, the Court should enter an order preliminarily and/or permanently restraining Angola from applying the LRO against Defendants.

228. At the direct and proximate result of the City's unconstitutional and unlawful application of the invalid Licensing and Regulatory Ordinance against Defendants, Defendants

have been unable to operate Showgirl upon the premises and has suffered monetary damages including but not limited to lost profits, loss of good will, remodeling costs, and maintenance costs.

229. Pursuant to 42 U.S.C. § 1983 and common law, Plaintiffs are entitled to an award damages for the deprivations of their constitutional rights and for the other losses sustained in amounts to which they are found to be entitled at trial.

COUNT IV – DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES THE IMPROVEMENT LOCATION PERMIT IS AN IMPERMISSIBLE PRIOR RESTRAINT

230. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

231. The PAUDO § 5.66(A) requires that all Sexually Oriented Businesses apply for and obtain an Improvement Location Permit prior to opening and operating and, therefore, operates as a prior restraint on protected First Amendment Activity.

232. PAUDO § 5.66(A) was applied against defendants under color of state law, causing them injury.

233. Because PAUDO § 5.66(A) was applied against defendants under color of state law, causing them injury, Defendants have continuing standing to challenge the PAUDO § 5.66 ILP requirement.

234. As pled above (Paragraphs 27-39), the ILP application and review process set forth in PAUDO § 9.05, permits the Zoning Administrator to exercise unfettered discretion to, *inter alia*, determine whether an application is "substantially complete," to determine what additional information to request, and to determine whether the proposed project complies with the other provisions of the Uniform Development Code.

235. The ILP application and review process set forth in PAUDO § 9.05 fails to specify any period for the Zoning Administrator's decision on an application for an ILP or when the Board of Zoning Appeals must rule on an appeal from the denial of an application for an ILP.

236. Because the ILP application and review process set forth in PAUDO § 9.05A is an impermissible prior restraint, it is void *ab initio* and could never have been validly applied against any Plaintiff.

237. Defendants applied the unconstitutional ILP application and review process set forth in PAUDO § 9.05A against Defendants, under color of state law, and in violation of their First Amendment rights.

238. Although the ILP process is no longer a prerequisite for Sexually Oriented Businesses to open and operate under § 5.66 of the AUDO, the City may choose to assert that the operation of Showgirl upon the Premises is an "establishment of a new land use or change [of] an existing use," pursuant to AUDO § 9.05 (clarification added).

239. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendant, and should do so here.

240. Because of the questioned validity of ILP application and approval process, which has been applied against the Plaintiffs to restrict their First Amendment rights, Plaintiffs are entitled to a declaration by this Court in regard to its constitutionality

241. The infringement of constitutional rights, especially First Amendment rights, even for minimal periods of time, constitutes irreparable injury.

242. Because the ILP application process is an unconstitutional prior restraint, the public interest weighs in favor of protecting constitutional rights, and Angola has no valid interest in enforcing or applying an unconstitutional ordinance, the Court should enter an order

preliminarily and/or permanently restraining Angola from applying the ILP requirement against Defendants or either one of them.

243. At the direct and proximate result of the City's unconstitutional and unlawful application of the facially invalid ILP requirement against Defendants, Defendants have been unable to operate Showgirl upon the premises and has suffered monetary damages including but not limited to lost profits, loss of good will, remodeling costs, and maintenance costs.

COUNT V – DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES THE LICENSING AND REGULATORY ORDINANCE AND UDO AMENDMENTS

244. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

245. Plaintiffs aver that the Ordinances at issue here are a means and a tool to prevent them from operating an adult business and have been and will be enforced by the Defendant using unconstitutional means. The sexually oriented business provisions of the Ordinances are not content-neutral but are legislative provisions clearly aimed at the content of First Amendment materials and expression, and are a means of harassing and preventing the opening of certain entertainment facilities and denying a livelihood to entertainers and others who are providing entertainment presumptively protected by the First Amendment. The right to engage in protected expression is a fundamental right guaranteed by the First Amendment to the United States Constitution, as applied to the State of Indiana by the Fourteenth Amendment.

