IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| PALMETTO, PROPERTIES, INC., an Illinois corporation; and GREGORY A. SCHIRMER, | ) | |
| Plaintiffs, | ) | |
| | ) | Case No. 99 C 2980 |
| vs. | ) | |
| | ) | Judge David H. Coar |
| COUNTY OF DuPAGE, a body politic and corporate, FOREST PRESERVE DISTRICT OF DuPAGE COUNTY, a body politic and corporate; JOSEPH E. BIRKETT, in his official capacity as DuPage County State's Attorney; and JIM E. RYAN, in his official capacity as Illinois Attorney General, | ) | |
| Defendant. | ) | |

**PLAINTIFFS' MEMORANDUM OF LAW**
**IN OPPOSITION TO**
**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

On June 20, 2000, the Defendants County of DuPage and Birkett (collectively "County") filed a motion for summary judgment in the above-captioned case, together with a supporting brief. At the same time, the remaining Defendant, the Forest Preserve District of DuPage County ("District"), filed a similar motion and a brief joining in the substantive portions of the County's brief. Pursuant to Local Rule 56.1(b)(2), the Plaintiffs, Palmetto Properties, Inc. and Gregory A. Schirmer (collectively "Palmetto"), now file their brief in opposition to the County's motion for summary judgment. To the extent that the District has adopted the County's arguments, this brief also opposes the District's motion. ("Def. Br." refers to the memorandum of law filed by the Defendants County and Birkett in support of their motion for summary judgment, while "Pl. Br." refers to Palmetto's previously filed memorandum of law in support of its own motion for summary judgment. "Joint Exh." refers to the numbered exhibits in the parties' joint filing under local rule 56.1(a)(1)).

## Argument

### I. Palmetto Has Properly Sued Defendant Birkett Under the Doctrine Articulated In *Ex Parte Young* and Its Progeny, and Neither the Eleventh Amendment Nor More General Justiciablity Concerns Bar Palmetto's Claims Against Any Defendant.

Both County and Birkett begin their argument in favor of summary judgment by asserting an Eleventh Amendment immunity from Palmetto's claims. For his part, Birkett observes that that the claims against him are similar to the claims against former Defendant Ryan, whom this Court has indeed already dismissed on Eleventh Amendment grounds. Birkett does not deny, however, that, under Illinois law, he is the front-line prosecutor of Illinois statutes in the County where Palmetto seeks to establish its adult entertainment facility. 55 ILCS 5/3-9005(a)(1) (1998) (authority to commence and prosecute both civil and criminal actions "in which the people of the State or county may be concerned"); see also Joint Exh. 1 ¶ 2. In light of this, he does not advance any claim that he is, in his official capacity, insufficiently connected to the enforcement of the challenged Illinois statute to fall within the well established doctrine, articulated in *Ex parte Young*, 209 U.S. 123 (1908), and its progeny, that even a state officer is subject to an official-capacity suit for prospective injunctive relief seeking to restrain him or her from enforcing a statute which is unconstitutional under federal law. For these reasons, Birkett is differently situated than Ryan, and Birkett is not entitled to avoid the merits of this litigation.

The Defendant County assumes that Palmetto has called upon it to defend the constitutionality of the Illinois statute as well. This is not correct. Palmetto has sued the County because it chose to adopt the unconstitutional provisions of the challenged statute into its own adult business use zoning provisions rendering *them* unconstitutional. But even if the County had been called upon to defend the Illinois statute itself, it would not have been immune, under the Eleventh Amendment, from an action seeking purely prospective relief, as the Defendant's own cited cases expressly recognize. *Garcia v. City of Chicago*, 24 F.3d 966, 969 (7th Cir. 1994) (State's Attorney in Illinois is immune from federal court damage action under Eleventh Amendment but that Amendment provides a State's Attorney "no shield against . . . requests" for injunctive relief); *Scott v. O'Grady*, 975 F.2d 366, 369 (7th Cir. 1992)("An exception to this rule is an official-capacity suit for prospective injunctive relief: a suit to enjoin a state official's action is not barred by the Amendment")(internal quotation marks omitted), *citing Ex parte Young*, 209 U.S. 123 (1908). *Herbst v. Ryan*, 90 F.3d 1300, 1301 (7th Cir. 1996) "involved the

appropriate allocation of responsibility for attorney's fees in a civil rights action." *Id*. at 1301, *citing* 42 U.S.C. § 1988; *see also Echols v. Parker*, 909 F.2d 795 (1990)(same). But since Section 1988 attorneys fees are not available except against a party who has lost on the merits, *Herbst* and *Echols* directly imply that Palmetto has quite properly sued Birkett and the other Defendants here.

