

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**THE FERRANTE GROUP, INC., d/b/a** )  
**DREAMERS CABARET,** )  
 )  
**Plaintiff** )  
 )  
**v.** )  
 )  
**CITY OF WESTBROOK and** )  
**CHARLES JARRETT,** )  
 )  
**Defendants** )

**No. 2:10-cv-403-DBH**

**RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The plaintiff in this 13-count action arising out of its attempts to open an entertainment facility featuring nude dancing in Westbrook, Maine, seeks summary judgment on Counts IX, X, and XI of its Second Amended Complaint. The defendants seek summary judgment on all counts. I recommend that the court deny the plaintiff’s motion and grant that of the defendants.

**I. Applicable Legal Standards**

**A. Federal Rule of Civil Procedure 56**

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party.” *Rodríguez-Rivera v. Federico Trilla Reg’l Hosp. of Carolina*, 532 F.3d 28, 30 (1st Cir. 2008) (quoting *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008)). “A fact is material if it has the potential of determining the outcome of the litigation.” *Id.* (quoting

*Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(c). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

"This framework is not altered by the presence of cross-motions for summary judgment." *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 6 (1st Cir. 2003). "[T]he court must mull each motion separately, drawing inferences against each movant in turn." *Id.* (citation omitted); *see also, e.g., Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996) ("Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se*. Cross motions simply require us to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed. As always, we resolve all factual disputes and any competing, rational inferences in the light most favorable to the [nonmovant].") (citations omitted).

## **B. Local Rule 56**

The evidence that the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the local rules of this district. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party’s statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant’s statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can trigger serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(f). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statement of fact.” *Id.*; *see also, e.g., Sánchez-Figueroa v. Banco Popular de P.R.*, 527 F.3d 209,

213-14 (1st Cir. 2008); Fed. R. Civ. P. 56(e)(2) (“If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]”).

## II. Factual Background

The parties’ respective statements of material facts, submitted pursuant to Local Rule 56, include the following undisputed material facts.

Adam Goodwin is a resident of Scarborough, Maine. City Defendants’ Statement of Undisputed Material Facts (“Defendants’ SMF”) (Docket No. 61) ¶ 1; Plaintiff The Ferrante Group’s Opposing Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 69) ¶ 1. Shawn Smetana is a former resident of Old Orchard Beach, Maine, the former director of operations of The Paper Moon in Richmond, Virginia, and the former general manager of Platinum Plus in Portland, Maine. *Id.* ¶¶ 5-6. Lawrence Ferrante, a master electrician and former police officer, is a resident of Westbrook, Maine. *Id.* ¶¶ 3-4.

In late winter 2010, Goodwin visited Smetana in Virginia looking for advice on setting up a nude entertainment nightclub in Maine. *Id.* ¶ 7. While working at Platinum Plus, Smetana had scouted possible locations for adult nightclubs in Maine municipalities without nude entertainment ordinances. *Id.* ¶ 8. In the spring of 2010, Goodwin approached Ferrante about opening an adult nightclub in Westbrook, to be called Dreamers Cabaret. *Id.* ¶ 10.<sup>1</sup>

On April 10, 2010, Ferrante filed articles of incorporation with the Maine Secretary of State for The Ferrante Group, Inc. *Id.* ¶ 17. The plaintiff was formed to own and operate Dreamers Cabaret, a nude entertainment nightclub in Westbrook. *Id.* ¶ 18. Ferrante is president

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<sup>1</sup> The plaintiff qualifies its response to this paragraph of the defendants’ statement of material facts, asserting that “[i]t would be more accurate to simply say that Larry Ferrante, Adam Goodwin and Shawn Smetana jointly came up with the concept for Dreamers cabaret.” Plaintiff’s Responsive SMF ¶ 10. This qualification does not respond directly to the factual assertions in paragraph 10 of the defendants’ statement of material facts. More importantly, the qualification has no bearing on the outcome of the motions for summary judgment.

of the plaintiff, which has no other officers. *Id.* ¶ 19. It has no directors. *Id.* ¶ 20. Ferrante is the sole shareholder of the plaintiff. *Id.* ¶ 21. Ferrante’s sole capital contribution to the plaintiff is what he estimates to be \$40,000 in labor. *Id.* ¶ 25.<sup>2</sup>

Ferrante’s business plan for Dreamers Cabaret was listening to Smetana and Goodwin and “believing in them.” *Id.* ¶ 31. On July 5, 2010, Ferrante entered into a promissory note with Goodwin in the amount of \$150,000 with an interest rate of 12%. *Id.* ¶ 32. Monthly payments on the note were scheduled to begin on January 1, 2011, but no payments have been made. *Id.* ¶¶ 33-34. Ferrante and Goodwin have an agreement that no payments are due on the note until Dreamers Cabaret is open and operating. *Id.* ¶ 36. The expenses of the plaintiff in connection with Dreamers Cabaret were paid directly from Goodwin’s bank and credit card accounts. *Id.* ¶ 39. The \$150,000 has been exhausted. *Id.* ¶ 40.

On October 10, 2010, the plaintiff entered into a promissory note with Mark Waldron for \$75,000 with an interest rate of 12%. *Id.* ¶ 42. Payments on this note were scheduled to begin on January 1, 2011, but no payments have been made. *Id.* ¶¶ 43-44. Ferrante has never seen the \$75,000 check from Waldron made payable to the plaintiff pursuant to this note. *Id.* ¶ 48.

Ferrante did not read either note before signing them at the direction of Goodwin and Smetana. *Id.* ¶¶ 49-50. He was not aware that by signing the notes he was personally guaranteeing payment. *Id.* ¶ 51.

On August 17, 2010, the plaintiff filed a Change of Use Application with the City of Westbrook for 84B Warren Avenue. *Id.* ¶ 52. In the application, the plaintiff identified the proposed new use of the building as a “private recreational facility.” *Id.* ¶ 54. If renovations are needed, the Change of Use Application requires the applicant to provide additional information

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<sup>2</sup> The portion of this paragraph of the defendants’ statement of material facts that is “qualified” by the plaintiff’s response, Plaintiff’s Responsive SMF ¶ 25, has been omitted.

such as the type, description, and cost of improvements, as well as construction and site plans. *Id.* ¶ 57. The application filed by the plaintiff did not disclose any planned renovations. *Id.* ¶ 58.<sup>3</sup> The Change of Use Application requires the applicant to certify, *inter alia*, that no substantive changes will be made without the approval of the building inspector and that it will comply with all relevant statutes, ordinances, codes, regulations and rules. *Id.* ¶ 61.<sup>4</sup> A Change of Use Permit for 84-B Warren Avenue was issued to Ferrante on August 18, 2010. *Id.* ¶ 63.

Before the Change of Use Application was filed, Ferrante knew that what the plaintiff describes as a barrier, 12 feet high by 38 feet long, was going to be constructed to separate the main room of the nightclub from a planned “couch room.” *Id.* ¶ 67.<sup>5</sup> Goodwin and Smetana built this barrier. *Id.* ¶ 69.<sup>6</sup> Westbrook Code Enforcement Officer Richard Gouzie discovered the new barrier or wall during an electrical inspection on or around August 23, 2010. *Id.* ¶ 70. During that inspection, Gouzie informed Ferrante that he needed a building permit to construct the barrier or wall, and Ferrante later obtained a permit for it, on August 25, 2010. *Id.* ¶¶ 71-72.

Ferrante signed a lease for 84-B Warren Avenue on behalf of the plaintiff on September 15, 2010. *Id.* ¶ 77. The lease provides that “TENANT shall use the leased premises for the purpose of an adult nightclub in compliance with Westbrook, Maine zoning.” *Id.* ¶ 78. On September 10, 2010, the City of Westbrook conducted a certificate of occupancy inspection of 84-B Warren Avenue at which Ferrante represented the plaintiff. *Id.* ¶¶ 79, 81. The City was represented by Gouzie, Fire Inspector Captain Charles Jarrett (a defendant in this action),

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<sup>3</sup> The plaintiff’s objection to this paragraph of the defendants’ statement of material facts, Plaintiff’s Responsive SMF ¶ 58, is overruled.

<sup>4</sup> The plaintiff’s objection to this paragraph of the defendants’ statement of material facts, Plaintiff’s Responsive SMF ¶ 61, is overruled.

<sup>5</sup> The plaintiff takes the position that this “barrier” was neither a wall, nor structural, either of which would have required a building permit, because it stopped two feet short of the building’s ceiling. Plaintiff’s Responsive SMF ¶ 67.

<sup>6</sup> The plaintiff purports to deny this paragraph of the defendants’ statement of material facts, but all that is denied is the defendants’ description of the barrier as a wall. Plaintiff’s Responsive SMF ¶ 69.

Assistant Assessor Dean Prindle, and Assistant Electrical Inspector Mike Corey. *Id.* ¶ 82.

During the inspection, Jarrett asked Ferrante “exactly” what the property would be used for. *Id.* ¶ 83. Ferrante’s response did not mention nude entertainment, *id.* ¶ 84,<sup>7</sup> or that all of the events contemplated to be held at the building involved nude dancing. *Id.* ¶ 88. During the September 10 inspection, Jarrett calculated the building’s occupancy as in excess of 300 based on its square footage and expected assembly use. *Id.* ¶ 91.

During the inspection, Jarrett also informed Ferrante that the building would require a fire alarm system and that, while he would accept a strobe light with alarm system, Ferrante must check with the Maine State Fire Marshal’s Office (“SFMO”) to determine what type of system it would require. *Id.* ¶¶ 92-93. Ferrante entered in a fire alarm contract with Maine State Security Services on September 13, 2010, calling for the installation of a fire alarm system within 30 days. *Id.* ¶ 95. Ferrante has testified that he hand-delivered the contract to Gouzie that morning and received a certificate of occupancy in return. *Id.* ¶ 96. Gouzie testified that he provided Ferrante with the certificate of occupancy during the September 10 inspection prior to any discussion of the fire alarm system. *Id.* ¶ 100. The certificate of occupancy is dated September 10, 2010. *Id.* ¶ 101.

When Dreamers Cabaret opened at 11:00 a.m. on September 17, 2010, it had no fire alarm system. *Id.* ¶¶ 102, 105. No one associated with the plaintiff or Dreamers Cabaret contacted the SFMO to inquire what type of fire alarm was required for 84-B Warren Avenue before Dreamers Cabaret opened. *Id.* ¶ 103.

During the week between the September 10 inspection and the September 17 opening of

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<sup>7</sup> The plaintiff responds to this paragraph of the defendants’ statement of material facts with a qualification that admits that Ferrante did not use the words “nude entertainment nightclub.” Plaintiff’s Responsive SMF ¶ 84. The remainder of the purported qualification is argumentative and not an appropriate response to a statement of material fact.

