

# ANDERSON LAW

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Virginia Beach, Virginia 23456



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October 21, 2022

Norfolk Circuit Court  
150 St. Pauls Ave  
Norfolk VA 23510

Re. California Burrito v. Norfolk City Council

Dear Clerk:

Enclosed, please find an original and one service copy of the following:

1. Petition of Appeal (With Exhibit)
2. Motion for Preliminary Injunction
3. Memorandum for Preliminary Injunction

Please serve all three documents on the Defendant via Norfolk Sheriff at this address:

Bernard Pishko, City Attorney  
810 Union Street Suite 900  
Norfolk VA

I am enclosing my firm's check to cover the filing and service of process fees in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy Anderson'.

Timothy Anderson

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

California Burrito

Civil Case No:

Petitioner/Appellant

v.

Norfolk City Council

Respondent / Appellee

**PETITION FOR APPEAL**

NOW COMES, your Petitioner, California Burrito by counsel and files this Petition for Appeal for consideration by this Court and in support thereof states as follows:

1. This is an appeal of the Norfolk City Councils decision of October 11, 2022 revoking the Special Exception (“SE”) of the Petitioner, and is filed pursuant to 15.2-2285(F) of the Code of Virginia as amended.
2. The Petitioner received correspondence from the Norfolk City Attorney with a proposed revocation of Special Exception. (“Exhibit A”).
3. A Inter Department Correspondence Sheet with supporting documents was sent to Dr. Larry H. Filer II, City Manager (Exhibit B).
4. The Petitioner is a nightclub operator doing business as California Burrito at 319 Granby Street, Suite 319 Norfolk, VA under a Special Exception Issued by the City of Norfolk and incorporated by ordinance 48,658 entered on August 24, 2021. On September 19, 2022, the Petitioner was served with a “Statement of Proposed Special Exception Revocation (“SE”) of 319 Grandy Street, Ste 319, Norfolk, VA with a hearing before City Council scheduled for October 11, 2022.

5. Exhibit A and Exhibit B differ in that notice of the procedures of revoking a proposed special exception are found in Norfolk City Ordinance 38,746, which contain various rights and remedies to a Respondent on how to submit evidence to be considered. Exhibit A (sent to the Petitioner) omitted notice of the procedure and Exhibit B (sent to City Manager) contains the procedure.
6. On October 11, 2022, the Petitioner appeared before City Council and was offered a 20 minute hearing to provide evidence in response to the allegations contained in Exhibit A.
7. Petitioner, through counsel was denied the opportunity to call witnesses, cross-exam accusers, or present evidence to dispute the allegations during the October 11, 2022 hearing.
8. Alternatively, the City of Norfolk presented a summary of disputed facts, specifically alleging facts that two previous overcrowding violations occurred at the Petitioners restaurant. Both violations referenced at the October 11, 2022 hearing were previously dismissed. A third violation for over occupancy is currently pending and has not been adjudicated by a Court. The facts of those alleged violations are disputed. The Respondent did not allow the Petitioner to exam the accuser of former violations, create a full and complete record to City Council before the decision to revoke was made. The City Attorney and City Council members engaged in total speculation as to facts and circumstances charged but not proven in any Court.
9. The basis for revocation were 3 charged over occupancy issues. Two of those were dismissed, and one is pending. The current pending violation charges the Petitioner

with having 7 more people in the establishment then allowed by the special exception permit.

### **COUNT 1 –DUE PROCESS VIOLATIONS**

10. The Petitioner incorporates all previous paragraphs
11. The Municipal Code of Norfolk further bypasses its Board of Zoning Appeals for a complete record with evidence to be presented related to allegations. Instead, the municipal code allows an *ad hoc pro forma* hearing involving a 20 minute restricted hearing where no record can be development, witnesses called or positions to be established. This a fundamentally punitive and prejudicial procedural system for any business facing the most extreme sanction of being shutdown to have to navigate.
12. The City of Norfolk deprived the right to give Petitioner notice of the “law” related to how evidence can be submitted, specifically Ordinance 38,746 (entered May 13, 1997) but gave such notice to the City Manager.
13. The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This understanding of due process has led the Court to require that government afford minimum procedural safeguards when it seeks to deprive a person of life, liberty, or property.
14. Norfolk has divested the Petitioner and its owners and operators the right to conduct lawful business operations based on conclusionary allegations from disputed facts with no established record.