246. The Ordinances are unconstitutional on their face and as applied to the Plaintiffs under the First and Fourteenth Amendments to the United States Constitution for numerous and various reasons, including, but not limited to, the fact that:

a. They effectuate an impermissible prior restraint on speech and expression;

b. They unduly, impermissibly, and unconstitutionally restrict the ability of individuals and businesses to engage in First Amendment protected activities within the City of Angola;

c. They deny Plaintiffs and others their procedural due process rights under the First and Fourteenth Amendments;

d. They fail to further any important, substantial or compelling governmental interest;

e. They permit restrictions on speech and expression that are greater than are essential to further any asserted governmental interests;

f. They permit restrictions on speech and expression that are not the least restrictive means available;

g. They contain criteria that are both arbitrary and capricious and which are not supported by any legislative record;

h. They contain numerous and various terms and phrases that are impermissibly vague and ambiguous, and the applicable definitions as contained therein are impermissibly and substantially overbroad judged in relation to their plainly legitimate sweep;

i. They have been applied against Plaintiffs by the City of Angola in an unconstitutionally vague manner;

j. They impermissibly single out First Amendment protected businesses for certain regulations;

k. They violate the substantive due process rights of the Plaintiffs and others;

l. They fail to provide for a constitutionally sufficient number of adequate alternative sites for the engagement in these forms of First Amendment protected activities;

m. They were enacted upon an insufficient record and are not justified on any factual or legal ground; and

n. They violate the liberty and occupational liberty interests of the Plaintiffs by prohibiting them from operating a lawful, and indeed constitutionally protected, business within the City of Angola.

247. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendant, and should do so here.

248. Because of the questioned constitutionality of the Ordinances, Plaintiffs are entitled to a declaration by this Court in regard to their constitutionality.

249. This Court should declare, for the reasons set forth above, that the Ordinances are unconstitutional both on their face and as applied to the Plaintiffs, and are in violation of the First and Fourteenth Amendments to the United States Constitution. This Court should further declare, for the reasons set forth above, that Butler and/or BBL Inc.'s operation of Showgirl upon the Premises constitutes a lawful conforming use pursuant to the provisions of the AUDO irrespective of any contrary provisions of the Ordinances.

250. Any action taken or to be taken by the Defendant and others to enforce any portion of Ordinances against the Plaintiffs has been and will be taken under color of law and has

deprived, and will deprive, Plaintiffs of their constitutional rights as set forth herein, and will cause them irreparable harm for which damages are an inadequate remedy as a matter of law.

251. Plaintiffs have a substantial likelihood of success on the merits in regard to their constitutional claims; any infringement of First Amendment rights, for even minimal periods of time, constitutes irreparable harm; the public interest weighs in favor of preventing the deprivation of constitutional rights; and any balancing of equities between the parties weighs in favor of the Plaintiffs and against the Defendant in any attempt to enforce a clearly and hopelessly flawed unconstitutional zoning and regulatory scheme. Accordingly, temporary, preliminary and/or permanent injunctive relief is warranted here to enjoin enforcement of the Ordinances.

252. For the reasons set forth above, and to preclude Plaintiffs and others from being denied their rights under the United States Constitution, this Court should enter an order enjoining, both preliminarily and permanently, the Defendants, their officials, employees, agents, and representatives, as well as all others who receive actual or constructive notice of the decision of this Court, from enforcing the Sexually Oriented Business provisions of the AUDO against the Plaintiffs, against the Premises, against any business thereon, and anywhere within the City of Angola. For the same reasons, this Court should enter an order enjoining, both preliminarily and permanently, Defendants, their officials, employees, agents, and representatives, as well as all others who receive actual or constructive notice of the decision of this Court, from treating the operation of a sexually oriented business on the Premises as anything other than a lawful conforming use.

253. If Plaintiffs are not permitted to operate Showgirl upon the Premises, as a direct and proximate result of the enforcement of the Ordinances against them, they will have incurred

and suffered, and will continue to suffer, significant damages, including but not limited to loss of constitutional rights, loss of earnings, loss of business profits, and loss of business reputation and good will.

254. Pursuant to 42 U.S.C. § 1983 and common law, Plaintiffs are entitled to an award of damages for the deprivations of their constitutional rights and for the other losses sustained in amounts to which they are found to be entitled at trial.

COUNT VI – PERSONAL LIABILITY OF VIVIAN LIKES FOR DAMAGES AND PUNITIVE DAMAGES

255. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

256. Defendant Vivian likes has personally and directly participated in the violation of Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

257. The acts of Defendant Likes set forth herein were undertaken for the purpose of precluding Showgirl from operating on the Premises in purposeful, reckless disregard, and willful indifference to Plaintiffs' constitutional rights.

258. The conduct that deprived Plaintiffs of their constitutional rights, including but not limited to the assertion of false disqualifying criteria to Mr. Sauerteig with respect to Showgirl operating on the Premises and the non- approval of the ILP, occurred with Likes knowledge and/or direction.

259. The acts of Defendant Likes set forth herein have precluded Showgirl from operating upon the Premises and as a direct and proximate result Defendants have incurred and suffered and will continue to suffer significant damages, including but not limited to loss of constitutional rights, loss of earnings, loss of business profits, and loss of business reputation and good will.