Finally, to the extent that the County and Birkett contend that they are beyond suit until they enforce or actively threaten to enforce the legislations challenged here, Def. Br. at 4, Palmetto adopts the arguments which it advances against the District's similar claim in its separate memorandum opposing the District's motion for summary judgment.

## II. The Defendants Are Not Entitled to Summary Judgment Because They Have Failed to Justify the Challenged Restrictions Concerning Adult Entertainment Facilities and Adult Business Uses.

All of the parties agree in this case that, prior to 1998, the Palmetto parcel was legally available to prospective adult business uses, subject to the required conditional zoning use approval.[1] Joint Exh. 1 ¶ 16. The Defendants now concede, however, that the overall effect of the adult business use zoning restrictions which the County adopted by amendment in December of 1998, leaves no land within the County's zoning jurisdiction[2] actually or even potentially legally available for location by an adult business use under any circumstance. Joint Exh. ¶¶ 17, 35-37. The Defendants nevertheless assert that the statutory and ordinance provisions are constitutionally valid. For the reasons detailed *infra*, however, the Defendants have failed to justify the challenged regulations as valid time, place, and manner restrictions, *cf*. *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996)(government bears burden of justifying adult use zoning regulations), and they are not entitled to summary judgment here.

[1] Although an applicant would have had to wait for an unreasonably long time, *see* Pl. Br. at 7-14, the present record suggests no reason why conditional approval would not have eventually been granted, under the prescribed substantive standards, *cf*. DuPage Zoning Ord. § 37-14.13-5(b) (1998), for an adult business use seeking to locate on the parcel.

[2] The "County's zoning jurisdiction" covers the unincorporated land within the County, a matter addressed at 8-9, *infra*.

### A. Palmetto's Planned Performance Dancing is Presumptively Protected Expression, So the Defendants May Not Avoid First Amendment Scrutiny.

In questioning whether Palmetto will disseminate any protected expression at all, (Def. Br. at 6-7, 21-22), the County overlooks both the stipulated facts and the applicable well-settled law. In the first place the parties have stipulated that Palmetto will, if free to do so, disseminate "nude and partially nude *performance* dancing." *Compare* Joint Exh. 1 ¶ 13 (emphasis added), *with* Def. Br. at 6 (omitting any reference to "performance"). Secondly, the County apparently fails to recognize that it is this performance which actually gives rise to protection under the First Amendment.[3] *Cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1990)(Souter, J., concurring in judgment). A performance is by definition expressive. Communication – that is, conveying a specific idea or a general emotional theme – is the central purpose of a performance, and it is the very essence of expression. All that is required to warrant treatment under the First Amendment is that "[a]n intent to convey a particularized message [is] present and the likelihood [is] great that the message would be understood by those who view it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *quoting Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974).

The United States Supreme Court has repeatedly made it abundantly clear that the message conveyed by live erotic entertainment such as nude performance dancing is sufficiently "particularized" to merit First Amendment protection, *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382, 1391 (2000)(plurality opinion); *Id*. at 1402 (Souter J., concurring in part and dissenting in part); *Id*. at 1406 (Stevens, J., joined by Ginsburg, J., dissenting); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1990)(plurality opinion); *Id*. at 582 (Souter, J., concurring in judgment); *Id*. at 587-88 (White, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). Palmetto need not establish that the expression it will disseminate is particularly complex or nuanced. It need not show that it will cover the *most* important or timely topics of

[3] Palmetto does not suggest that all nudity, or even all dancing, is expressive. Indeed it is not. Nudity in a department store dressing room or restroom stall has no expressive effect. The very fact that people try to hide that nudity from all others indicates that it is neither intended nor likely to send any message at all. Similarly, social dancing in which two people engage in order to enjoy each other's company does have a substantial constitutionally protectable expressive element. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989). Again, the fact that lovers often dance romantically when by themselves indicates that they are doing something other than trying to send a message to others.

the day.[4] It need only show that the performances will be "sufficiently imbued with the elements of communication to fall within the scope of the First . . . Amendment . . .." *Spence* at 409. The stipulation suggests absolutely no difference between Palmetto's planned performance dancing and the nude performance dancing which has repeatedly drawn the appropriate form of First Amendment scrutiny when legislation affecting it has been challenged. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990)(plurality opinion)(invalidating prior restraint); *Id*. at 238 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in part and dissenting in part) (same); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981)(invalidating zoning ban).