### **COUNT 2 – ARBITRARY MISUSE OF POLICE POWER**

15. The Petitioner incorporates all previous paragraphs

16. There is no record to establish a breach of the SE issued in this matter. Absence a clear established record established by a credible fact finder, such as the Board of Zoning Appeals, there is no conclusions City Council could have reached warranting that the Petitioner violated its SE.
17. As the municipal code creates an erroneous procedure to revoke a SE and City Council did not establish a clear record of a SE violation by the Petitioner, the actions by City Council were unlawful.
18. The Respondent cannot demonstrate a rational basis for the exercise of police powers in revoking the SE to the public or public safety.
19. To revoke the Petitioners ability to operate on a basis of unfounded allegations only, not proven in any court and further dismissed by Courts on two separate occasions is a violation of the Fairly Debatable rule.
20. Prior to the October 11, 2022, the Petitioner offered to surrender his nightclub permit, and just operate as a restaurant serving alcohol and to be closed before midnight. The City arbitrarily refused to negotiate in good faith to find a solution other than punitively shutting the establishment down.
21. Currently, the Petitioner has no ability to sell alcohol in any capacity and could only operate as a restaurant without alcohol. This is not a financially sustainable option for the Petitioner, therefore the actions of the Respondent have permanently shut the doors of the Petitioner.

Wherefore, the Petitioner respectfully requests the Honorable Court to grant the following relief:

1. Entry of an order declaring the actions of the Norfolk City Council as unlawful, invalid and void in violation of the Petitioners rights protected by the Due Process Clause of the Fourteenth Amendment.
2. Entry of an order declaring the actions of the Norfolk City Council in revoking the SE as arbitrary and a misuse of police powers violating the fairly debatable standard.
3. Entry of an order scheduling a prompt evidentiary hearing concerning the issues raised in this petition.
4. Entry of an order enjoining Norfolk from revoking the Petitioners SE.
5. Any further relief as may be appropriate.

Respectfully submitted

California Burrito

By: \_\_\_\_\_

Counsel

Timothy Anderson  
Anderson & Associates PC  
2492 N. Landing Rd 104  
Virginia Beach VA 23456  
757-301-3636 Tel  
VSB 43803

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

California Burrito

Civil Case No:

Petitioner/Appellant

v.

Norfolk City Council

Respondent / Appellee

**EXHIBIT A**



THE CITY OF  
**NORFOLK**  
OFFICE OF THE CITY ATTORNEY

BERNARD A. PISHKO  
City Attorney  
ADAM D. MELITA  
HEATHER A. MULLEN  
JACK E. CLOUD  
DEREK A. MUNGO  
TAMELE Y. HOBSON  
NADA N. KAWWASS  
ANDREW R. FOX  
MICHELLE G. FOY  
MATTHEW P. MORKEN  
HEATHER L. KELLEY  
ERIKKA M. MASSIE  
ZACHARY A. SIMMONS  
ALEX H. PINCUS  
MICHAEL A. BEVERLY  
MARGARET A. KELLY  
KATHERINE A. TAYLOR  
KRISTOPHER R. MCCLELLAN  
BONNIE P. LANE

September 19, 2022

**HAND-DELIVERY**

Mr. Miguel Roldan-Ortiz  
California Burrito LLC  
957 S. Club House Road  
Virginia Beach, VA 23452

Mr. Miguel Roldan-Ortiz  
California Burrito LLC  
319 Granby Street – Suite 319  
Norfolk, VA 23510

Re: Special Exception Permit for California Burrito @ 319 Granby Street, Suite 319

Dear Owner:

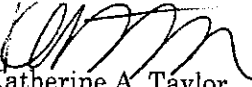
Please be advised that the Zoning Administrator has initiated action to revoke the Conditional Use Permit granted to California Burrito by Ordinance No. 46,858. The public hearing will be held on October 11, 2022 at 7:00 pm. in the Norfolk City Council Chambers.

A copy of the information provided by the Zoning Administrator to the City Manager requesting that the matter be placed on the City Council Docket is enclosed.

I will be handling the matter. Please let me know if you have any questions.

Thank you.