Dreamers Cabaret, three stages and a bar were installed at 84-B Warren Avenue; the individual who built the stages was also hired to build a wall on the first floor to separate an electrical room from the bathrooms. *Id.* ¶¶ 106-08.

During September 17-18, 2010, all credit card charges at Dreamers Cabaret were credited to an account in the name of Platinum Pawn and Loan, owned by Goodwin. *Id.* ¶ 117. On September 13, 2010, Goodwin, on behalf of Platinum Pawn and Loan, entered into an agreement for the installation of an automated teller machine within Dreamers Cabaret. *Id.* ¶ 118.<sup>8</sup>

On September 18, 2010, Jarrett was informed that 84-B Warren Avenue was being used as a dance club and instructed to inspect the building that afternoon for fire safety issues. *Id.* ¶¶ 119-21.<sup>9</sup> Jarrett met Westbrook Police Officers Rebecca Towne and Ryan Close at the Westbrook Public Safety building, and they then went to 84-B Warren Avenue. *Id.* ¶ 122. When they arrived at approximately 5 or 6 p.m. on September 18, 2010, they were met by Ferrante, who was there at Smetana's request. *Id.* ¶¶ 124-25.

Jarrett then inspected the first and second floors of Dreamers Cabaret. *Id.* ¶ 127. At some point either before starting or after completing the inspection, Jarrett told Ferrante that Dreamers Cabaret was being shut down for violations of the National Fire Protection Association ("NFPA") Fire Safety Code. *Id.* ¶ 128.<sup>10</sup> Jarrett provided Ferrante with two notices of violation at the conclusion of the inspection. *Id.* ¶ 129. The first notice cited the failure to have an approved fire alarm system in the building as required for occupancy loads of more than 300, pursuant to NFPA 101 Life Safety Code Sections 9.6.1 and 12.3.4.1.2. *Id.* ¶ 130. Chapter 13 of

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<sup>8</sup> The plaintiff qualifies its response to a portion of this paragraph of the defendants' statement of material facts, Plaintiff's Responsive SMF ¶ 118, but I have not included that portion of the paragraph in this recitation of the facts.

<sup>9</sup> The portions of these paragraphs of the defendants' statement of material facts that are qualified by the plaintiff in its responses, Plaintiff's Responsive SMF ¶¶ 119-21, have been omitted.

<sup>10</sup> The plaintiff denies this paragraph of the defendants' statement of material facts, but the denial addresses only the timing of Jarrett's announcement that the business was closed down. Plaintiff's Responsive SMF ¶ 128.

the Westbrook Code of Ordinances adopts and incorporates the NFPA 101 Life Safety Code. *Id.* ¶ 131. The first notice also noted that Ferrante had not obtained construction permits from the SFMO for the building. *Id.* ¶ 133.

The second notice cited the failure to ensure sprinkler system coverage for the hallway created by the new wall built between the electrical room and the bathrooms on the first floor. *Id.* ¶ 135. Ferrante signed both notices at the end of the September 10 inspection. *Id.* ¶ 136.

On September 21, 2010, Gouzie wrote to Ferrante to inform him that the City was revoking his certificate of occupancy for 84-B Warren Avenue pursuant to I.B.C. Building Code, Section 110.4 because Ferrante had failed to provide accurate information on the proposed use of the building during the September 10 inspection. *Id.* ¶ 137.<sup>11</sup> Chapter 6 of the Westbrook Code of Ordinances adopts and incorporates the International Building Code 2003, as amended. *Id.* ¶ 138. The letter also states that “construction was done after the Occupancy Permit was issued without proper permits.” *Id.* ¶ 140. It states that the “facility must remain closed until all permits and inspections are completed for the added construction done without proper permits” and that Ferrante must “complete all necessary work to the alarm system required by Captain Jarrett.” *Id.* ¶ 141. The letter states that Ferrante has 30 days to appeal the revocation of the occupancy permit. *Id.* ¶ 142.

On September 20, 2010, Ferrante filed an application for a building permit for the 12-foot wall separating the bathrooms and the electrical room on the first floor of Dreamers Cabaret. *Id.* ¶ 143. Also on that date, Goodwin and Smetana met with the SFMO and delivered a handwritten fire alarm plan for Dreamers Cabaret at 84-B Warren Avenue. *Id.* ¶ 144. Smetana also signed and submitted an application for a construction permit from the SFMO for the fire alarm system.

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<sup>11</sup> The plaintiff qualifies this paragraph of the defendants’ statement of material facts by noting that the letter states additional reasons for the revocation. Plaintiff’s Responsive SMF ¶ 137.

*Id.* ¶ 145. He wrote that Dreamers Cabaret “would like to open Friday 09-24-10.” *Id.* ¶ 146.

The SFMO approved the application on September 21, 2010 and issued a construction permit for the fire alarm system on September 22, 2010. *Id.* ¶ 147. On or about September 21 or 22, 2010, Ferrante and Christopher L’Heureux of Maine State Security submitted the fire alarm plan and an application for an electrical permit with the City. *Id.* ¶ 149. On September 21, 2010, Jarrett contacted L’Heureux to inform him that he needed more complete information on the fire alarm system, such as wiring details, input-output matrix, battery calculations, and shop drawings. *Id.* ¶ 150. L’Heureux submitted the requested information to Jarrett on September 24, 2010. *Id.* ¶ 152. On September 28, 2010, Jarrett informed L’Heureux by e-mail that the design of the fire alarm system was acceptable and that he could begin construction. *Id.* ¶ 153. L’Heureux did not complete construction of the fire alarm system until October 6, 2010. *Id.* ¶ 154.

On October 7, 2010, L’Heureux informed Jarrett that construction of the fire alarm was complete and asked to schedule an inspection. *Id.* ¶ 155. On October 12, 2010, Jarrett inspected and approved the fire alarm system. *Id.* ¶ 156. Smetana filed an application for a barrier free permit which was approved by the SFMO on September 21, 2010. *Id.* ¶ 158. Smetana also filed an application for a dance license, on behalf of Ferrante, and on September 22, 2010, the SMFO conducted an inspection of Dreamers Cabaret for that license. *Id.* ¶¶ 159-60. The dance license was issued to Ferrante on October 28, 2010, setting the total occupancy of the first floor of Dreamers Cabaret at 367 people. *Id.* ¶ 161.<sup>12</sup>

On October 20, 2010, the plaintiff appealed Gouzie’s revocation of the occupancy permit to Westbrook’s Zoning Board of Appeals. *Id.* ¶162. Evidentiary hearings were conducted by the

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<sup>12</sup> The plaintiff qualifies this paragraph of the defendants’ statement of material facts by stating the occupancy of specific rooms, Plaintiff’s Responsive SMF ¶ 161, information that is not relevant to the resolution of the motions for summary judgment.

Westbrook Zoning Board of Appeals on November 10 and 23, 2010, during which Ferrante, Gouzie, Jarrett, Corey, and Prindle testified. *Id.* ¶ 164.<sup>13</sup> On December 2, 2010, the Zoning Board of Appeals issued a 12-page order denying the plaintiff’s administrative appeal. *Id.* ¶ 166. The order included 26 findings of fact and 8 conclusions of law and apprised the plaintiff and Ferrante of their right of appeal under Maine Rule of Civil Procedure 80B. *Id.* ¶ 167.

After learning of the existence of Dreamers Cabaret, Westbrook Mayor Colleen Hilton called a special meeting on September 22, 2010 to review and refer an adult entertainment ordinance to the Westbrook City Council. *Id.* ¶ 168. The City had previously enacted an adult entertainment ordinance which did not get recodified in the Westbrook Code of Ordinances due to a clerk’s error. *Id.* ¶ 169. Westbrook’s Nude Entertainment Ordinance was referred to the Committee of the Whole of the Westbrook Municipal Officers during their September 27 and October 18, 2010, meetings. *Id.* ¶ 171. The plaintiff’s attorney testified on behalf of Dreamers Cabaret during the October 18 meeting. *Id.* ¶ 172.

On November 1, 2010, the municipal officers of the City voted 7-0 to adopt the Nude Entertainment Ordinance after public comment. *Id.* ¶ 173. At this time, the municipal officers were aware of a history of police calls associated with an adult entertainment club in Portland and possessed Dr. Richard McCleary’s 2008 report outlining the negative secondary effects of adult entertainment facilities in Jackson County, Missouri. *Id.* ¶¶ 174-75. The Nude Entertainment Ordinance allows commercial establishments to provide adult entertainment after obtaining a permit from the code enforcement officer. *Id.* ¶ 177. The Nude Entertainment Ordinance states that it is retroactive to September 22, 2010. Statement of Undisputed Material Facts in Support of Plaintiff’s Motion for Summary Judgment (“Plaintiff’s SMF”) (Docket No.

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<sup>13</sup> The plaintiff qualifies this paragraph of the defendants’ statement of material facts by stating that the testimony “was severely limited by the time available.” Plaintiff’s Responsive SMF ¶ 164. That information is not relevant to the resolution of the motions for summary judgment.

60) ¶ 4; City Defendants’ Opposing Statement of Material Facts (“Defendants’ Responsive SMF”) (Docket No. 65) ¶ 4.<sup>14</sup>

On May 16, 2011, the Maine Superior Court dismissed the plaintiff’s Rule 80B appeal of the city’s revocation of its occupancy permit. Defendants’ SMF ¶ 191; Plaintiff’s Responsive SMF ¶ 191.<sup>15</sup>

After the plaintiff challenged the constitutional validity of the Westbrook Nude Entertainment Ordinance, the defendants retained Dr. Richard McCleary to review the negative secondary effects of a nude entertainment business in Westbrook. *Id.* ¶ 192. In his report dated March 14, 2011, Dr. McCleary concluded that nude entertainment businesses nationwide and in Maine have negative secondary effects, most notably an increase in criminal activity. *Id.* ¶ 195. He also concluded that the Westbrook Nude Entertainment Ordinance would mitigate the “crime-related secondary effects” of nude entertainment businesses. *Id.* ¶ 196.<sup>16</sup>

Dreamers Cabaret is located within the Industrial Park District, the only area of Westbrook in which a commercial establishment may present nude entertainment according to the Nude Entertainment Ordinance. Plaintiff’s SMF ¶ 8; Defendants’ Responsive SMF ¶ 8.

### **III. Defendants’ Motion**

The plaintiff’s second amended complaint asserts the following claims: violation of the First Amendment (Counts I-IV, VIII, XI), violation of the constitutional guarantee of due process (Count V), violation of the constitutional right to equal protection of the laws (Count VI),

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<sup>14</sup> The defendants qualify this paragraph of the plaintiff’s statement of material facts by taking issue with language that I have not repeated in my recitation of the facts. Defendants’ Responsive SMF ¶ 4. Resolution of the dispute identified by that qualification could not have any bearing on resolution of the motion for summary judgment.