Thirdly, the County appears to seriously misunderstand the concept of *presumptively* protected expression. It is certainly true that some nude or partially nude performance dancing could be determined, after the fact, to be unprotected because it turned out to be legally obscene. *Cf. Miller v. State of California*, 413 U.S. 15 (1973). It is also quite possible that some of the activities which could occur at a night club – *e.g.* cigarette smoking or social dancing – are simply not expressive in any meaningful sense. *Cf. City of Dallas v. Stanglin*, 490 U.S. 19 (1989). But with respect to activities, including performance dancing, which ordinarily convey a particularized message or a general emotional theme, the courts presume that they are entitled to First Amendment protection,[5] and place the burden on a party who argues otherwise to establish that they are not. In the rare instance where a party succeeds in such an endeavor, it almost invariably does so after, rather than before, the fact. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975)(*post hoc* sanction preferred to prior restraint). Thus, while "[i]t is always difficult to know in advance what an individual will say," *Id*. at 559, the First Amendment's presumption is always strongly in favor of protection. This is why the Supreme Court concluded that the resolution of all of the cases cited in the preceding paragraph required

[4] The United States Supreme Court long ago recognized that expression concerning sex is sufficiently important to merit constitutional protection: "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (1957).

[5] Under the County's analysis a court could never establish in advance, for instance, that a video store is entitled to First Amendment protection against a law forbidding rentals because it cannot be known in advance whether it might rent a video tape which has been inadvertently erased (or never recorded), and hence carries no message at all. Neither the First Amendment nor the ripeness considerations to which the County briefly alludes, Def. Br. at 7, have ever required that courts adopt this kind of wait-and-see attitude toward expression.

First Amendment scrutiny *without* first undertaking a detailed analysis of the expression actually involved.

The County also misunderstands the situation facing the Sixth Circuit in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997). *Cf*. Def. Br. at 7. The ordinance challenged in that case contained many different regulations, some much narrower than others, including a simple prostitution prohibition against customers engaging in sexual intercourse with dancers. *DLS* at 405-407. The *DLS* court complained at some length that the challengers had not focused their attack on any particular prohibitions, *Id*. at 407-408, and it expressly recognized that the varied prohibitions under review regulated everything from Strauss's *Salome* to "activities which are indistinguishable from prostitution . . .." *Id*. at 409. It was for *this* reason, that the *DLS* court noted that a case-by-case analysis of the challenger's activities was perhaps appropriate. *Id*. at 408-409. Yet the present case involves no such narrow prohibitions at all. Indeed, the County's own ordinance provisions and the challenged Illinois statute both presume that operations like Palmetto's will disseminate expression. In designating Palmetto's operation as an "adult entertainment facility," 55 ILCS 5/5-1097.5 (1998), and an "adult entertainment cabaret," DuPage Zoning Ord. § 3.2 (1998), they expressly characterize it as an expressive operation, *cf*. *Schad v. Borough of Mt Ephraim*, 452 U.S. 61, 66, 76 (1980)(live entertainment, including nude performance dancing, protected by First Amendment), and they regulate it as such. Neither of the challenged provisions purports to narrowly restrict any generally non-expressive activities which might occur on regulated premises. In this respect the legislation challenged here is critically different from that involved in *DLS*. This Court should thus treat Palmetto's planned performance dancing as expressive, which is precisely what the *DLS* court itself went on to do in any event. *Id*. at 409-10.

Finally, the County's suggestion that the general character of performance dancing cannot be established in advance, Def. Br. at 6-7, 21-22, collides with its own requirement that prospective adult entertainment cabarets seeking to locate in an I-1 zone obtain special zoning use approval prior to disseminating their expression, *Cf*. DuPage Zoning Ord. § 37-10.1-2(v). The County fails to explain how, if the *general* character of performance dancing cannot be predicted in advance, the Zoning Board of Appeals will ever be able to evaluate the specifics of that dancing in order to determine whether the required special use permission should be granted for a particular prospective adult entertainment cabaret at a particular location. The County's

own zoning plan thus belies its argument that it cannot evaluate the character of performance dancing in advance of its actual presentation.