Very truly yours,

  
Katherine A. Taylor  
Assistant City Attorney

KT:sb  
Enclosure

cc: Bernard A. Pishko, City Attorney  
Adam Melita, Deputy City Attorney  
George Homewood, Director of Planning  
Jeremy Sharp, Zoning Administrator



**City of Norfolk's**  
**Statement of Proposed Special Exception**  
**Revocation for California Burrito, 319 Granby Street, Suite 319**

California Burrito is an entertainment establishment with alcoholic beverages located at 319 Granby Street, Norfolk, Virginia. Through California Burrito, LLC, Miguel Roldan is the owner and operator of California Burrito and the holder of a Special Exception adopted June 13, 2017, under Ordinance No. 46,858 (Exhibit 1). The Special Exception requires adherence to specific conditions contained therein and also requires compliance with all other applicable laws and ordinances.

The Special Exception is conditioned upon operating hours of 11 am to 2 am the following morning, with a total occupancy, including employees, of 49 people. It permits entertainment from a disc jockey and live bands with a dance floor.

On October 30, 2020, the Norfolk Fire Marshal counted the occupancy at California Burrito as 131—82 people over the limit. The Fire Marshal did not issue a summons, but organized a meeting for Miguel Roldan with the Fire Marshal, Neighborhood Development, Zoning, the Norfolk Police Department, Virginia ABC, Norfolk Building and Electrical Inspectors, and the local Norfolk Health Department. Electrical found many violations and expired permit issues at California Burrito, and the Fire Marshal issues a red tag for the 150 amp disconnect. There was no GCFI extension cord, there were unsecure open wiring connections without junction boxes, and television and fan cords exposed and run through the ceiling, portable power strips used for coolers, receptacle covers that were not bolted, improper fan installation, circuits installed without permits or inspection, and receptacles near

sinks without GCFI protection. In the meeting, the parties discussed the improper use of firepits for outside dining, that there was no fire or security plan, that the security cameras were not working, that the business was not complying with Covid-19 pandemic regulations or signage from the Governor's executive orders, that no one was keeping a count at the entrance, as well as food safety issues.

On May 20, 2021, Miguel Roldan applies for a Conditional Use Permit—Nightclub at the same location for "California Burrito/The Back Social Club." This application was meant to operate with a total occupancy of 99, an increase from 49.

On June 3, 2021, Miguel Roldan failed to have all of his managers appear virtually for a meeting with the Business Action Team, including representatives from the City government and outside partners such as Health and Virginia ABC. He was given another chance to have them attend and a subsequent follow-up meeting was held on July 1, 2021.

On July 17, 2021, the Fire Marshal issues a summons to Miguel Roldan for overcrowding. The Fire Marshal inspector noticed a large crowd outside of California Burrito with a security guard at the side of the restaurant counter inside checking patron identification. The patrons were moving from the restaurant counter area at the front of the building to the back, to The Back Social Club. The inspector asked the security guard for the count, and the hand counter showed 77 patrons in the back. No count was maintained for the front restaurant counter area or employees. Two Fire Marshal inspectors did a head count, finding a total of 78 patrons and 5 employees in the back, and 5 employees and 20 people in line for entry in the front of

the establishment, for a total occupancy of 108—59 over occupancy. The security guard told the Fire Marshal inspector that the owner, Miguel Roldan, had told him that they could go to 100 persons.

On August 31, 2021, the summons for overcrowding was nolle prosequied in court while Mr. Roldan had a pending Conditional Use Permit application to increase his occupancy for California Burrito/The Back. This application was before the Planning Commission for public hearing on January 27, 2022. Planning Commission recommended denial. On March 8, 2022, City Council denied the ordinance granting a Conditional Use Permit for California Burrito and The Back Social Club.

Meanwhile, on February 26, 2022, the Fire Marshal issued another summons to Miguel Roldan for overcrowding at California Burrito, but the Fire Marshal did not notify the City Attorney. On June 29, 2022, this summons was dismissed in Norfolk General District Court since the Fire Marshal inspector who wrote the summons did not appear for the hearing.

On July 31, 2022, another summons was issued for failure to maintain count. Miguel Roldan was on site and at the front of California Burrito with security. There was a line at the front and security was not sure of the count and stated that inside security had the count. Inside security stated that the count was 49. The Fire Marshal inspector used handheld counting device to count and determined the occupancy was 56. Miguel Roldan had 10 people leave to come into compliance, and a summons was issued that is pending for September 27, 2022.