260. Defendant likes is therefore individually liable to Defendants for compensatory and punitive damages in an amount to be determined at trial.

COUNT VII – ATTORNEY FEES 42 U.S.C. § 1988

261. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

262. Plaintiffs, as prevailing parties, are entitled to an award of costs and attorney fees incurred herein pursuant to 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Honorable Court to grant relief to the Plaintiffs and against the Defendant as follows:

A. Finding and declaring that the Licensing and Regulatory Ordinance was enacted contrary to I.C. § 36-7-4-602;

B. Finding and declaring that the Licensing and Regulatory Ordinance is contrary to I.C. § 36-1-6-9;

C. Finding and declaring that the Licensing and Regulatory Ordinance is contrary to I.C. § 7.1-3-9-6;

D. Finding and declaring that Improvement Location Permit requirement of PAUDO § 5.66(A) and PAUDO/AUDO § 9.05 are an impermissible prior restraint on First Amendment activity;

E. Finding and declaring that the Ordinances are unconstitutional on their faces and as applied to Plaintiffs under the First and Fourteenth Amendments;

F. Enjoining Defendants and their employees, agents, employees, and all persons acting on their behalf from enforcing the Licensing and Regulatory Ordinance against Plaintiffs or their interests;

G. Enjoining Defendants and their employees, agents, employees, and all persons acting on their behalf from enforcing the UDO Amendments against Plaintiffs or their interests;

H. Enjoining Defendants and their employees, agents, employees, and all persons acting on their behalf from enforcing AUDO § 9.05 against Plaintiffs or their interests;

I. Awarding Plaintiffs monetary damages against Defendants for, *inter alia*, lost profits, loss of good will, remodeling costs, and maintenance costs;

J. Awarding punitive monetary damages against Defendant Vivian Likes;

K. Awarding Plaintiffs their attorney fees and costs; and

L. Awarding such further and additional relief that the Court deems just and proper.

Dated: March 19, 2013

Respectfully Submitted,

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Pending Admission Pro Hac Vice

JURY DEMAND

Plaintiffs BBL Inc., Alva Butler, and Sandra Butler hereby demand a trial by jury.

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Pending Admission Pro Hac Vice

APPEAL FROM HEARING OFFICER DECISION ON SEXUALLY ORIENTED BUSINESS LICENSE

263. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

264. Petitioner/Appellants BBL Inc., and Alva Butler hereby submit and perfect their appeal of the Decision of the City of Angola, Indiana Hearing Officer in In re: The matter of Alva J. Butler a/k/a Alva James Butler/BBL, Inc., Case Number 1418-2012(2012-1). *See* Exhibit EE hereto

265. The final Decision of the Hearing Officer was issued on February 17, 2012.

266. The Court can and should exercise supplemental jurisdiction over Butler's and BBL's Appeal pursuant to 28 U.S.C. § 1367 and City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997). Indiana state law does not permit constitutional challenges to be raised in the context of administrative proceeding such as the hearing before the Hearing Officer below, set forth in LRO § 10. Petitioner/Appellants appeal is submitted here in due regard of the doctrine of constitutional avoidance.

267. Should the Court at any time decline to exercise supplemental jurisdiction over this petition for judicial review/appeal or the matter is otherwise dismissed, the time for BBL Inc. and/or Alva Butler to file their appeal in state court is tolled 30 days from such dismissal pursuant to 28 U.S.C. § 1367(e), unless a longer period is provided by state law.

268. The Licensing and Regulatory Ordinance, including LRO § 10, indicates that an appeal shall be taken within 30 days from the Hearing Officer's decision on appeal form the Decision of the Building Commissioner, but does not specify the manner or mechanism for taking the appeal. Pursuant to LRO § 10(a) the Hearing Officer's decision does not become effective until the 30th day after it was issued.

269. This petition for judicial review and/or appeal of the Hearing Officer's decision is timely submitted.

270. The Hearing Officer, in his order on Petitioner/Appellants Request for Reconsideration, and as requested by the City's Response to Request for Reconsideration, has declined to identify any specific mechanism or method for appealing the Hearing Officers Decision.

271. Appellant/Petitioner Alva Butler's mailing address is 1521 Sycamore Hills Drive, Fort Wayne, IN 46814-9303.

272. Appellant/Petitioner BBL Inc.'s, mailing address is 1521 Sycamore Hills Drive, Fort Wayne, IN 46814-9303.

273. The name and address of the Hearing Officer is James A. McEntarfer, McEntarfer Law Office, 215 West Maumee Street, Angola Indiana, 46703.