For all of the foregoing reasons, this Court should do what the courts of this country virtually always do when faced with legislation regulating performance dancing *as such*. It should presume that the dancing will be constitutionally protected unless and until the regulator establishes otherwise, and it should subject the challenged regulation to the scrutiny appropriate under the First Amendment.

### B. The Defendants Have Failed to Justify the Challenged Restrictions Which, They Admit, Leave No Land Within the County's Zoning Jurisdiction Available to Adult Business Uses.

The parties have stipulated that, under the County's current adult use zoning provisions, an adult business use cannot locate anywhere in unincorporated DuPage County. There is no existing lot which meets all of the locational requirements which the County now imposes on adult business uses, Joint Exh. 1 ¶ 36, and no buildable lot can be created, *e.g.* by division and/or combination of existing lots, which will do so, *Id*. ¶ 37. Under these circumstances, Palmetto challenges the County's existing adult business use zoning regulations as failing, *inter alia*, the third requirement which the First Amendment imposes upon time, place, and manner regulations, Pl. Br. at 5-7: the challenged provisions fail to leave open ample alternate avenues for the expression which adult business uses disseminate. *Cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1980).[6] The County attempts to defend against this challenge by reasoning backwards. Since other local governments have been able to restrict adult business uses to industrial zones or to require them to separate by 1000 feet from certain other uses, Def. Br. at 13-14, the County *begins* with the assumption that it is entitled to do so. But the County forgets that the legal outcome in each of the cases which it has cited was the *result* of applying *all three* prongs

[6] The County is correct insofar as it asserts, Def. Mem. at 15-16, that the First Amendment requires no single magic minimum number of legally available adult business use sites for all cases. In light of *Schad*, however, there is a strong presumption that there should be more than zero. This Court need not rely upon any general presumption here, since the parties have stipulated that at least nine adult business uses, Joint Exh. 1 ¶¶ 42-44, 46, would require relocation sites if the challenged provisions are valid. Quite apart from its other problems, *see infra* at 8-9, the County's suggestion that potential adult business use sites are available in incorporated areas, Def. Br. at 16, fails to establish that there are enough such sites within municipalities to provide those relocation sites *and* to supply the demand for adult business use expression within those municipalities themselves.

of the standard time, place, and manner test to the particular regulations and to the *actual land* at issue. Thus the County is profoundly mistaken in urging its industrial zoning and 1000-foot separation requirements as an *excuse* for leaving no land legally available to adult business uses. It may impose those requirements only if, as in the other situations in which some similar requirements have been upheld, they satisfy the third prong of the time, place, and manner test by leaving some land legally available for adult business uses.

An example serves to illustrate the constitutional difficulty with the County's assumption and with its reasoning. A small local government might enact an ordinance restricting outdoor public meetings, political rallies, and the like to one particular corner of a centrally located park. It might justify this restriction as minimizing the adverse secondary effects of public gatherings on residences and as preserving other park areas for traditional recreational purposes. If the chosen area is suitable for public gatherings, of sufficient size, and reasonably accessible, such an ordinance might well pass constitutional muster under the time, place, and manner test. Under such circumstances, the local government could thus constitutionally prohibit an outdoor political rally in other areas within its jurisdiction. But if, through no fault of the local government, the only legally available corner of the park floods and officials decide (for budgetary or aesthetic reasons) to leave that corner of the park as a pleasant lake for boating and ice skating, the government simply cannot persist in its restriction of public meetings to *that* area. It will have to reassess the situation. It will have to permit political rallies and other public meetings at *other* places within its jurisdiction. It will not be heard to say to a permit applicant that no place is available for public meetings or political rallies any longer. It will not be heard to say that the applicant *could* have rallied at some earlier time.