For these reasons, the City proposes that the Special Exception be revoked.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

California Burrito

Civil Case No:

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**EXHIBIT B**



Inter Department Correspondence Sheet

TO: Dr. Larry H. Filer II, City Manager

FROM: Jeremy Sharp, Zoning Administrator  
Bernard A. Pishko, City Attorney, Allan Bull, City Clerk,

COPIES TO: George Homewood, Director of Planning

SUBJECT: Request for City Council Public Hearing of California Burrito  
Special Exception Permit (Ordinance No. 46,858)

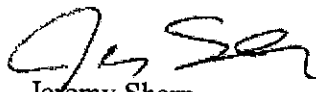
September 19, 2022

The City has evaluated the operations of California Burrito, an establishment located at 319 Granby Street, Suite 319 operated by the owner, Miguel Roldan-Ortiz. A copy of that special exception permit (Ordinance No. 46,858) is attached (Attachment 1).

The purpose of this memo is to request that a public hearing be set on City Council's Agenda on October 11, 2022 in order for it to determine whether the conditional use permit should be revoked.

On May 13, 1997, City Council adopted Ordinance No. 38,746 (Attachment 2) setting forth specific procedures to be followed in all proceedings in which the City Council considers the revocation of any permit or certificate previously granted by City Council. This procedure requires that a Statement of Proposed Revocation be prepared and submitted to City Council 14 days prior to the hearing.

I will prepare for your review a draft "Statement of Proposed Revocation," a draft City Council transmittal letter, and a draft ordinance to be adopted in the event revocation is approved by the City Council.

  
Jeremy Sharp  
Zoning Administrator

Attachments

05/24/2017 lds

ATTACHMENT 1

Form and Correctness Approved: *RAF*

Contents Approved. *aw*

By *Alvaro Duarte*  
Office of the City Attorney

By *[Signature]*  
DEPT

NORFOLK, VIRGINIA

**ORDINANCE No. 46,858**

*C-3*

AN ORDINANCE GRANTING A SPECIAL EXCEPTION AUTHORIZING THE OPERATION OF AN ENTERTAINMENT ESTABLISHMENT WITH ALCOHOLIC BEVERAGES KNOWN AS "CALIFORNIA BURRITO" ON PROPERTY LOCATED AT 319 GRANBY STREET, SUITE 319

- - -

BE IT ORDAINED by the Council of the City of Norfolk

Section 1 - That a Special Exception is hereby granted to California Burrito, LLC authorizing the operation of an entertainment establishment with alcoholic beverages known as "California Burrito" on property located at 319 Granby Street. The property which is the subject of this Special Exception is more fully described as follows

Property fronts 55 feet, more or less, along the western line of Granby Street beginning 218 feet, more or less, from the southern line of West Freemason Street and extending southwardly; premises numbered 319 Granby Street, suite 319

Section 2 - That the Special Exception granted hereby shall be subject to the following conditions

- (a) The hours of operation for the establishment, for the sale of alcoholic beverages, and for entertainment shall be limited to 11 00 a m until 2 00 a m the following morning seven days per week. No use of the establishment outside of the hours of operation listed herein shall be permitted
- (b) The seating for the establishment shall not be less than 33 seats indoors, shall not be more than 4 seats outdoors, and the total occupant capacity, including employees, shall not exceed 49 people
- (c) No entertainment shall be permitted anywhere outside the building

- (d) No smoking shall be permitted anywhere in the outdoor dining area. Signage notifying patrons of this restriction shall be conspicuously posted.
- (e) This special exception shall terminate in the event of a change in ownership of the establishment and may be revoked in the event of a change in the operation or management of the establishment as described in the Description of Operations set forth in "Exhibit A," attached hereto, provided that no termination in the event of a change in ownership of the establishment shall be effective until 120 days after the change or until a new special exception is granted showing the new owner, whichever is earlier. Notwithstanding the above, no violation of this condition shall be deemed to have occurred if the only change in management is a result of one or more of the members of the management team identified in the Description of Operations ceasing to work at the establishment.
- (f) Entertainment shall be limited to live bands having no more than five (5) members, disc jockey, karaoke, comedian, and poetry reading. No other form of entertainment is permitted.
- (g) The dance floor shall not exceed 268 square feet and shall be located as indicated on the basic floor plan attached hereto and marked as "Exhibit B." The dance floor shall be constructed of a different material than the primary floor material.
- (h) The layout of the establishment shall adhere to the specifications of the floor plans attached hereto and marked as "Exhibit B."
- (i) No door to the establishment which opens onto or faces a public right-of-way shall be propped open during any time that entertainment is being provided.
- (j) The establishment shall maintain a current, active business license at all times while in operation.
- (k) The establishment shall remain current on all food and beverages taxes and business personal property.