<sup>15</sup> The plaintiff lists two paragraphs numbered 190 in its response to the defendants’ statement of material facts. I refer to the second as paragraph 191. The plaintiff qualifies its response to paragraph 191 of the defendants’ statement of material facts with information that does not deny the substance of that paragraph, which is set forth in the text, and that is not relevant to resolution of the motions for summary judgment.

<sup>16</sup> The plaintiff qualifies its responses to paragraphs 195 and 196 of the defendants’ statement of material facts, but admits that those paragraphs accurately set forth Dr. McCleary’s conclusions. Plaintiff’s Responsive SMF ¶¶ 195-96.

unlawful exercise of police power (Count VII), unconstitutional vagueness and overbreadth (Counts IX-X), equitable estoppel (Count XII), and violation of the separation of powers (Count XIII). Second Amended Complaint (“Complaint”) (Docket No. 48) ¶¶ 119-32.

## **A. Preliminary Issues**

### **1. Standing**

The defendants contend that the plaintiff is a “sham” corporation and, therefore, is not the real party in interest in this case. Defendants’ Motion for Summary Judgment (“Defendants’ Motion”) (Docket No. 58) at 11-14. Federal Rule of Civil Procedure 17(a) requires that only the real party in interest prosecute an action. Both sides rely on the Maine Law Court’s standard for disregarding the corporate form, although the cited authority does not use the standard to disqualify a named plaintiff:

As a matter of public policy, corporations are separate legal entities with limited liability. As such, courts are generally reluctant to disregard the legal entity and will cautiously do so only when necessary to promote justice. However, a court may pierce the corporate veil when equity so demands, and may disregard the corporate entity when used to cover fraud or illegality, or to justify a wrong.

An examination of the different tests courts apply suggests two common elements that a plaintiff must establish before a court will disregard the corporate entity: (1) some manner of dominating, abusing, or misusing the corporate form; and (2) an unjust or inequitable result that would arise if the court recognized the separate corporate existence. . . . Therefore, before a court may pierce the corporate veil, a plaintiff must establish that: (1) the defendant abused the privilege of a separate corporate identity; and (2) an unjust or inequitable result would occur if the court recognized the separate corporate existence.

*Johnson v. Exclusive Props. Unltd.*, 1998 ME 244, ¶¶ 5-6, 720 A.2d 568, 571 (citations and internal quotation marks omitted).

The Law Court also cited with approval, but did not adopt, the factors weighed by the Massachusetts courts when determining whether a shareholder has abused the privilege of

separate corporate identity:

(1) common ownership; (2) pervasive control; (3) confused intermingling of business activity, assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporate assets by the dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholder; and (12) use of the corporation in promoting fraud.

*Id.* ¶ 7; 720 A.2d at 571. Several of these factors do not apply to the undisputed material facts in this case. Those factors that might bear some superficial relationship deal with Goodwin or Smetana, not with Ferrante, the plaintiff's sole shareholder.<sup>17</sup> The defendants' challenge to the corporate plaintiff's standing to sue is based on the activities or failures to act of Goodwin and Smetana. Defendants' Motion at 12-13.

In addition, the defendants do not explain how an unjust or inequitable result would be inevitable if the corporate plaintiff were allowed to continue to press this action. They state, in conclusory terms, that the corporate plaintiff "was created by Goodwin and Smetana for the fraudulent purpose of concealing the true owners and operators of Dreamers[.]" *id.* at 13, but that says nothing about any injustice or lack of equity inherent in this lawsuit.

The defendants are not entitled to summary judgment on this basis.

## **2. Qualified Immunity**

Defendant Jarrett contends that he is entitled to qualified immunity on all counts asserted against him.<sup>18</sup> Defendants' Motion at 32-34. Qualified immunity "provides a safe harbor for public officials acting under the color of state law who would otherwise be liable . . . for

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<sup>17</sup> I reject the plaintiff's argument that the existence of any of these factors occurred "only because the Club was shut down by Westbrook the day after it opened." Plaintiff's Opposition to Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 70) at 4. Nothing that the defendants are alleged to have done prevented the plaintiff from having financial records, keeping corporate and individual assets separate, or observing corporate formalities.

<sup>18</sup> Counts VII-XI and XIII attack the Nude Entertainment Ordinance and cannot reasonably be construed to allege any liability on Jarrett's part. Complaint at 29-32.

infringing the constitutional rights of private parties.” *Borges Colón v. Román-Abreu*, 438 F.3d 1, 18 (1st Cir. 2006) (quoting *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 6 (1st Cir. 2005)). Jarrett’s bid for qualified immunity with respect to the plaintiff’s constitutional claims sets in motion what the First Circuit has dubbed “a trifucated inquiry”:

We ask, first, whether the plaintiff has alleged the violation of a constitutional right. If so, we then ask whether the contours of the right were sufficiently established at the time of the alleged violation. Finally, we ask whether an objectively reasonable official would have believed that the action taken or omitted violated that right.

*Acevedo-Garcia v. Monroig*, 351 F.3d 547, 563-64 (1st Cir. 2003) (citation and internal quotation marks omitted).

Qualified immunity is an affirmative defense against damages liability which may be raised by government officials sued in their personal capacity. *See Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980). The general rule of qualified immunity, set out in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), is that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” This rule eliminates from consideration claims of the officials’ subjective state of mind, such as bad faith or malicious intention, concentrating on the “objective reasonableness” of the official’s conduct. “On summary judgment on qualified immunity, the threshold question is whether all the uncontested facts and any contested facts looked at in plaintiff’s favor show a constitutional violation.” *Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006).

Here, the plaintiff contends that Jarrett “agreed to allow the [certificate of occupancy] to issue to [the plaintiff] provided they [sic] had a ‘plan of correction[.]’ to have a fire alarm system installed within 30 days[.]” but, when he learned that Dreamers Cabaret “was presenting nude

dancing, and under prodding from other Westbrook authorities due to the nature of the business, he denied that he had approved the plan of correction and he issued notices of violations, shutting Dreamer's down[.]” Plaintiff's Opposition at 30. This is the only alleged constitutional violation discussed by the plaintiff with respect to Jarrett in connection with the qualified immunity defense.<sup>19</sup> The record citations provided by the plaintiff in support of its argument, to the extent that they are undisputed, establish only that:

- Ferrante testified that Jarrett told him on September 10, 2010, that he could get a certificate of occupancy if he had a contract to install the required fire alarm system within 30 days; that he entered into a fire alarm contract on September 13, 2010, that called for installation of a system within 30 days; and that he hand-delivered the contract to Gouzie on September 13, 2010, and received a certificate of occupancy in return.
- Jarrett testified that Ferrante never asked him if he would accept a contract to install a fire alarm system; that he would not allow 84-B Warren Avenue to open for business without a fully installed and inspected fire alarm system approved by the SFMO; and that he told Ferrante that he could not open until the fire alarm system was installed.
- A certificate of occupancy dated September 10, 2010, was issued for 84-B Warren Avenue; Jarrett had the authority to issue a certificate of occupancy to the plaintiff provided it had a plan in place to have a fire alarm system installed.

Defendants' SMF ¶¶ 94-99; Additional Statement of Material Facts (included in Plaintiff's Responsive SMF beginning at 50) ¶¶ 3-4.

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<sup>19</sup> The plaintiff also asserts, in its brief discussion of qualified immunity, that it “has alleged facts which overcome Jarrett's assertion of qualified immunity at this stage” and “the facts alleged by Plaintiff are that Jarrett took these actions in an effort to thwart Plaintiff's speech. This is a well-recognized and longstanding constitutional violation and one which precludes qualified immunity protections for Jarrett at this point.” Plaintiff's Opposition at 30. These assertions invoke the legal standard for a motion to dismiss; the standard applicable here is that for motions for summary judgment, as set forth in section I above.

The cited facts do not even establish that Jarrett revoked the certificate of occupancy, much less that he did it only after learning that nude dancing was taking place at 84-B Warren Avenue and “under prodding from other Westbrook authorities.” On the showing made, no constitutional violation took place; at most, two individuals differ over what was said on a given day. That dispute, as presented, has no constitutional dimension. The plaintiff has proffered nothing that would allow the drawing of a reasonable inference that Jarrett revoked the certificate<sup>20</sup> and issued notices of violation “in an effort to thwart Plaintiff’s speech.” Plaintiff’s Opposition at 30.

On the showing made, Jarrett is entitled to qualified immunity and, therefore, to summary judgment.

### **B. Prior Restraint (Count I)**

Count I of the second amended complaint alleges that the revocation of the plaintiff’s certificate of occupancy was “an unconstitutional prior restraint of Plaintiff’s rights to free expression, in violation of the First Amendment.” Complaint ¶ 120. The defendants contend that the revocation was “unrelated to speech and serve[d] legitimate governmental interests.” Defendants’ Motion at 14. The plaintiff admits that the fire and building codes upon which Gouzie stated that the revocation was based are content-neutral, Plaintiff’s Opposition at 6, but asserts that they were used in this case “as tools of censorship.” *Id.*

The plaintiff further asserts that “it was established that the codes at issue had not been enforced similarly against any other commercial business” and that “the unwavering enforcement of these regulations was never even considered until the ‘content’ of the use became known.” *Id.* at 7. To support this argument, the plaintiff cites only its own responses to the

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<sup>20</sup> Indeed, the undisputed evidence is that Gouzie, not Jarrett, revoked the certificate of occupancy. Defendants’ SMF ¶ 137; Plaintiff’s Responsive SMF ¶ 137.

defendants' statement of material facts. *Id.* (citing "OSMF ¶¶ 91-101"; "OSMF" is defined as "Opposing Statement of Material Facts" without further citation, *id.* at 4, and the only document related to a statement of material facts produced by the plaintiff that has 101 or more numbered paragraphs is its response to the plaintiff's statement of material facts, Docket No. 69). This is insufficient. Of the 11 paragraphs cited by the plaintiff, the last six contain qualifications wherein the plaintiff alleges additional facts. Because a moving party has no opportunity under this court's local rules to reply to facts alleged in a qualification or denial of a paragraph of its statement of material facts by a nonmoving party, a nonmoving party must include these facts in its own statement of additional material facts, to which the moving party may respond under Local Rule 56, in order to rely on facts other than those stated in the moving party's statement of material facts. *Zurich Ins. Co. v. Sunday River Skiway Corp.*, Civil No. 08-325-P-H, 2010 WL 1511495, at \*6 (D. Me. Apr. 15, 2010), and cases cited therein. The plaintiff's additional facts opposition to the defendants' motion for summary judgment are thus without factual support in the record and may not be considered. Of course, a motion for summary judgment that is, for all practical purposes, unopposed must nonetheless be considered on its merits. *Lopez v. Corporación Azucarera de Puerto Rico*, 938 F.2d 1510, 1516-17 (1st Cir. 1991).