Nor will it be heard to say that a permit applicant can go to some other town or county to hold a political rally. The County cites no case suggesting that a government may satisfy its obligations under the third prong of the time, place, and manner test by vaguely point a prospective speaker to another jurisdiction. Indeed, in the context of adult use zoning, any such suggestion is flatly foreclosed by the United States Supreme Court's decision in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). In that case, Mt. Ephraim argued that it could prohibit nude or semi-nude performance dancing – and indeed all live entertainment – within its jurisdiction because it was essentially a bedroom community and because people had access to live entertainment and nude performance dancing in other nearby jurisdictions. In rejecting these

arguments, the Court demonstrated the formidable strength of the constitutional protections which operate when zoning restrictions regulate presumptively protected expression. First, the Court rejected Mt. Ephraim's argument that it was merely a bedroom community by noting that the Borough contained *some* commercial land and uses. *Id*. at 73. It then went on to reject Mt. Ephraim's other premise: that it could regulate expression by passing the burden of that expression off onto another zoning jurisdiction. The Court noted that if there were "countywide zoning" it might be "quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities . . .." It concluded, however, that "the Borough cannot avail itself of that argument in this case. There is no county wide zoning . . .." *Id*. at 76.[7]

In light of this language, it is difficult to see how the County can suggest that "[t]he *Schad* decision is inapplicable to a case involving [a] county form of government." Def. Br. at 17.[8] This case is identical to *Schad* on both of the foregoing scores. The County's own comprehensive zoning map shows many business (B-1 and B-2) districts remaining in its unincorporated

[7] This decision in *Schad* is especially sound because, unless the County were to act pursuant to its countywide planning authority, *see* at 11, *infra*, its reliance upon other jurisdictions would set up a judicially unworkable political shell game, where the County points to certain municipalities and those municipalities point, in turn, to others, and those others point back to the unincorporated areas of the County. Beyond this game of revolving defendants, neither the County nor prospective adult business uses can rely upon municipalities to maintain any particular set of adult use zoning regulations. Even if a municipality annexes an existing adult business use, it could rezone and abolish it after an appropriate amortization period. And the County can provide no authority whatsoever for any suggestion, Def. Br. at 17, that a municipality annexing a vacant but legally available site must maintain zoning regulations which allow the operation of an adult use on it.

[8] *David Vincent, Inc. v. Broward County*, 200 F.3d 1325 (11th Cir. 2000), hardly supports the County's suggestion in this respect. On the contrary, it expressly *cites*, rather than distinguishes, *Shad* in evaluating a claim that a County had not kept current with its on-going duty to provide alternate avenues for adult use expression. *Id*. at 1336. Indeed, the Eleventh Circuit rejected the challenge in that case precisely because, unlike here, Broward County had maintained "the ratio of [legally available] sites to land area in unincorporated Broward County" after the challenged provisions had first been upheld. *Id*. at 1336. Also in contrast to the present case, Broward County had not recently extended its separation requirements to make them more restrictive. *Id*. at 1332. Furthermore, also unlike here, Broward County's zoning ordinance continued to provide for roughly the number of adult uses which had recently been operating in the unincorporated areas of the county. *Id*. at 1336. While the Eleventh Circuit did note that the unincorporated area of Broward County was shrinking, *e.g. Id*. at 1337, it did not even remotely suggest that, while the county still retained unincorporated commercial land, that fact altogether relieved the county of its on-going obligations under the third prong of the time, place, and manner test. Indeed the court's express analysis strongly suggests otherwise. Broward County was not defending completely exclusionary adult uses zoning provisions as the DuPage County is here, and absolutely nothing in the Vincent opinion suggests that it could have done so successfully.

areas, Joint Exh. 9, and the presence of nine adult business uses in business districts in unincorporated DuPage County, Joint Exh. 1 ¶¶ 42-44, 46, demonstrates that those business areas are in active commercial use. Furthermore, the County has thus far regulated adult business uses only through its zoning authority, which is *not* countywide in the sense that it can govern the location of uses within municipal boundaries. 55 ILCS 5/5-12001 (1998)(counties authorized to zone "outside the limits of . . .cities, villages and incorporated towns"). On the other hand, the County's *planning* authority *is* countywide in that sense and in the sense suggested by *Schad*, *cf*. 55 ILCS 5/5-1401, 1405 (authorizing plans for "all" of a county and encouraging coordination with municipalities), but, although the County has adopted a county-wide comprehensive plan, it has not even attempted to use this planning authority to regulate adult business uses. Joint Exh. 1 ¶ 40. On this record, then, the County stands in the same position as Mt. Ephraim occupied when *Schad* was decided. There may well come a time when no unincorporated land is left in DuPage County. If so, it will no longer have any zoning ordinance provisions – adult business use or otherwise – to apply or defend. There may even come a time, before all of the unincorporated land is gone, when the unincorporated County no longer has any business zones or commercial uses. At that point, the County may indeed become the sort of "bedroom community" contemplated in *Schad*. But that time has not yet arrived, and until it does, the County simply cannot say that it has no room left for expression. The First Amendment did not permit that from Mt. Ephraim in *Schad*, and it will not permit it here.