taxes which may become due while it is in operation

- (l) During all hours of operation, the establishment operator shall be responsible for maintaining those portions of public rights-of-way improved by sidewalk and portions of any parking lot adjacent to the premises regulated by the special exception so as to keep such areas free of litter, refuse, and both solid and liquid waste
- (m) The establishment shall maintain a designated driver program which shall provide, at minimum, that designated drivers may be served non-alcoholic beverages at no charge. The establishment shall describe the program in writing and its availability shall be made known to patrons via either a printed card placed on each table and on the bar or a description printed on the menu
- (n) A menu shall be provided containing an assortment of foods which shall be made available at all times the establishment is open. A food menu and full dining service shall be available at the bar
- (o) The business authorized by this special exception shall be conducted in accordance with the Description of Operations set forth in Exhibit A," attached hereto. The representations made in "Exhibit A" shall be binding upon all owners, operators and managers who operate and/or manage the premises covered by this special exception. Should any owner, operator or manager desire to operate the business in a manner different than as represented in "Exhibit A," a new special exception must be obtained prior to implementing such change. Where any limitation or representation contained in "Exhibit A" is inconsistent with any condition of this ordinance, the conditions of this ordinance shall govern
- (p) The violation of any requirement, limitation, or restriction imposed by the Virginia ABC Commission shall be deemed a violation of this special exception. This special exception may be revoked for any violation of a general or specific condition, including a condition incorporated by reference and including a condition arising from



requirements, limitations, or restrictions imposed by the ABC Commission or by Virginia law

- (q) Neither the establishment nor any portion of it shall be leased, let, or used by any third party to stage an event for profit. No outside promoter shall be permitted to use, operate, rent, or host any event on the premises.
- (r) An ABC manager, employed and compensated by the applicant, shall be present at all events held on the premises. This manager shall supervise the event at all times. The ABC manager shall be present on the premises at least one hour prior to the beginning of the event and shall remain on the premises until the event is concluded and the establishment is secured and locked. If alcohol is not served or consumed, a responsible supervisor, employed and compensated by the applicant, shall perform this function.
- (s) In addition to the ABC manager or supervisor the applicant shall provide such additional paid staff as may be necessary to coordinate, supervise, and manage any event held on the premises.
- (t) The establishment manager shall notify the Commissioner of the Revenue no less than 72 hours prior to the commencement of any event at which a cover charge is to be collected.
- (u) A copy of this Adult Use Special Exception ordinance and Exhibits shall be available on the premises at all times for inspection, and a notice indicating that this Adult Use Special Exception ordinance and all amendments are kept on the premises and are available for review by any member of the general public shall be posted in a visible location. The notice shall also contain information on where and how to report violations of conditions and shall include the address of the zoning administrator.
- (v) A binder or folder containing documentation relating to the operation of the establishment shall be kept on the premises at all times and shall be produced upon request made by any person. For

purposes of this section, the documentation relating to the operation of the establishment shall include copies of the following

- (1) This special exception;
- (2) Any ABC license(s)
- (3) Any occupancy permit(s);
- (4) Certifications of all persons who work on the premises as a security guard;
- (5) All fire code certifications, including alarm and sprinkler inspection records;
- (6) Any health department permit(s)
- (7) The emergency action plan required under the Fire Prevention Code;
- (8) The names, addresses, and phone numbers of all persons who manage or supervise the establishment at any time; and
- (9) The establishment's designated driver program

Section 3 - That the City Council hereby determines that the Special Exception granted herein complies with each of the requirements of § 25-7 of the Zoning Ordinance of the City of Norfolk, 1992 (as amended)

Section 4 - That the Special Exception granted hereby amends the previously granted special exception permitting an Eating and Drinking Establishment on this property, adopted on April 12, 2016, (Ordinance No 46,311) and all provisions and conditions previously approved are entirely superseded by the terms of this Special Exception

Section 5 - That this ordinance shall be in effect from the date of its adoption

ATTACHMENTS

- Exhibit A (5 pages)
- Exhibit B (1 page)

ATTACHMENTS

Exhibit A (5 pages)

Exhibit B (1 page)