Even if the plaintiff had presented the additional factual material that it cites in a manner that would allow the court to consider it, its take on the facts is not correct. The plaintiff cites paragraphs from its opposing statement of material facts that "establish" only the following:

- During the September 10, 2010, inspection of 84-B Warren Avenue, Jarrett "calculated the building's occupancy as in excess of 300," informed Ferrante that the building would require a fire alarm system, and informed Ferrante that he would accept a strobe light with alarm system but that Ferrante must check with

the MSFO to determine what type of system it would require. Defendants' SMF ¶¶ 91-93; Plaintiff's Responsive SMF ¶¶ 91-93 (stating that the corresponding paragraphs of the defendants' statement of material facts were admitted).

- Ferrante testified that Jarrett told him that if he had a contract to install the required fire alarm system within 30 days, he could get a certificate of occupancy from the city; that on September 13, 2010, he entered into a fire alarm contract calling for the installation of a fire alarm system within 30 days; and that he hand-delivered the contract to Gouzie on September 13, 2010, whereupon he was given a certificate of occupancy. *Id.* ¶¶ 94-96 (also admitting the defendants' corresponding paragraphs).
- Jarrett testified that Ferrante never asked him whether he would accept a contract to install the fire alarm system, but that testimony is not credible in light of other testimony from Jarrett. Defendants' SMF ¶ 97; Plaintiff's Responsive SMF ¶ 97.<sup>21</sup>
- Jarrett testified that he would not allow 84-B Warren Avenue to open until a fire alarm system, approved by the SFMO, had been installed and inspected. *Id.* ¶¶ 98-99.<sup>22</sup>
- Gouzie testified that he provided Ferrante with the certificate of occupancy for 84-B Warren Avenue during the September 10 inspection and prior to the discussion about a fire alarm system. *Id.* ¶ 100.

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<sup>21</sup> The plaintiff has "qualified" this paragraph of the defendants' statement of material facts by attacking Jarrett's credibility. Plaintiff's Responsive SMF ¶ 97. This is not an appropriate response under Local Rule 56(c). In addition, the qualification is not responsive to the substance of the paragraph, which accordingly is deemed admitted.

<sup>22</sup> The plaintiff qualifies its response to these paragraphs of the defendants' statement of material facts, but admits that they accurately report Jarrett's testimony. Plaintiff's Responsive SMF ¶¶ 98-99.

- The certificate of occupancy for 84-B Warren Avenue issued to Ferrante is dated September 10, 2010. *Id.* ¶ 101.<sup>23</sup>

Even given the plaintiff's challenges to the accuracy of the facts reported in these paragraphs, they cannot reasonably be read to support the assertions that "Westbrook utilized its building and fire codes as a 'restraint' so that they could adopt legislation designed to completely censor the Plaintiffs' [sic] desired form of expression," that "the codes at issue had not been enforced similarly against any other commercial business," or that the defendants' "unwavering enforcement of these regulations was never even considered until the 'content' of the use became known." Plaintiffs' Opposition at 6, 7.

It is likely that the plaintiff meant to refer to Paragraph 7 of its own "Additional Statement of Material Facts," which appears at the end of its "Opposing Statement of Material Facts." Docket No. 69, at 50. That paragraph, denied by the defendants, states:

CEO Gouzie testified that he has never, in 10 years, revoked a Certificate of Occupancy. CEO Gouzie also testified he has never, in 10 years, inspected a building after a Certificate of Occupancy issued.

Additional Statement of Material Facts ("Plaintiff's Additional SMF") (included in Plaintiff's Responsive SMF, beginning at 50) ¶ 7. Even taking this paragraph at face value, the plaintiff has cited no authority for the proposition that Gouzie inspected 84-B Warren Avenue after the certificate of occupancy was issued. Moreover, it says nothing about Westbrook's alleged use of its building and fire codes to give it time to adopt the Nude Dancing Ordinance.

The authority cited by the plaintiff for this paragraph, an excerpt from the transcript of testimony before the Westbrook Zoning Board of Appeals, is silent about whether Gouzie had ever inspected a building after a certificate of occupancy had been issued for that building.

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<sup>23</sup> The plaintiff qualifies paragraphs 100 and 101 of the defendants' statement of material facts to assert that Gouzie provided the certificate of occupancy on September 13 in exchange for the fire alarm contract. Plaintiff's Responsive SMF ¶¶ 100-01.

Westbrook Zoning Board of Appeals/Westbrook High School/Westbrook, Maine/November 10, 2010/ 7:00 p.m. (Exh. 7 to Docket No. 69), at 49:21-50:18. The full cited portion of Gouzie’s testimony, in response to the plaintiff’s attorney’s questions, follows:

Q. How many times have you revoked a certificate of occupancy from a business in the past year, can you tell me?

A. I haven’t.

Q. Just one?

A. Just the one.

Q. How many in the last two years?

A. Well, technically, I’ve done it quite a few times because when I close a building down, I’m actually revoking their certificate of occupancy.

Q. I’m talking about a business that’s in operation and you’re not shutting down a building. How many times have you revoked a certificate of occupancy other than this one for Dreamers in the past three years?

A. I haven’t.

Q. Past five years?

A. I haven’t.

Q. You haven’t?

A. No.

Q. How long have you been a code enforcement officer?

A. 10 years.

Q. How many times have you done it in 10 years?

A. I haven’t, just the once.

*Id.*

No evidence in the summary judgment record has been brought to the court’s attention that would support the characterization of the revocation of the certificate of occupancy in this case as closing down a business and “not shutting a building down.” Certainly the certificate of occupancy itself was directed at the building, not the business. Plaintiff’s Additional SMF ¶ 3. Gouzie testified that he had “close[d] a building down” “quite a few times.” On the showing made, the plaintiff has not established that a reasonable factfinder could conclude that Gouzie had not previously enforced the Westbrook building and/or fire codes in a manner similar to that used in this instance, by revoking a certificate of occupancy.

Of course, even if the plaintiff had submitted evidence that would allow such an inference to be drawn, that inference does not necessarily support the plaintiff's contention that the revocation of the certificate of occupancy in this case served as a prior restraint on the plaintiff's speech, as expressed in nude dancing. "The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal quotation marks and citation omitted; emphasis in original). Gouzie give no reason for his revocation other than violation of the admittedly content-neutral ordinances, and the only evidence proffered by the plaintiff would not allow a reasonable fact-finder to conclude otherwise. The majority of the plaintiff's discussion of this issue, Plaintiff's Opposition at 7-9, deals with the constitutionality of the Nude Entertainment Ordinance, which is not at issue in Count I.

On the showing made, the defendants are entitled to summary judgment on Count I.

### **C. Procedural Safeguards (Count II)**

Count II of the second amended complaint is limited by its terms to the revocation of the certificate of occupancy and the issuance of the notices of violation. Complaint ¶ 121. Again, the plaintiff's argument, based on the case law it cites, appears to be addressed to alleged flaws in Westbrook's Nude Entertainment Ordinance, as a "system of prior restraint." Plaintiff's Opposition at 11-13. In any event, the plaintiff admits that "the processes [presumably, those that took place after the certificate of occupancy was revoked,] have been sufficiently thorough and prompt[,]" but asserts, nonetheless, that "there are no 'procedural safeguards.'" *Id.* at 13.

First, because I have concluded that no reasonable fact-finder could conclude that the revocation of the certificate of occupancy was a prior restraint on protected speech, on the

showing made by the plaintiff, it is apparent that the plaintiff has not established a necessary predicate to this claim: that the ordinance at issue be directed at speech. Second, the plaintiff fails to identify what required procedural safeguards are missing from the revocation at issue in this count, particularly when it admits that the “processes’ set forth by the defendants, Defendants’ Motion at 19, are “sufficiently thorough and prompt.” *See generally City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781-83 (2004).

This conclusion applies as well to Jarrett’s notices of violation. The plaintiff has made no attempt to differentiate between the revocation of the certificate of occupancy and the notices of violation for purposes of this claim.

On the showing made, this “as applied” challenge to the revocation fails. The defendants are entitled to summary judgment on Count II.

#### **D. Censorial Motive (Count III)**

The defendants contend that Count III is included in their discussion of the allegation of prior restraint included in Count I. Defendants’ Motion at 16. The plaintiff does not respond to this contention and does not mention Count III in its opposition. Despite the fact that Count I attacks only the revocation, and Count III attacks both the revocation and the issuance of the notices of violation, *compare* Complaint ¶ 120 *with id.* ¶ 122, I am inclined to agree. I see no legal difference between an allegation of prior restraint on protected speech and an allegation that the same conduct was “content based and initiated for a censorial motive.” Complaint ¶ 122.

The defendants are entitled to summary judgment on Count III.

#### **E. Unbridled Administrative Discretion (Count IV)**

Count IV challenges only the revocation of the certificate of occupancy, alleging that it involved “procedures [that] allow for the utilization of unbridled administrative discretion, in

violation of the First Amendment.” *Id.* ¶ 123. The defendants respond that the Westbrook building and fire codes “are not prior restraint[s] on speech and employ sufficiently definite standards.” Defendants’ Motion at 16.

“Unbridled administrative discretion” is a sub-issue “under the prior restraint doctrine.” *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 687 (9th Cir. 2010). It is not at all clear that it provides a basis for a cause of action distinct from a claim of prior restraint, as alleged here in Count I. Even if it does, however, the case law requires that the regulations at issue, here the Westbrook building and fire codes, contain narrow, objective, and definite standards to guide the government officials who administer them. *New England Reg’l Council of Carpenters v. Kinton*, 284 F.3d 9, 21 (1st Cir. 2002).

Here, the plaintiff “submit[s] that the ability to simply change the level of enforcement of the building and fire codes allows for abuse.” Plaintiff’s Opposition at 10. It cites the following language from the I.B.C. Building Code, “incorporated into the Westbrook Ordinances by Chap. 7, Sec. 6-2”:

**Revocation.** The building official is authorized to, in writing, suspend or revoke a Certificate of Occupancy or completion issued under the provisions of this code wherever the certificate is issued in error, or on the basis of incorrect information supplied, or where it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code.

Defendants’ SMF ¶ 138; Plaintiff’s Responsive SMF ¶ 138.

Any local ordinance could be “abused” by those charged with its enforcement. That is not the gravamen of Count IV. The plaintiff’s argument attacks the revocation provision of these ordinances themselves:

What does “in error” mean? What is incorrect information? Who determines that “a building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code[]?”

