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' SECOND SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On August 1, 2000, the Defendants County of DuPage and Joseph E. Birkett (collectively "the County") filed their reply brief in support of their motion for summary judgment. In that memorandum, the County cited *Ranch House, Inc. v. Amerson*, 22 F. Supp. 2d 1296 (N.D. Ala. 1998), as a case which upheld the constitutionality of a statewide statute governing the location of adult business against a challenge which, the County supposed, was similar to that advanced by the Plaintiffs here. (Def. Reply at 10). On January 17, 2001, the United States Court of Appeals for the Eleventh Circuit reversed that decision, leaving no reported case definitively upholding a statewide statute like that at issue here. In the following supplemental memorandum, the Plaintiffs (collectively "Palmetto") briefly address the significance of the Eleventh Circuit's decision in *Ranch House, Inc. v. Amerson*, Docket No. 98-6857 (Jan. 17, 2001). A copy of the slip opinion is also attached for the convenience of this Court and the Defendants.

Palmetto tenders this memorandum simultaneously with a motion seeking leave to file it in order to update authority upon which the Defendants have relied here.

Argument

I. The Eleventh Circuit Has Now Reversed the Case on Which the County Relied Concerning Alabama's Statewide Statute Regulating the Location of Adult Businesses. In So Doing, It Has Further Demonstrated Why the Defendants Are Not Entitled to Summary Judgment Here.

In *Ranch House, Inc. v. Amerson*, Docket No. 98-6857 (Jan. 17, 2001), the Eleventh Circuit reversed a District Court judgment upholding the constitutionality of Alabama's statewide statute regulating the location of businesses which disseminate sexually oriented expression. It remanded the matter for reconsideration and elaboration of the very sparse record to which the parties had stipulated in that case. The Eleventh Circuit's opinion (attached hereto in slip form) makes clear, in a way that the District Court's opinion had not, that the constitutional challenge mounted in that case is not precisely the same as those which Palmetto advances here. *See Id*., slip op. at 29-33. Nevertheless, the Eleventh Circuit's opinion is significant to this case because it expressly recognizes that even the temporary closure of substantially all of the adult business in Calhoun County would strengthen the constitutional challenge to the lack of an amortization provision for existing businesses:

> For example, Ranch House seems to be asserting that, in the absence of a reasonable amortization period, § 200.5(4) will require the immediate closure of its business and thereby have the effect of completely denying public access to all protected nude entertainment in Calhoun County during the period necessary for it to relocate. If the club is one of a small number of venues in the County, and the statute effectively requires at least the temporary closure of substantially all such venues, Ranch House's argument would be strengthened. *See [Young v.] American Mini Theatres[, Inc.]*, 427 U.S. [50] at 71 n. 35 . . . (cautioning against the enactment of zoning regulations that have "the effect of suppressing or greatly restricting access to lawful speech").

Ranch House, slip op. at 33-34 (footnote omitted). In this case, the parties' comprehensive stipulation leaves it unmistakably clear that the cumulative effect of the challenged statute and the County's zoning ordinance *permanently* precludes the location of *any* adult business uses anywhere in DuPage County. (Joint Exh. 1 ¶¶ 36, 37). *A fortiori*, then, the Eleventh Circuits analysis requires invalidation of the legislation which Palmetto challenges here.

The Eleventh Circuit's *Ranch House* opinion is also significant here because it joins the Seventh Circuit's recent opinion in *Shultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000),

in recognizing, as the County does not, that nude and partially nude performance dancing are presumptively protected expression, *Ranch House*, slip op. at 8 n. 3, and in distinguishing, as the County has not, between a regulation requiring the wearing of a g-string and pasties everywhere and at all times, (*i.e.* altogether prohibiting exposure only of the genitals and female areolae) from one, such as the County's, regulating locations where additional exposures – whether live, printed, or recorded on film – of, *inter alia*, the buttocks and any portion of the female breast below the top of the areola may be made, *Id*., slip op. at 4 (setting forth language of ban and locational restriction), 17 (recognizing that the challenged ban does more than the challenged locational restriction), 27-28 (recognizing that locational restrictions more readily pass constitutional muster than complete bans). Like the Seventh, the Eleventh Circuit appears altogether unwilling to travel along the slippery slope down which the County invites this Court.

Finally, the Eleventh Circuit's opinion is significant here because it also joins the Seventh Circuit, *cf. North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996), in expressly recognizing that it is the government which bears the burden of justifying restrictions on adult entertainment, even when they are properly analyzed as time place and manner regulations on the expression which they disseminate. *See Ranch House*, slip op. at 21. And nothing in *Ranch House* suggests that *this* case is not ready for disposition on Palmetto's motion for summary judgment. In contrast to that case, the parties here entered into a comprehensive stipulation, (Joint Exh. 1), so, Palmetto respectfully submits, there should be no need for further factual development. In addition, two of the factors supporting the Eleventh Circuit's remand decision are not present here. First, in that case, Ranch House is open and operating under an injunction which the Eleventh Circuit expressly continued. *Id*., slip op. at 24, 35. Palmetto, on the other hand is closed while it awaits this Court's decision on the cross-motions for summary judgment (although it has reserved its right to renew its withdrawn motion for a preliminary injunction should that decision be substantially delayed). Second, the Eleventh Circuit seemed unsure whether the Alabama Attorney General had been afforded a fair opportunity to participate in the litigation. *Id*., slip op. at 25-26. Here, of course, Palmetto actually *joined* the Illinois Attorney General rather than merely notifying him, but the Attorney General actively and successfully sought dismissal of the claims against him in this Court. Under the circumstances presented here, the Eleventh Circuit's reasoning requires that the County bear its burden on the summary judgment record now before this Court. This it has woefully failed to do.

Conclusion

For all of the foregoing reasons, this Court should grant Palmetto's and deny the remaining cross motions for summary judgment.

Respectfully submitted,
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and Gregory A. Schirmer,

By:_____
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