Adopted by Council June 13, 2017  
Effective June 13, 2017

TRUE COPY  
TESTE

\_\_\_\_\_  
R BRECKENRIDGE DAUGHTREY, CITY CLERK

BY \_\_\_\_\_  
DEPUTY CITY CLERK



**EXHIBIT "A"**  
**Description of Operations**  
**Entertainment Establishment**  
 (Please Print)

Date March 13 '17

Trade name of business California Burrito LLC

Address of business 319 Granby Street Norfolk VA

Name(s) of business owner(s)\* Miguel Roldan - California Burrito, LLC

Name(s) of property owner(s)\* Armistead W Dey Jr

Name(s) of business manager(s)/operator(s) Miguel Roldan, Nicole Roldan, Keily Escobar

Daytime telephone number (757) 653-4981

\*If business or property owner is a partnership, all partners must be listed.  
 \*If business or property owner is an LLC or Corporation, all principals must be listed.

**1 Proposed Hours of Operation:**

<u>Facility</u>	<u>Alcoholic Beverage Sales and Entertainment</u>
Weekday From <u>11</u> To <u>2am</u>	Weekday From <u>11</u> To <u>2am</u>
Friday From <u>11</u> To <u>2am</u>	Friday From <u>11</u> To <u>2am</u>
Saturday From <u>11</u> To <u>2am</u>	Saturday From <u>11</u> To <u>2am</u>
Sunday From <u>11</u> To <u>2am</u>	Sunday From <u>11</u> To <u>2am</u>

**2. Type of ABC license applied for (check all applicable boxes):**  
 On-Premises       Off-Premises (second application required)

**3. Type of alcoholic beverage applied for:**  
 Beer       Wine       Mixed Beverage

**Exhibit A – Page 2**  
**Entertainment Establishment**

- 4 Will video games, pool tables, game boards or other types of games be provided?  
 Yes (If more than 4, additional application required)       No

4a If yes, please describe type and number of each game to be provided.

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5. Will patrons ever be charged to enter the establishment?  
 Yes       No

5a. If yes, why

Special music events

5b. Which days of the week will there be a cover charge (circle all applicable days):

Monday      Tuesday      Wednesday      Thursday      Friday  
Saturday      Sunday

6. Will the facility or a portion of the facility be available for private parties?  
 Yes       No

6a. If yes, explain:

Corporate parties, wedding celebrations

- 7 Will a third party (promoter) be permitted to lease, let or use the establishment?  
 Yes       No

7a. If yes, explain:

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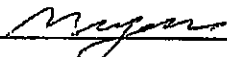
8. Will there ever be a minimum age limit?  
 Yes       No

**Exhibit A – Page 3**  
**Entertainment Establishment**

9. Additional comments/description/operational characteristics or prior experience:

Currently operating California Burrito

Note. If smoking is permitted, then floor plans must be submitted showing all necessary building requirements for such facility

  
\_\_\_\_\_  
Signature of Applicant

Non-Entertainment  
Option

**Exhibit A – Floor Plan(s) Worksheet  
Entertainment Establishment**

- Complete this worksheet based for each floor plan submitted with application
- Floor plan(s) must be prepared by a registered design professional and include:
  - Tables/seats
  - Restroom facilities
  - Bar
  - Ingress and egress
  - Standing room
  - Disc Jockey/Band/Entertainment area)
  - Outdoor seating
  - Total maximum capacity (including employees)

**1 Total capacity**

- a. **Indoor**
- |   |           |
|---|-----------|
| Number of seats (not including bar seats) | <u>36</u> |
| Number of bar seats                       | <u>5</u>  |
| Standing room                             | <u>0</u>  |
- b. **Outdoor**
- |                 |          |
|-----------------|----------|
| Number of seats | <u>4</u> |
|-----------------|----------|
- c. **Number of employees**
- |  |          |
|--|----------|
|  | <u>4</u> |
|--|----------|

**Total Occupancy  
(Indoor/Outdoor seats, standing room and employees) = 49**

**2. Entertainment**

List ANY type of entertainment proposed other than a 3 member live band, karaoke, comedian, or poetry reading.

---

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**3. Will a dance floor be provided?**

- Yes     No

- 3a. If yes,  
Square footage of establishment: \_\_\_\_\_  
Square footage of dance floor: \_\_\_\_\_

- If a disc jockey is proposed, a dance floor must be provided.
- If the dance floor is more than 10% of the square footage of the establishment, a Dance Hall permit is required.