In asserting that it can no longer leave any land within its zoning jurisdiction legally available to adult business uses, the County relies only upon its erroneous legal assumption that it is entitled, *a priori*, to restrict adult business uses to its industrial zones – as opposed to its business zones – and that, even there, it may impose 1000-foot separation requirements upon them. It points to absolutely no study justifying that assumption in light of the actual zoning situation it faces. Indeed, the last time the County considered any adult use zoning studies at all, it concluded that a 500-foot separation requirement, which did not involve all portions of a forest preserve, sufficed to serve its legitimate government interests. Joint Exh. 1 ¶¶ 4-5, 7. Under those provisions, Palmetto would not be foreclosed from using its parcel as planned. *Id*. ¶ 16. The County does not even pretend that either it or the State of Illinois relied upon any new study to justify a) the extension of the applicable separation requirement from 500 to 1000 feet or b) the inclusion of all portions of a forest preserve in the enumeration of uses from which adult

business uses must separate. Indeed, even at this late date in this litigation, it can point to no new studies which justify these extensions – even a study not actually relied upon by the legislators in this case. *Cf. DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829-30 (7th Cir. 1999). The Seventh Circuit has recently made it abundantly clear that, at least by the time of summary judgment, the government must justify its current adult business use zoning regulations with *some* actual studies. *Id*. at 830-31. Furthermore, the Seventh Circuit expressly held that a government "defending a more substantial set of regulations [must] create a more substantial record in support of summary judgment." *Id*. at 831. This requirement is critical here. The County would rely upon studies by which it once justified regulations which, *inter alia*, left the Palmetto parcel available for development by an adult business use to now justify new and greater restrictions which have removed that parcel and all others within its jurisdiction from any possibility of such use. Even now the County has done no land use study of its own,[9] and no Defendant can cite any study justifying the County's total ban of adult business uses from all of the territory within its zoning jurisdiction.[10]

Before resorting to or acquiescing in the complete zoning ban which it attempts to defend here, the County must reevaluate matters in light of its current situation. If, as it claims, Def. Br. at 3, 16, the County believes that it is best evaluated for present purposes "as a total unit," then it can act as such under its planning authority and take advantage of the Supreme Court's express suggestion in *Schad*. Even if the County wishes to continue to try to regulate adult business uses through its zoning ordinance, it may well find, on reevaluation, that it can find room for adult business uses in some of its remaining business zones after all. Or it may find that it can more narrowly tailor its separation requirements to take account of such intervening uses as highway overpasses or railroad tracks in order to safely open up some land to adult business uses. Indeed,

---

[9] In arguing that its zoning history is "unique," Def. Br. at 18, the County calls into very serious question the extent to which it can rely at all upon any other jurisdictions' studies to support its adult business use zoning provisions. A local government is entitled to rely upon the result of studies undertaken elsewhere only if that "evidence . . . is reasonably believed to be relevant to the problem that the [local government] addresses. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986).

[10] This Court need not entirely reject the abstract possibility that a zoning jurisdiction, such as a county, could show, after a specific, focused *factual* study that, despite its best reasonable efforts to keep some unincorporated land legally available to adult business uses, it has lost to annexation the only remaining land upon which such uses could operate without imposing substantial deleterious secondary effects. It need only hold, following *DiMa*, that the defense of such a complete ban requires a much greater showing than the County has even begun to make here.

it may find that it can regulate deleterious secondary effects directly, such as by prescribing exterior appearance standards, rather than indirectly by imposing separation requirements. The County is far from powerless to deal with the secondary effects which might arise from adult business uses. What it may *not* do on the present record, however, is enforce time, place, and manner regulations (which, in other situations, leave sufficient land available) when, under the present circumstances, they amount to a blanket ban on adult business uses from all of the territory within its jurisdiction.

### C. The Defendants Have Failed to Justify the Imposition of a Separation Requirement from All Portions of a Forest Preserve, Including Those Portions of the Forest Preserve Lying Within 1000 Feet of the Palmetto Parcel.