How much of a “portion” need be involved? How serious does the “violation of any ordinance or regulation or any of the provisions of this code” have to be?

Plaintiff’s Opposition at 10. Presumably, these questions are raised by the plaintiff to demonstrate the lack of narrow, objective, or definite standards.

However, the plaintiff’s challenge in Count IV is to the ordinance “as applied.” Complaint ¶ 123. The “in error” provision of the revocation clause is, therefore, not at issue, and I will not consider it further. The plaintiff does not argue that the violations identified by Gouzie in revoking the certificate of occupancy were not serious enough to trigger that result, so the plaintiff’s last question is irrelevant. Nor does this case implicate “[h]ow much of a ‘portion’” of the building at issue “need be involved.” “Who determines” that a violation of the code exists is clearly the municipal official or officials charged with its enforcement.

That leaves the plaintiff’s question regarding “incorrect information,” which was one of the reasons given by Gouzie for the revocation. Defendants’ SMF ¶ 137; Plaintiff’s Responsive SMF ¶ 137. The fact that the plaintiff can argue to a court that it did not provide incorrect information by calling its intended use of 84-B Warren Avenue a “private recreational facility,” *id.* ¶ 54, when it intended to use the building for a nude entertainment nightclub, *id.* ¶ 68, does not mean that the regulation’s reliance on “incorrect information” is too broad, too subjective, or too indefinite. Similarly, the plaintiff apparently intends to argue that Ferrante’s response (“events and functions”) to Jarrett’s question on September 10, 2010, about “exactly” what the property would be used for was not incorrect information, but, again, that that does not make the ordinance language too broad, too subjective, or too indefinite.

I emphasize that the plaintiff has not established that the revocation could reasonably have been a prior restraint on its planned speech, and, in such circumstances, the section of the

ordinance at issue, under which the revocation was made, need not contain the “carefully drawn procedural safeguards” upon which the plaintiff relies. *Christy v. City of Lansing*, 693 F. Supp. 558, 561-62 (W.D. Mich. 1988). Indeed, the *Christy* court upheld exactly the same language as that quoted above from the Westbrook ordinances against exactly the same challenge, “even if” the requirement of carefully drawn, specific standards were applicable. *Id.* at 562.<sup>24</sup>

The defendants are entitled to summary judgment on Count IV of the second amended complaint.

#### **F. Due Process (Count V)**

Count V of the second amended complaint alleges that the “procedures and conduct utilized” in the revocation of the certificate of occupancy and the issuance of the notices of violation deprived the plaintiff “of protected rights prior to any notice or opportunity to be heard, in violation of the Plaintiff’s due process rights.” Complaint ¶ 124. The defendants respond that the plaintiff was not entitled to pre-deprivation notice and hearing before the revocation. Defendants’ Motion at 25-28. They do not mention the notices of violation.

The defendants begin by asserting that the plaintiff has no property interest in the certificate of occupancy. However, the case law that they cite deals with applications for such licenses, not with situations in which the license or certificate has already been issued. They then contend that the plaintiff can have no property interest in a certificate of occupancy obtained under false pretenses, but the plaintiff argues that the representations that it would be using 84-B

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<sup>24</sup> The plaintiff dismisses the opinion in *Christy*, pronouncing its reasoning “simply not valid.” Plaintiff’s Opposition at 11. It does not explain how or why, noting only that “[t]his simply can not be reconciled with the facts of the instant case, nor the citations of authority in this and the preceding section of Plaintiff’s response herein.” *Id.* I see nothing in the facts of the instant case that is necessarily at odds with the *Christy* opinion, and I find its reasoning persuasive. The plaintiff cites more than a dozen cases in the two sections of its memorandum to which it refers. To the extent that those cases are quoted or described in the text of the plaintiff’s memorandum of law, they are not necessarily inconsistent with *Christy*. In the absence of some indication by the plaintiff of the manner in which one or more of these opinions in fact cannot be reconciled with *Christy*, this court will not scrutinize each cited case to determine whether the plaintiff is correct.

Warren Avenue as a private recreational facility and for events and functions were not false. Plaintiff's Opposition at 25. This view of the evidence, with all of the indulgence afforded parties opposing summary judgment, is tenable, although barely, and summary judgment may not be awarded on the basis of the defendants' "false pretenses" argument.

More persuasive is the defendants' citation of *Taylor Novelty, Inc. v. City of Taylor*, 816 F.2d 682 (table), 1987 WL 37171 (6th Cir. 1987). In that case, an applicant for a certificate of occupancy stated that the business to be operated in the building was a retail store. *Id.* at \*1. After the certification was issued, the applicant filed suit in federal court, stating that it intended to use the store to offer sexually explicit publications, to exhibit sexually explicit video tape recordings and semi-nude and nude dancing by coin-operated devices. *Id.* The complaint alleged that two parts of the city's zoning regulations violated the applicant's First Amendment right to operate such machines. *Id.*

After the city was served with the complaint, the city's building department revoked the certificate of occupancy on the grounds that the applicant had misrepresented its intended use of the building. *Id.* The applicant contended that the revocation without notice or an opportunity to be heard violated its due process rights. *Id.* at \*4. The court held that the applicant had a limited property interest in the certificate of occupancy, but was not entitled to a hearing prior to revocation of a zoning permit, particularly where the permit was issued upon "a deliberately false statement by the would-be occupant, and in contravention of the issuing authority's own ordinances." *Id.* Also relevant were the facts that the applicant had not obtained a building permit, which was a prerequisite to a certificate of occupancy, that the applicant had not yet opened for business and had been in possession of the certificate for less than two months when it was revoked, and that the certificate was a permit to occupy a building rather than a license to

operate a business. *Id.*

Most of these factors are present here. The case law cited by the plaintiff, Plaintiff's Opposition at 24-27, other than that cited for the very basic proposition that a state actor may not deprive a plaintiff of a protected property interest without due process of law, and to the extent that the plaintiff provides pinpoint citations, uniformly involves licenses to conduct businesses or other distinguishing facts. *Hicks v. Georgia State Bd. of Pharmacy*, 553 F. Supp. 314, 318 (D. Ga. 1982) (no property interest in having pharmacist license reinstated); *Childers v. Department of Env'tl. Prot.*, 696 So.2d 962, 964-66 (Fla.App. 1997) (state agency may not revoke license for cause not clearly within ambit of agency's statutory authority); *Roy v. City of Augusta*, 712 F.2d 1517, 1522-23 (1st Cir. 1983) (state supreme court judgment gave plaintiff property interest in license; defendants might be liable for frustrating due process provided by state); *Decker v. Hillsborough County Attorney's Office*, 845 F.2d 17, 22 (1st Cir. 1988) (alleged failure to return items of personal property seized pursuant to search warrant not a deprivation of due process where meaningful postdeprivation remedy provided); *Scott v. Greenville County*, 716 F.2d 1409, 1417-19 (D. S. C. 1983) (state law gave plaintiff property interest in building permit as soon as he applied and submitted plans showing a permitted use, so due process protection extended to treatment of application).

In addition, due process permits an administrative agency to take summary action without a pre-deprivation hearing where such action is necessary to protect public health and safety. *Woolfhaus, Inc. v. Inhabitants of Town of Old Orchard Beach*, No. 00-353-P-H, 2001 WL 501048, at \*7 (D. Me. May 11, 2001) (and cases cited therein). When a building certified for occupancy by more than 300 people is without a fire alarm system, that is a matter of public safety. In addition, Maine law holds that licenses do not create a protected property interest

“when broad discretion is vested in a[n] official or agency to deny or approve the application.”

*Id.* In the absence of a right to renewal of a license as a matter of law, this court held, there is no colorable claim to a property interest in the license. *Id.* An occupancy permit surely cannot create a greater property interest than a business license.

Since the record establishes only that the notices of violation would have provided a basis for the revocation of the certificate of occupancy, not that they actually did so, there is no factual basis for a claim that the issuance of those notices deprived the plaintiff of a protected property interest.

The defendants are entitled to summary judgment on Count V.

### **G. Equal Protection (Count VI)**

In Count VI of the second amended complaint, the plaintiff alleges that it was deprived of equal protection of the law by the revocation of the certificate of occupancy and issuance of the notices of violation in that this conduct “unreasonably require[d] the Plaintiff to submit to controls not imposed on other similarly situated businesses or properties.” Complaint ¶ 125. It provides only conclusory statements in opposition to the defendants’ contention that it has not shown that they acted with intentional or purposeful discrimination “rather than simply enforcing legitimate, content-neutral building and fire codes.” Defendants’ Motion at 29.

The plaintiff cites case law supporting the well-established propositions that a public official may not deny any individual the equal protection of the laws and that similarly situated individuals must be treated alike. Plaintiff’s Opposition at 27-28. Other than quotations from, and citations to, such case law, the plaintiff offers only the following: “Suffice it to say that the record reflects differential treatment imposed upon the Plaintiff, which can not be justified” and “The Defendants are not entitled to summary judgment on the equal protection issue.” *Id.* at 28.

This is simply not enough, and the plaintiff will be deemed to have waived opposition to the motion as to this count.

Presumably, the record of “differential treatment imposed upon the Plaintiff” is that described in the previously-discussed Paragraph 7 of the plaintiff’s additional statement of material facts. Plaintiff’s Additional SMF ¶ 7. Even if every factual assertion in that paragraph were accepted as true, however, no basis for an equal protection claim is apparent. The plaintiff has not provided any evidence that there was any other individual similarly situated who or which was treated differently by the defendants. If the plaintiff means to suggest that the group of similarly situated individuals is defined as all applicants for certificates of occupancy, in the absence of some explanation, that definition is far too broad. For all that appears, every individual resident of Westbrook and every business operating in Westbrook could apply for a certificate of occupancy. There can be no doubt that some of those individuals will be treated somewhat differently from others, without thereby raising constitutional implications.

Particularly where, as here, the First Circuit counsels “extreme reluctance” to entertain equal protection challenges to local planning decisions, *Macone v. Town of Wakefield*, 277 F.3d 1, 10 (1st Cir. 2002), it is not difficult to conclude that the plaintiff has not refuted the defendants’ arguments. The defendants are entitled to summary judgment on Count VI.

#### **H. Valid Legislative Predicate and Improper Motive (Counts VII & VIII)**

With Count VII, the plaintiff moves into the section of its complaint challenging the Westbrook Nude Entertainment Ordinance (“NEO”). Two final counts appear to address both the ordinance and the certificate of occupancy; I will address them at the end of this discussion section. In Count VII, the plaintiff alleges that there is “no proper legislative predicate” for the NEO, rendering it unconstitutional. Complaint ¶ 126. Count VIII alleges that the NEO was

enacted for an improper purpose, specifically, to prevent the plaintiff from presenting “nude and/or exotic dancing,” and is “not unrelated to the suppression of free speech.” *Id.* ¶ 127.