Entertainment  
option

**Exhibit A – Floor Plan(s) Worksheet  
Entertainment Establishment**

- Complete this worksheet based for each floor plan submitted with application.
- Floor plan(s) must be prepared by a registered design professional and include.
  - Tables/seats
  - Restroom facilities
  - Bar
  - Ingress and egress
  - Standing room
  - Disc Jockey/Band/Entertainment area)
  - Outdoor seating
  - Total maximum capacity (including employees)

1 Total capacity

a. Indoor

Number of seats (not including bar seats)	<u>28</u>
Number of bar seats	<u>5</u>
Standing room	<u>8</u>

b. Outdoor

Number of seats	<u>4</u>
-----------------	----------

c. Number of employees

<u>4</u>
----------

Total Occupancy

(Indoor/Outdoor seats, standing room and employees) = 49

2. Entertainment

List ANY type of entertainment proposed other than a 3 member live band, karaoke, comedian or poetry reading.

DJ, 5-member live band - unamplified

3. Will a dance floor be provided?

Yes     No

3a. If yes,

Square footage of establishment 2,832

Square footage of dance floor 268

- If a disc jockey is proposed, a dance floor must be provided
- If the dance floor is more than 10% of the square footage of the establishment, a Dance Hall permit is required

DEPARTMENT OF CITY PLANNING

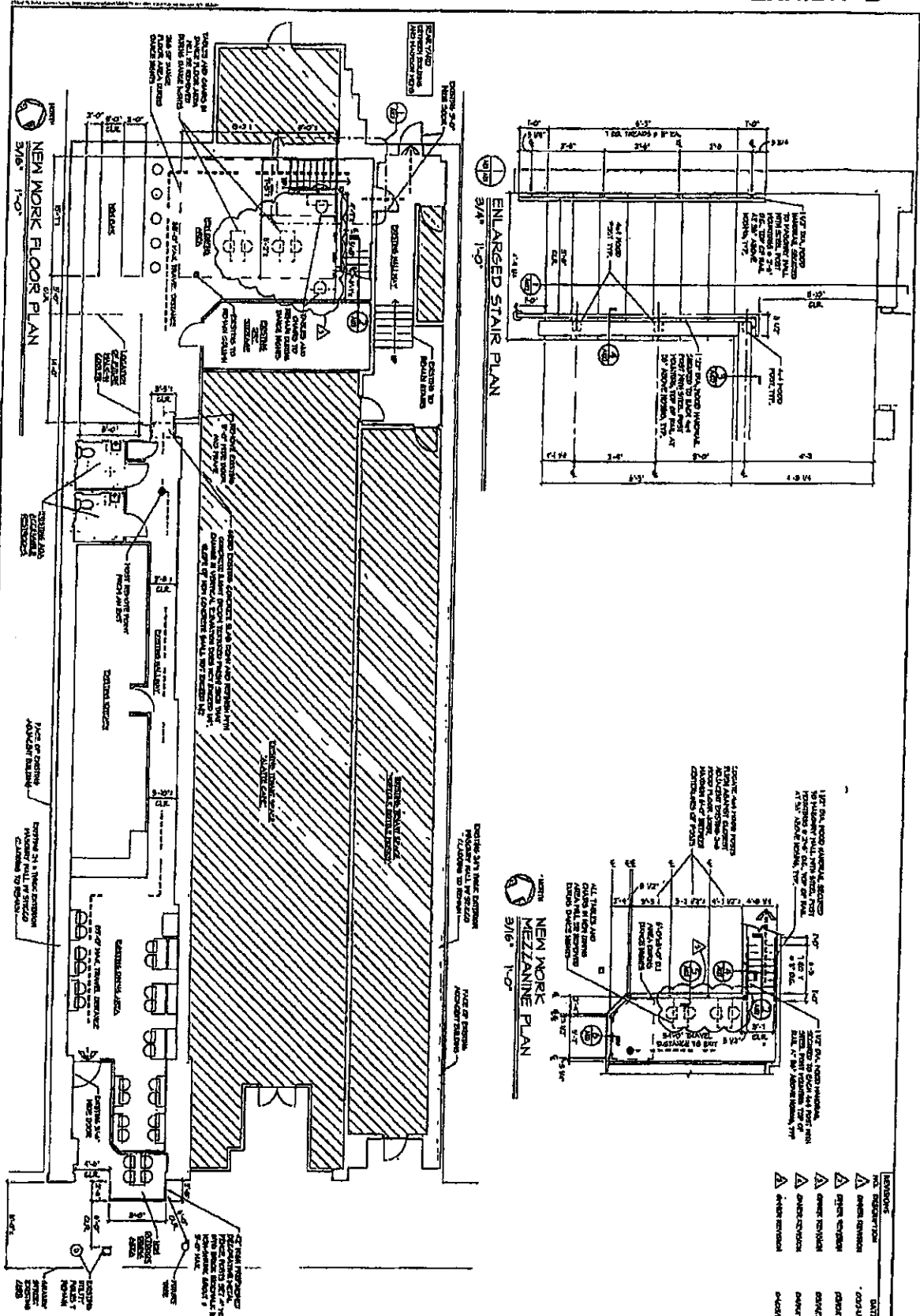
810 Union Street, Room 508

Norfolk, Virginia 23510

Telephone (757) 664-4752 Fax (757) 441-1569

(Revised January, 2015)





**A101**  
 02 OF 03  
 2016-058  
 08/19/16

**CALIFORNIA BURRITO TENANT IMPROVEMENTS**  
 310 GRANBY ST.  
 NORFOLK, VA  
 NEW WORK FLOOR PLANS AND ENLARGED STAIR PLAN



**Riddick Fiedler Stern,**  
 Architecture Planning Interior Design  
 251 West Park Street • Norfolk, VA 23510

REVISION	NO.	DESCRIPTION	DATE
△	1	ISSUE FOR PERMIT	08/19/16
△	2	ISSUE FOR PERMIT	08/19/16
△	3	ISSUE FOR PERMIT	08/19/16
△	4	ISSUE FOR PERMIT	08/19/16
△	5	ISSUE FOR PERMIT	08/19/16
△	6	ISSUE FOR PERMIT	08/19/16
△	7	ISSUE FOR PERMIT	08/19/16
△	8	ISSUE FOR PERMIT	08/19/16
△	9	ISSUE FOR PERMIT	08/19/16
△	10	ISSUE FOR PERMIT	08/19/16

04/30/97 JM

Form and Correctness Approved:

ATTACHMENT 2

Contents Approved:

By Daniel R. Hagemister  
Office of the City Attorney

By [Signature]  
DEPT City Planning & Codes Adm

NORFOLK, VIRGINIA

R-15

**ORDINANCE No. 38,746**

AN ORDINANCE ESTABLISHING PROCEDURES FOR REVOKING PERMITS.