The County properly notes that Palmetto does not challenge the locational restrictions imposed by the 1986 version of the County's adult business use zoning provisions. Def. Br. at 10. Palmetto could not challenge them even if it wanted to; those locational provisions did not in any way interfere with the use of the Palmetto parcel by an adult business use. Joint Exh. 1 ¶ 16. The County nevertheless undertakes to explain that the 1986 provisions were supported studies and resulted from a careful evaluation of the available materials. Def. Br. at 10. The County admits that the 1998 provisions – the ones actually challenged here – were not so supported, Joint Exh. 1¶ 7; Def. Br. at 10-11, 13, but it advances the altogether unsupported claim that its 1998 adult business use zoning amendments need not be supported by studies because the County adopted them only to avoid confusion with the newly enacted state statute, Def. Br. at 10 – which is also challenged here. In the first place, the County somewhat overstates the "inconsistency," Def. Br. at 10, between its 1986 provisions and the 1998 Illinois statute.[11] They each imposed different requirements, but they were not inconsistent in the sense that they could not be simultaneously satisfied by actually applying the most restrictive provisions of each. To be sure,

[11] The County also overstates the extent to which its 1998 zoning amendments harmonized its adult business use zoning provisions with the new Illinois statute. While the 1998 zoning amendment adopted all of the new statutory restrictions, it also *retained* many regulations, such that restricting adult business uses to the industrial zones, which were not contemplated by the new statute at all. Joint Exh. 4-6. As a cumulative result, the County wound up with adult business use zoning restrictions which are actually more restrictive than the Illinois statute. In this light, the County's quite puzzling suggestions that its zoning efforts concerning adult business uses were entirely displaced by a "centralize[d]" State policy, Def. Br. at 18, and that the State is the "traditional" zoning agency in Illinois, Id. at 10, are belied by the record.

the County's interest in avoiding "confusion," Def. Br. at 10, is commendable, but the County is wrong in supposing that this laudable goal immunized both the Defendants and the challenged provisions from the otherwise appropriate constitutional scrutiny. If the County incorporated an unconstitutional statutory provision into its own zoning ordinance, even the best of motive (or the most genuine ignorance concerning the unconstitutionality) will not enable the county to enforce those provisions in the face of a proper constitutional challenge. That is the County's problem here.

Recognizing this difficulty, the County attempts to defend the Illinios statute but it incorrectly anticipates the exact nature of Palmetto's challenge. Time and time again, the County argues that the fact that this Court can ignore the fact that neither the Illinois legislators nor the County's own officials ever actually considered any studies or other materials which might support the challenged statute. Def. Br at 10-13. That may be true to some extent, *see DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829-30 (7th Cir. 1999), but it is not the thrust of Palmetto's challenge. Palmetto does *not* complain merely that the officials who promulgated the 1998 statute and ordinance amendment did not actually see, evaluate, and debate existing studies which, in fact, support the new and extended separation requirements. It predicates its challenge on complete absence of any such studies. It is not quite correct to assert, as the County does, that American courts have "recognize that adult uses have adverse secondary effects." Def. Br. at 9. It is more accurate to say that those court's have deferred to legislative findings concerning such effects when they have been supported by factual studies. Indeed, the Seventh Circuit has recently reiterated the proposition that, at least by the time of summary judgment, a government must defend challenged adult use regulations on the basis of a sound factual record. DiMa, at 831. Palmetto argues, not that required the factual record was absent in 1998, but that it is absent now.[12]

[12] Even if this Court were to follow the Eighth Circuit, *Thames Enterprises, Inc. v. City of St. Louis*, 851 F.2d 199, 201 (8th Cir. 1988), and defer to the experience of the drafters of challenged the provisions, *cf.* Def. Br. at 11, the present record is utterly devoid of any indication of that experience. In light of *DiMa*, this Court is not permitted to guess. Similarly, to the extent that the Fifth Circuit ever meant to suggest that new factual support for adult use regulations is no longer required, *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1263 (5th Cir. 1992) – a suggestion predicated upon a now-abandoned portion of a critical concurrence in a judgment by Justice Souter, *compare Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582-83 (1990), *with City of Erie v. Pap's, A.M.*, 120 S.Ct. 1382, 1405-1406 (2000) – the Seventh Circuit currently disagrees.