The plaintiff asserts that the fact that the NEO was adopted “within days of the decision to utilize the code provisions to close (and totally censor) any further presentation” of its planned performances proves “an improper and censorial motive” and that the fact that the “legislative predicate” upon which the NEO was adopted is “shoddy ‘junk science,’ presented to advance an agenda” and that both of these conclusions establish constitutional violations. Plaintiff’s Opposition at 13-19.

The plaintiff’s challenge to the “legislative predicate” of the NEO requires consideration of a four-part test first set out in *United States v. O’Brien*, 391 U.S. 367 (1968). “[N]ude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment’s protection.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000). An ordinance that is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments and not at suppressing the erotic message conveyed by nude dancing need only satisfy the “less stringent” intermediate level of scrutiny. *Id.* That is the *O’Brien* four-part test.<sup>25</sup>

The four parts of the *O’Brien* test are: (1) whether the ordinance is within the municipality’s constitutional power to enact; (2) whether the ordinance furthers the important government interests of regulating conduct and combating the harmful secondary effects associated with nude dancing; (3) whether the government interest is unrelated to the suppression of free expression; and (4) whether the restriction is no greater than is essential to the furtherance of the government interest. *Id.* at 296, 301.

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<sup>25</sup> Contrary to the title of Count VIII in the second amended complaint, the courts will not “strike down an otherwise constitutional statute on the basis of an alleged illicit motive.” *Pap’s*, 529 U.S. at 292.

The plaintiff recites the test, but abandons it to assert that “[t]here needs to be an appropriate *evidentiary hearing*, to test the hypothesis that adult entertainment businesses create ‘adverse secondary events.’” Opposition at 14-15 (emphasis in original). This argument misstates the applicable case law. I assume that the plaintiff is addressing the second element of the *O’Brien* test. The plaintiff emphasizes the word “evidence” in some of the cases that address this issue, *id.* at 15, but the mere use of that word does not require that the evidence be obtained only through a court hearing.

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), the Supreme Court held that a municipality that wants to address the secondary effects of protected speech “may rely on any evidence that is ‘reasonably believed to be relevant’ for demonstrating a connection between speech and a substantial, independent government interest.” *Id.* at 438 (citation omitted). The plaintiff makes much of the following passage:

The municipality’s evidence must fairly support the municipality’s rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings, the municipality meets the standard set forth in *Renton [v. Playtime Theatres, Inc.]*, 475 U.S. 41 (1986). If plaintiffs succeed in casting doubt on a municipality’s rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

*Id.* at 438-39 (citation omitted).

The plaintiff argues that it has cast doubt on “the work of Dr. Richard McCleary, upon which the Defendants rely” through the work of its expert, R. Bruce McLaughlin, which apparently disputes Dr. McCleary’s conclusions. Opposition at 15. It does not cite to the summary judgment record in support of this contention, and there is no mention of McLaughlin in either the plaintiff’s statement of additional facts or its statement of material facts submitted in

support of its own motion for partial summary judgment. Plaintiff's Additional SMF; Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's SMF") (Docket No. 60). In the absence in the summary judgment record of any information about McLaughlin's work,<sup>26</sup> the plaintiff has not "cast doubt" on Dr. McCleary's findings, which are set forth at paragraphs 192-96 of the defendants' statement of material facts.

The plaintiff asserts in a footnote that "[i]t must be acknowledged that there are peer-reviewed articles and judicial opinions which establish the fact that adult businesses do not invariably cause adverse secondary effects." Opposition at 15 n.2. It has not provided copies of the articles cited in the footnote but, in any event, the proposition for which they are cited is not the correct legal test. As the Supreme Court held in *Alameda Books*, the evidence upon which the municipality relies, if it fairly support's the municipality's rationale for the ordinance at issue, need not prove that the city's justification of its ordinance is necessarily correct. 535 U.S. at 439.<sup>27</sup> The evidence upon which the municipality relies

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<sup>26</sup> An untitled document listed by the plaintiff as "Bruce McLaughlin's Report dated 1/29/11," Exhibit 15 to Docket No. 69, and bearing the heading "Jackson County, Missouri/Report to the County Legislature" does mention "Dr. McCleary's work" at page 1. This 115-page exhibit is cited in the plaintiff's "qualified" responses to paragraphs 194-96 of the defendants' statement of material facts. Even if this were the proper way to present facts for the court's consideration, which it is not, as discussed above, the failure of the plaintiff to provide pinpoint citations is also fatal. *See, e.g., Thayer v. Dion*, No. 2:09-cv-00435-DBH, 2010 WL 4961739, at \*1 n.2 (D. Me. Nov. 30, 2010) ("[A] district court's role in deciding the motion [for summary judgment] is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe. In a motion for summary judgment, the job of a court is only to decide, based on the evidentiary record that accompanies the moving and resistance filings of the parties, whether there really is any material dispute of fact that still requires a trial. It is the responsibility of the parties to provide the evidence necessary for this assessment." Citations and internal punctuation omitted.); *Tum v. Barber Foods, Inc.*, No. 00-371-P-C, 2002 WL 89399, at \*13 n.11 (D. Me. Jan. 23, 2002) ("It is not the court's role to search through the summary judgment record for material that might support a party's factual assertions. *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995).").

<sup>27</sup> Similarly, paragraph 5 of the plaintiff's statement of additional facts, which states that the plaintiff's attorney "testified to the Westbrook City Council on behalf of Dreamer's Cabaret and submitted three binders of secondary effects materials to that body which refut[ed] and dispelled the idea that nude entertainment facilities cause a disproportionate amount of negative secondary effects[.]" Plaintiff's Additional SMF ¶ 5, and to which the defendants have objected, Defendants' Reply SMF ¶ 5, cannot serve to establish a disputed issue of material fact about the second prong of the *O'Brien* test. The plaintiff's attorney is not an appropriate witness before this court, and the legal conclusions that the paragraph recites are to be made by the court after reviewing the actual documents, not as they are filtered through an advocate for one of the parties. *See, e.g., Daytona Grand, Inc. v. City*

need not settle the matter beyond debate or produce an exhaustive evidentiary demonstration. Moreover, its policy expertise is entitled to deference, and it may demonstrate the efficacy of its method of reducing secondary effects by appeal to common sense, rather than empirical data. It may also rely on the experiences of other jurisdictions and on findings expressed in other cases.

*Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 742 (4th Cir. 2010) (citations and internal quotation marks omitted). *See also, e.g., Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 561 (5th Cir. 2006); *Flanigan's Enters., Inc. v. Fulton County*, 596 F.3d 1265, 1279 (11th Cir. 2010). Contrary to the plaintiff's contention, these opinions do not create an "irrebuttable presumption," nor is their approach "totally improper." Opposition at 17.

The plaintiff does not specifically mention any of the remaining three prongs of the *O'Brien* test. It is possible to interpret Count VIII of the second amended complaint, which alleges that the NEO was "an unlawful exercise of the state's [sic] police power in that it was adopted for an improper purpose, that being to restrain Plaintiff from the presentation of nude and/or exotic dancing" and is "not content-neutral and is not unrelated to the suppression of free speech," Complaint ¶ 127, as addressing the first and third prongs of the *O'Brien* test, but the plaintiff offers no argument or citation of authority directed at those elements, asserting merely that "[b]ased on the highly disputed nature of this issue [the evidence upon which the municipality relied in enacting the ordinance], the Defendants are simply not entitled to summary judgment on Counts VII and VIII of the Second Amended Complaint." Opposition at 20.

However, the defendants are entitled to summary judgment on both counts, on the showing made. I note only that the ordinance (Exh. 5 to Docket No. 60) meets the case law's definition of "content-neutral," *e.g., Big Dipper Entertainment, L.L.C. v. City of Warren*, 641 F.3d 715, 717 (6<sup>th</sup> Cir. 2011) (so long as ordinances aim to limit secondary effects of adult

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*of Daytona Beach*, 490 F.3d 860, 879-85 (11th Cir. 2007) (describing evidence found sufficient to cast doubt on evidence upon which city relied in enacting ordinance).

businesses, courts will treat them as content-neutral, citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986)),<sup>28</sup> and being unrelated to the suppression of free speech, e.g., *Heideman v. South Salt Lake City*, 165 Fed.Appx. 627, 633, 2006 WL 245160, at \*\*4 (10th Cir. Feb. 2, 2006) (Supreme Court has consistently held that control of negative secondary effects is unrelated to suppression of expression).

### I. Vagueness

Count IX of the second amended complaint challenges the NEO as unconstitutionally vague in its use of the term “theatrical performances.” Complaint ¶ 128. Beginning with the unexceptionable premise that “an enactment is void for vagueness if it[s] prohibitions are not clearly defined,” citing *Grayned v. City of Rockland*, 408 U.S. 104, 108 (1972), the plaintiff asserts that the NEO’s exception for performances at theaters, dinner theaters, movie theaters, and similar establishments “limited to occasional nudity by bona fide stage actors[,]” is “comparatively useless and open to subjective interpretation of biblical proportions.” Plaintiff’s Opposition at 21. The plaintiff then quotes a 1971 Supreme Court opinion and a 1974 opinion of the Second Circuit and asserts, in conclusory fashion, “it [presumably the ordinance’s reference to theatrical performances] is undeniably vague, and completely open to interpretation to those who would enforce it.” *Id.* at 21-22.

In a response not much more specific, the defendants contend that “[b]oth the context of the Ordinance and common meaning sufficiently define ‘theatrical performances.’” Defendants’

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<sup>28</sup> The plaintiff does state, almost in passing, that the “coincidental” timing of the enactment of the NEO – “it was adopted within days of the decision to utilize the code provisions to close (and totally censor) any further presentation of the ‘recreational’ performances deemed by the Defendants to be unacceptable” – is “indicative of an improper and censorial motive.” Plaintiff’s Opposition at 13. But, the lengthy quotation from *754 Orange Ave., Inc. v. City of West Haven*, 761 F.2d 105, 113 (2d Cir. 1985), does not address how long after learning of the existence of an adult entertainment business the municipality in which it is located may enact an ordinance limiting such entertainment without demonstrating thereby an improper motive. *Id.* at 13-14. Immediately after the quotation, the plaintiff “[t]urn[s] to the issue of ‘legislative predicate[.]’” *Id.* at 14. The defendants point out that the gap in this case was 45 days. Defendants’ Reply at 6 n.3. The passage of that number of days, standing alone, cannot serve to invalidate an otherwise constitutional ordinance.