274. The name and address of the Building Commissioner is Dean Twitchell, City of Angola Building Department, 210 North Public Square, Angola, Indiana, 46703.

275. The Decision denies BBL Inc./Alva Butlers Application for a Sexually Oriented Business License on the basis that there exists on the basis that the following parcels are not at least 750 feet from 310 West Wendell Jacob Avenue, Angola, Indiana: 3095 N. Wayne Street, 595 Eyster Drive, 380 Eyster Drive, and 360 Eyster Drive.

276. The following person participated in the hearing leading to the Decision and are aggrieved by the decision:

a. BBL Inc., by officer Alva Butler and counsel Sara Seibert, Seibert, Eberhard & Weimer, P.C., 1504 North Wayne Street, Suite A, Angola, Indiana 46703; and

b. Alva Butler, by counsel Sara Seibert.

277. BBL Inc., and Alva Butler are entitled to review because a) each appeared at the February 12, 2012, hearing before the Hearing Officer b) the Decision precludes the operation of Showgirl by BBL Inc. upon the premises owned by Alva Butler with his wife Sandra Butler and reversal and c) the decision is specifically directed at BBL Inc. and Alva Butler.

278. BBL Inc., and Alva Butler have exhausted all available administrative remedies by timely pursuing a hearing before the Hearing Officer relative to their application for a Sexually Oriented Business license.

279. The Hearing Officer's decision prejudices Petitioner/Appellants for numerous and various reasons, including:

a. It is arbitrary, capricious, and abuse of discretion and otherwise not in accordance with the law because the Building Commissioner and Angola (the "Respondent/Appellants") failed to prove that there exists a conforming, lawfully established residence on any parcel not at least 750 feet from the Premises. All five of the properties identified – 3095 N. Wayne Street, 595 Eyster Drive, 380 Eyster Drive, and 360 Eyster Drive. – are zoned commercial, either a C1 or C2 District. The only residence-type uses permitted in C1 Districts are upper floor dwelling units. AUDO § 2.31. The only residence-type uses permitted in C2 Districts are nursing homes. AUDO § 2.35. The Respondent/Appellees failed to present any evidence that the residences asserted where either upper floor dwelling units, nursing homes, grandfathered residences, or otherwise lawful uses. The Respondent/Appellees also failed to present evidence that such uses were lawfully established as of November 8, 2012, when Petitioner/Appellants submitted their application.

b. The LRO is contrary to Petitioner/Appellants' rights under the First and Fourteenth Amendments for the reasons stated in Count V, above, which is hereby incorporated by reference.

c. The LRO is in excess and contrary to state law for the reasons stated in Counts I – VI, above, which are hereby incorporated by reference.

d. The Hearing Officers decision was not supported by substantial evidence because the respondent Appellees failed to present any evidence that the residences asserted were lawful or lawfully established uses, as stated in subparagraph a, above.

280. Petitioner/Appellants reserve the right to amend the grounds set forth above in conformity with Indiana State Law, LRO § 10, and/or further order of the Court.

281. In decision upon their Petition for Judicial Review/Appeal, Petitioner/Appellants respectfully request that the Honorable Court:

a. Find that the Hearing Officer's Decision was arbitrary, capricious, and an abuse of discretion;

b. Find that the Hearing Officer's Decision was not supported by substantial evidence;

c. Find that the LRO and the Hearing Officer's Decision thereon was in excess of authority granted by state law and contrary to state law;

d. Find that the LRO and the Hearing Officers' Decision thereon was contrary to Petitioner/Appellants rights under the First and Fourteenth Amendments of the United States Constitution;

e. Reverse the Hearing Officer's Decision with instructions that Petitioner/Appellants be issued a Sexually Oriented Business license or with a declaration that Petitioner/Appellants need not obtain a Sexually Oriented Business license to operate Showgirl upon the Premises; and

f. Grant such further and additional relief that the Court deems just and proper.

Dated: March 19, 2013

Respectfully Submitted,

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VERIFICATION OF ALVA BUTLER FOR HIMSELF AND FOR BBL INC.

I, Alva Butler, being the sole officer of BBL, Inc., do hereby certify under penalty of perjury that the facts as they relate to myself and BBL, Inc., as set forth in the complaint and the petition for judicial review/appeal above, are true and correct to the best of my knowledge.

Alva J. Butler

Alva J. Butler

Subscribed and sworn to before me, a notary public, this 18th day of March, 2013.

JUDY WILLIAMS
NOTARY PUBLIC
STATE OF FLORIDA
Comm# EE020810
Expires 10/30/2014

Judy Williams, Notary Public
Pinellas County, Florida
My Commission Expires: 10-30-2014