There is a very good reason why the Defendants have not produced any land use studies supporting the challenged statutory requirement that adult entertainment facilities separate by 1000 feet from *all* portions of a forest preserve, including those portions of a forest preserve dedicated, not to any active or recreational use, but to actually preserving wetland flora and fauna. That reason is that no such studies or materials exist. The County has not been able to articulate how a forest preserve area such as Fern Marsh South might be subject to any blighting effects, nor has it shown that there is any realistic potential for any crime at all[13] in that pristine marsh. Similarly, the County's speculation that the use of Fern Marsh South might someday change, Def. Br. at 14, 19-20, is not only unsupported by the summary judgment record, it is contrary to the District's own dedication of that land, Joint Exh. 1 ¶¶ 22-23, 29-30, 32. Finally, the County's observation that the public is not actually forbidden to enter forest preserve areas such as Fern Meadow South fails to distinguishes those areas from many others, e.g public streets in industrial zones, which it has left unprotected by any adult business use sepation requrement. While the County suggests that the General Assembly was entitled to some latitude in drawing bright legislative lines, Def. Br. at 14, the constitutional narrow tailoring requirement simply will not permit the imposition of a burden 90 per cent of which serves no identifiable governmental purpose. *Cf*. Joint Exh. 1 ¶¶ 22-23, 29-30, 32, ; *see also* Pl. Br. at 3-5. Because the record discloses no basis for the challenged locational restrictions, the Defendants are not entitled to summary judgment. *Cf. DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999); *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996).

### D. The Defendants Have Utterly Failed to Overcome the Presumption That Its Special Use Requirement Imposes an Unconstitutional Prior Restraint.

Although the County appears to undertake to defend its requirement that adult business uses obtain conditional use approval (before locating in an I-1 zone) against Palmetto's prior restraint challenge, Def. Br. at 20 (recognizing prior restraint challenge in count 4 of complaint), it cites not a single case which actually applies constitutional prior restraint standards[14] or which

[13] The Seventh Circuit long ago rejected the County's suggestion, Def. Br. at 15, that unfounded perceptions and fear of crime are enough the support time, place, and manner restriction on expression. *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1252 n. 2 (7th Cir. 1985).

[14] Perhaps this is because the prior restraint cases flatly refute the County's analysis. A prior restraint challenger is not required to show even "a single instance where the County has arbitrarily applied" its

actually involved a prior permission requirement for expression, *Id*. 20-22. Instead, it attempts to deflect what it calls a "non-issue," *Id*. at 20, by returning to its argument that Palmetto's performance dancing will not be constitutional protected at all, *cf*. at 4-7, *supra*, and by seriously mischaracterizing its own ordinance definitions. Contrary to the County's unsupported suggestion here, Def. Br. at 21-22, female performance dancers will have to wear more than merely the g-strings and pasties involved in *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382 (2000), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1990)(plurality opinion), in order to avoid the adult business use zoning requirements.[15] Neither *Pap's A.M.* nor *Barnes* had anything to do with adult use *zoning*, and neither even remotely supports the County's conditional use approval requirements against Palmetto's prior restraint challenge. The County not only ignores but trivializes prior restraint analysis by suggesting that an ordinance requiring prior specific permission for expression has only a "minimal effect" on expression or that such an ordinance can be legitimately used to "mute[]" the regulated expression. That is precisely what prior restraint analysis is deliberately designed to avoid.

**Conclusion**

For all of the foregoing reasons, this Court should deny summary judgment to the County and to Birkett, and, to the extent it has joined in their motion, to the District as well.

Of Counsel:

J. D. Obenberger and Associates
Three First National Plaza
70 West Madison Street
Suite 3700
Chicago, Illinois 60602

(312) 558-6420

Respectfully submitted,

_____
Reed Lee, Esq.
Co-counsel for Plaintiffs

---

conditional use requirements to an adult business use. Def. Br. at 20. Rather, since prior restraints are presumptively unconstitutional, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975), the *County* must effectively foreclose the ability of its officials, whose good faith cannot be presumed in this context, to misuse its ordinance provisions requiring prior permission for expression. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988). This it has not even attempted to do.

[15] *Cf*. DuPage Zoning Ord. § 3.2 "Specified Anatomical Areas." G-strings expose considerable portions of the wearer's "buttock[s]", and pasties expose portions of a "female breast below a point immediately above the top of the areola."