Reply at 23. The entire subsection at issue provides:

The provisions of Section 22-48(A) through (D) shall not apply to theaters, dinner theaters, licensed movie theaters or similar establishments which are primarily devoted to theatrical performances or the presentation of movies, provided that any displays of live nudity within such theaters, dinner theaters, licensed movie theaters or similar establishments shall be limited to occasional nudity by bona fide stage actors during the course of theatrical performances; provided also that the provisions of Section 22-48(E) through (H), 22-49(C) through (H) and 22-50 of this Article shall apply to nude theatrical performances under this section.

Defendants' SMF ¶ 180; Plaintiff's Responsive SMF ¶ 180.

A similar exception was found not to be constitutionally vague in *Ways v. City of Lincoln*, No. 4:00CV3216, 2002 WL 1742664, at \*7 (D.Neb. July 29, 2002) (citing *Farkas v. Miller*, 151 F.3d 900, 902, 905-06 (8th Cir. 1998)). I find the reasoning in those two cases to be persuasive. See Section IV.B below for a discussion of the plaintiff's motion for summary judgment on this count.

### **J. Overbreadth**

Count X of the second amended complaint alleges that the NEO "criminalizes activities that are inherently innocent, without benefit of advancing any legitimate governmental interest, and imposes a complete criminalization of the expressive exposure of human nudity, . . . and it contains restrictions on First Amendment freedoms that are overbroad and far greater than are essential to the furtherance of any alleged government interest." Complaint ¶ 129. The plaintiff's memorandum of law does not address the allegations of criminalization, and I see nothing in the language of the NEO to support such a characterization.<sup>29</sup> I will not consider that aspect of Count X any further.

Because the Supreme Court said in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-72

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<sup>29</sup> The NEO merely imposes fines for violations, with the suspension or revocation of use permits and/or certificates of occupancy for repeated offenses. Defendants' SMF ¶ 179; Plaintiff's Responsive SMF ¶ 179.

(1991), that a requirement that dancers wear pasties and a G-string does not offend the Constitution, as seen through the lens of the fourth prong of the *O'Brien* test, the plaintiff contends, “any greater restriction on expressive nudity is, *per se*, overbroad.” Plaintiff’s Opposition at 23. An ordinance is overbroad when it “sweeps within its ambit (protected) activities as well as unprotected ones.” *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1123 n.9 (citation and internal quotation marks omitted). “The overbreadth doctrine is ‘strong medicine’ to be used ‘sparingly’ and only when the overbreadth is not only ‘real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.’” *Ways v. City of Lincoln*, 274 F.3d 514, 518 (8th Cir. 2001) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973)).

The plaintiff also cites *Peek-a-Boo Lounge of Brandenton, Inc. v. Manatee County*, 337 F.3d 1251, 1273-74 (11th Cir. 2003), for the proposition that the question of whether restrictions on nudity “far more than a simple ‘pasties and G-string[]’ is overbroad” can only be resolved at trial. Plaintiff’s Opposition at 24. The plaintiff does not identify the allegedly offending passage of the NEO, but I assume that it means the provision that nude entertainment “shall not include any showing of the male or female genitals, pubic area, perineum or anus or female breast below the top of the nipple of any person with less than a fully opaque covering.” Defendants’ SMF ¶ 178; Plaintiff’s Responsive SMF ¶ 178.

However, the Eleventh Circuit in *Peek-a-Boo* said, in *dicta*, that

we find it difficult to conclude on this record that preventing erotic dancers from wearing G-strings, thongs, pasties and the like has only a ‘*de minimis*’ effect on the expressive component of erotic dancing or ‘leaves ample capacity to convey the dancer’s erotic message.’ On the contrary, because erotic dancers in Manatee County are *not* ‘free to perform wearing pasties and G-strings,’ arguably, the County’s prohibition could significantly impact that message.

337 F.3d at 1274 (citations omitted; emphasis in original). It then remanded the case to the trial court because “[t]his concern about the scope” of the ordinance at issue “has not yet been adequately addressed either by the Defendants or by the District Court.” *Id.*

Even if *Peek-a-Boo* were interpreted to support the plaintiff’s *per se* position, there have been many court decisions holding otherwise. *See, e.g., Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512, 529-30 (6th Cir. 2009) (interpreting *Barnes* as upholding requirement that erotic performers wear at least pasties and G-strings; upholding regulation requiring performers to be clad in garments that “cover more than the pubic area and areolae”); *Nite Moves Entertainment, Inc. v. City of Boise*, 153 F.Supp.2d 1198, 1209 (D. Idaho 2001) (rejecting plaintiff’s argument here and citing cases); *Café 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 645-46 (M.D.Fla. 1994) (rejecting plaintiff’s argument here and upholding requirement that exposure be limited to three-fourths of the breasts and two-thirds of the buttocks).

I find the reasoning of these courts to be persuasive and reject the plaintiff’s “*per se*” interpretation of *Barnes*. See Section IV.B below for a discussion of the plaintiff’s motion for summary judgment on this count.

#### **K. Alternative Avenues of Communication**

Count XI of the second amended complaint alleges that the NEO is unconstitutional because it “fails to provide sufficient locations for the establishment of the First Amendment protected businesses purportedly restricted by the [NEO], failing to provide for any ‘adequate alternative avenues of communication,’ and . . . failing to identify [such avenues.]” Complaint, ¶ 130. The plaintiff’s opposition does not discuss this count separately, stating only, at the close of its argument with respect to Count X, that “[t]he Defendants are not entitled to judgment on Counts X and XI of the Second Amended Complaint.” Plaintiff’s Opposition at 24.

The defendants do the same. Defendants' Motion at 25. I must, therefore, defer consideration of this count until I address the plaintiff's motion for summary judgment, in the hope that the plaintiff will identify the source of this alleged constitutional requirement and explain how the NEO has violated it.

#### **L. Equitable Estoppel**

In Count XII, the plaintiff alleges that the revocation of the certificate of occupancy, the issuing of the notices of violation, and the application of the NEO to it are all "barred by the doctrine of equitable estoppel." Complaint ¶ 131. The defendants contend that this claim is barred by Maine law, because equitable estoppel claims cannot be brought against municipalities as an affirmative cause of action. Defendants' Motion at 34-35. That is an accurate statement of Maine law. *Buker v. Town of Sweden*, 644 A.2d 1042, 1044 (Me. 1994); *see also Tarason v. Town of South Berwick*, 2005 ME 30, ¶ 16, 868 A.2d 230, 234.

The plaintiff responds that this argument "completely overlooks the legal principle that there is a Federal Constitutional Due Process element within an equitable estoppel argument." Plaintiff's Opposition at 31. It cites cases that in turn cite a case in which a federal cause of action was based on the due process clause of the Constitution. *Southern Coop. Dev. Fund v. Driggers*, 696 F.2d 1347, 1355 (11th Cir. 1983). There is no mention of equitable estoppel on the page of the *Driggers* decision cited by the plaintiff, which deals with a federal constitutional claim. If state-law equitable estoppel is indeed tied to a federal constitutional due process claim, the second amended complaint already includes a count alleging such a claim. Complaint ¶ 124. A plaintiff cannot separate out the elements of a particular constitutional claim and use them as the bases for separate causes of action.

The plaintiff contends that the Maine Law Court "ignore[d] the Constitutional Due

Process application of equitable estoppel in the cases cited above [as following *Driggers*].” Plaintiff’s Opposition at 32. To the contrary, the Law Court, applying Maine common law, had no need to consider the concept of federal due process merely because equitable estoppel had been asserted as a plaintiff’s cause of action. There is no conflict between *Buker* or *Tarason* and federal constitutional law. Even a direct claim of federal common law equitable estoppel, used to oppose a defendant’s use of a statute of limitations defense, has the same elements as a Maine state-law claim of equitable estoppel and does not require consideration of federal due process concerns.<sup>30</sup> See, e.g., *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66, 73 (1st Cir. 2005).

The defendants are entitled to summary judgment on Count XII.

### **M. Separation of Powers**

The final count in the second amended complaint, Count XIII, alleges that a subsection of the NEO, entitled “violations and Penalties” violates the doctrine of separation of powers, although the means of the violation is not clear. Complaint ¶ 132. This count also appears under the heading “State law Claims Pursuant to 28 U.S.C. Section 1367.” *Id.* at 31. Asserting that this claim “is more accurately an *ultra vires* claim against Defendant City,” the defendants argue that Westbrook has the authority to adopt penalties for violation of its own ordinances under the municipal home rule provision of the Maine constitution. Defendants’ Motion at 30-31. They contend that the penalty provisions of the NEO are not preempted by state law, specifically 30-A M.R.S.A. § 4452(3). *Id.* at 31-32.

The plaintiff agrees that the intent of Count XIII is to allege “that Defendant City lacks the authority to set the penalties imposed for violations of the NEO because to do so violates the

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<sup>30</sup> In addition, Count XII is placed under the heading “State Law Claims Pursuant to 28 U.S.C. Section 1367.” Complaint at 31. The plaintiff cannot for the first time in its opposition to a motion for summary judgment claim that this is actually a claim based on federal common-law equitable estoppel. *Logiodice v. Trustees of Maine Cent. Inst.*, 170 F.Supp.2d 16, 30 n.12 (D. Me. 2001).

doctrine of separation of powers.” Plaintiff’s Opposition at 28-29. It contends that “the State Statute[] [30-A M.R.S.A. § 4452(3)] may well be guilty of the same violations as the Defendants.” *Id.* at 29. This is so, it asserts, because neither the city nor the state has “the authority to invade the province of the court when it comes to sentencing penalties.” *Id.*

The plaintiff then goes on to cite case law to the effect that a municipality may not impose a penalty that exceeds the penalty imposed by the state. *Id.* This proposition does not appear to be related to the argument that the penalties involved in the NEO are invalid because they invade the province of the courts. The plaintiff closes by asserting that “[t]he bottom line is that ordinances define violations, but the courts hand down sentences, subject to no ‘municipal minimum mandatory.’” *Id.* at 30.

I suppose that the plaintiff’s closing assertion has the merit of bringing its argument full circle, but otherwise its presentation is impenetrable. In addition, if what the plaintiff asserts is correct, no municipality can establish by ordinance any penalties<sup>31</sup> for violation of any ordinance, because those violations might end up in court. That result is obviously not required by Maine or federal law. *See, e.g., Brown v. City of Chicago*, 42 Ill.2d 501, 506-07, 250 N.E.2d 129, 132 (1969) (rejecting this argument). *United States v. Booker*, 543 U.S. 220 (2005), cited by the plaintiff, Plaintiff’s Opposition at 29-30, does not require otherwise.

The defendants are entitled to summary judgment on Count XIII.

#### **IV. Plaintiff’s Motion**

The plaintiff has moved for summary judgment on Counts IX, X, and XI of its second

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<sup>31</sup> The plaintiff uses the words “penalties” and “sentencing” interchangeably. The meanings of the two words are quite different, and municipal ordinances do not themselves impose sentences. Sentencing is a function of the courts.

amended complaint. Plaintiff[s]<sup>32</sup> Motion for Summary Judgment (“Plaintiff’s Motion”) (Docket No. 59) at 1. The motion is largely based on the decision of the Maine Supreme Judicial Court, sitting as the Law Court, in *City of Bangor v. Diva’s, Inc.*, 2003 ME 51, 830 A.2d 898.

The Law Court said, *inter alia*:

Because the ordinances at issue do not completely ban nude dancing, the appropriate inquiry in this case is whether the Bangor ordinances are content-neutral, designed to serve a substantial governmental interest, and allow for reasonable alternative avenues of communication. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434-35 . . . (2002) (plurality).

*Diva’s*, 2003 ME 51, ¶ 12, 830 A.2d at 902-03.

#### **A. Count XI**

This is apparently the source of Count XI, which alleges that the defendants violated the First Amendment by “failing to provide for any ‘adequate alternative avenues of communication[.]’” Complaint ¶ 130. The language actually comes from *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), where the Supreme Court held that an ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school was constitutionally acceptable because it was designed to serve a substantial governmental interest and allowed for reasonable alternative avenues of communication. *Id.* at 43, 50.

The Supreme Court addressed the latter requirement as follows:

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520

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<sup>32</sup> The motion asserts that The Ferrante Group and Lawrence Ferrante are both plaintiffs in this action. Plaintiff’s Motion at 1. The second amended complaint, filed some three months before the motion, lists only The Ferrante Group as a plaintiff, Complaint at 1, and the case is listed on the docket as currently having only the single plaintiff. *See* Docket generally.

acres of land consists of ample, accessible real estate[.]

\* \* \*

That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . In our view, the First Amendment requires only that Renton reform from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

*Id.* at 53-54.

The “reasonable alternative avenues of communication” requirement is thus demonstrated to apply to limitations on the location of an adult entertainment business. The Bangor ordinance at issue in *Diva’s* also restricted the location of commercial establishments offering nude entertainment, 2003 ME 51, ¶ 13, 830 A.2d at 903. The Law Court made clear that this concern relates to the fourth element of the *O’Brien* test, that the restriction on alleged First Amendment freedoms be no greater than necessary to achieve the government’s purpose. *Id.* ¶ 28, 830 A.2d at 907. Evidence in the *Diva’s* case established that there were 963 acres in Bangor “potentially available for adult businesses,” and the Law Court therefore concluded that the ordinance’s “incidental restriction on speech is no greater than is necessary to achieve the government’s purpose, providing reasonable alternative avenues for expression.” *Id.* ¶ 29, 830 A.2d at 907.

Here, the plaintiff asserts that a community “may restrict the geographical areas within which such nude entertainment may appear, but it *must* allow nude entertainment somewhere in the community in order for the protected speech to be provided reasonable alternative avenues of communication[.]” citing *Diva’s*, but without a pinpoint citation. Plaintiff’s Motion at 8 (emphasis in original). If the plaintiff means to argue that it has a constitutional right to present nude dancing somewhere in Westbrook without any restrictions on the attire to be worn, or not

worn, by the dancers, it is quite simply wrong, as the case law discussed earlier has established. If it means to suggest that the zoning district in which the NEO allows nude dancing is insufficient in size, as was an issue in *Diva's*, the Law Court's opinion forecloses that argument. As the defendants point out, Opposition to Plaintiff's Motion for Summary Judgment ("Defendants' Opposition") (Docket No. 64), at 19, under the NEO approximately 1,147 acres are zoned for industrial or industrial park use, approximately 11% of its total zoned land area. City Defendant[s]' Additional Statement of Undisputed Facts (included in City Defendants' Opposing Statement of Material Facts (Docket No. 54) beginning at 4) ¶ 5; Plaintiff Dreamers' Reply to City Defendant[s]' Additional Statement of Undisputed Facts (included in Plaintiff's Reply Statement of Material Facts in Support of Its Motion for Summary Judgment (Docket No. 67) beginning at 5) ¶ 5.<sup>33</sup> The NEO allows nude entertainment only in an industrial park zone. Plaintiff's SMF ¶ 8; Defendants' Responsive SMF ¶ 8. From all that appears in the summary judgment record, this is sufficient under *Diva's*.

The plaintiff is not entitled to summary judgment on Count XI. Now that the meaning of this count is clear, I conclude that the defendants are entitled to summary judgment on this count as well. See Section III.K above.

## **B. Counts IX and X**

Count IX alleges that the NEO is void for vagueness and Count X alleges that it is overbroad. The plaintiff bases its arguments for summary judgment on these counts on asserted differences between the ordinance upheld in *Diva's* and the NEO that it contends renders the NEO unconstitutional. Plaintiff's Motion at 5-13. It asserts that the NEO "is in fact dramatically more restrictive than the Bangor Ordinance in that it bans the presentation of the very nudity

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<sup>33</sup> The plaintiff's qualified response suggests that the NEO allows nude entertainment only in the Industrial Park Zone and that these figures include another Industrial Zone as well, thereby generating an erroneous percentage. However, it does not suggest what the correct percentage would be.

which it purports to only restrict geographically.” *Id.* at 12.

The plaintiff offers no substantive argument with respect to vagueness, however. It asserts only, in conclusory terms, that the NEO is “circular and thus unconstitutionally vague . . . in that it purports to allow nude dancing but restricts it to the Industrial Park District when in fact it also bans nude dancing in that very district by proscribing the ‘conduct’ of ‘nudity’ according to its own definition.” *Id.* at 4, 15. This argument rests on the assumption that only dancing without any covering whatsoever of any part of the body is nude dancing, and the Constitution requires that such dancing be allowed. As set forth above, this is a misstatement of the governing case law on this issue. Accordingly, the plaintiff is not entitled to summary judgment on Count IX and the defendants are entitled to summary judgment on this count for the reasons set forth above in the discussion of the defendants’ motion on this count. See Section III.I.

The plaintiff’s overbreadth argument boils down to this: the NEO is unconstitutional because it does not allow the display of the female breast below the top of the nipple, while the Bangor ordinance which the Law Court found constitutional in *Diva’s* allowed fully topless dancing. Plaintiff’s Motion at 13.<sup>34</sup> The plaintiff correctly cites *Clarkson v. Town of Florence*, 198 F.Supp.2d 997 (E.D. Wis. 2002), for the proposition that an ordinance with a similar restriction on display of the breasts has been invalidated on constitutional grounds. *Id.* at 14-15 & n.10.

In *Clarkson*, a town ordinance prohibited performances in taverns which “expose to view any portion of [the] genitals, pubic area, vulva, anus, anal clef [sic] or cleavage” and any appearance by a female on the premises “in such manner or attire as to expose to view any

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<sup>34</sup> The plaintiff also attacks the NEO’s requirement that the pubic area be covered as “substantially broader than in *Barnes* and *City of Erie*.” Plaintiff’s Motion at 14. That may be, but the Bangor ordinance upheld in *Diva’s* was essentially the same – “shall not include any showing of the . . . pubic area . . .with less than a fully opaque covering,” *id.* at 13 – and *Diva’s* is the plaintiff’s preferred authority. The plaintiff does not suggest that the Law Court got this part of its analysis wrong. I see no reason to pursue this particular issue further.

portion of the breast below the top of the areola[.]” 198 F.Supp.2d at 1000. The first distinguishing factor, therefore, is that the *Clarkson* breast display restrictions applied to waitresses, employees, and patrons, not just to the protected expression of erotic dancing. The court in *Clarkson* erroneously stated that the ordinance “only banned nudity as part of certain expressive conduct” and concluded that the “language of the ordinance makes clear that it was content-based.” *Id.* at 1007. This led the court to consider applying strict scrutiny as the standard of review,<sup>35</sup> but *Erie* convinced it to use “the *City of Renton* standard” rather than the *O’Brien* test, although it opined that “the result is the same under any test.” *Id.* at 1008.

The *Clarkson* court stated that the standard it applied was as follows: “when the government could adopt a narrower regulation that would significantly reduce the negative impact on expressive activity without substantially interfering with its legislative goals it must do so.” *Id.* at 1009. The court also read *Erie* to hold that “requiring pasties and G-strings is as far as government can go without restricting more expression than is necessary to further its interest in combating secondary effects[.]” *id.*, a reading that several other courts have rejected, as discussed above.

But, a regulation narrowly tailored to serve an acceptable government interest “need not be the least restrictive or least intrusive means of doing so.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (interpreting *O’Brien*). Indeed, “narrow tailoring is less important when the potential for overbreadth burdens a category of speech subject to less than full first amendment protection; sexually-oriented expression falls into such a category.” *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1276 (5th Cir. 1988).

I find the following opinions persuasive, all of which are inconsistent with the analysis and result in *Clarkson*: *Richland Bookmart*, 555 F.3d at 529-30 (“We have previously upheld

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<sup>35</sup> The court noted that “[u]nder strict scrutiny the ordinance was clearly unconstitutional.” 198 F.Supp.2d at 1009.

various time, place, and manner regulations of businesses featuring performers clad in revealing garments that nonetheless cover more than the pubic area and areolae[.]” rejecting *Clarkson*’s interpretation of *Barnes* and *Pap*’s); *Nite Moves*, 153 F.Supp.2d at 1209-10 (rejecting narrow tailoring analysis used in *Clarkson*); *Café 207*, 856 F.Supp. at 645-46 (calling *Clarkson*-type interpretation of *Barnes* a “misreading”); *Bright Lights, Inc. v. City of Newport*, 830 F.Supp. 378, 383-84 (E.D. Ky. 1993) (upholding ordinance requiring wearing of bikini top; “some leeway must be afforded the reform efforts of the City Council”).

The question is a close one, but, on balance, I conclude that the Westbrook ordinance does not transgress the limits of the First Amendment by requiring exotic dancers to cover more of their breasts than would be covered by pasties. The plaintiff is certainly not entitled to summary judgment on this issue. The question is closer for the defendants’ motion, but I recommend that they be granted summary judgment on Count X, as it is not overbroad. See Section III.J above.

## V. Conclusion

For the foregoing reasons, I recommend that the plaintiff’s motion for summary judgment be **DENIED** and that of the defendants **GRANTED**.

### NOTICE

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within fourteen (14) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.*

Dated this 29<sup>th</sup> day of December, 2011.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

**Plaintiff**

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