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the following procedures, which are adopted pursuant to Section 10 of the Norfolk City Charter, shall govern all proceedings in which the Council considers the revocation of any permit or certificate that the Council has previously granted:

- (a) The process for revoking permits or certificates issued by Council shall be initiated by the preparation of a formal Statement of Proposed Revocation by the city manager or his designee. This statement shall be submitted to Council members not later than fourteen days prior to the scheduled proceeding before Council.
- (b) The Statement of Proposed Revocation shall be supported by appropriate documentation and may include affidavits, photographs, video tapes, recordings, official reports, compilations of statistics and any other pertinent matters.
- (c) The Statement of Proposed Revocation shall also contain a concise exposition of the principles of law under which revocation of the permit is being sought.
- (d) The Statement of Proposed Revocation shall be sent to the Permit Holder at the same time it is forwarded to Council members.
- (e) The Permit Holder thereafter shall file all documents including affidavits, exhibits, photographs, compilation of statistics, etc. that constitutes its defense. This Response must address all matters set forth in the Statement of Proposed Revocation. The Permit Holder shall include in its Response a written statement of all legal authorities upon which it relies. The Response shall be submitted to the City Clerk not later than seven days before Council is scheduled to meet on the revocation issue. Ten copies of the Response shall be filed with the Clerk who shall advise the

Council when all the materials are filed and the matter ready to be heard by Council.

- (f) Immediately upon receipt of the Response, the City Clerk shall provide one copy of said Response to each Council member. Also, one copy shall be provided to the Office of the City Attorney.
- (g) The Office of the City Attorney shall represent the City Manager (or his designee) before Council. Council shall allow the City Attorney to present an opening argument not to exceed fifteen minutes. The Permit Holder shall then be allowed oral argument not to exceed twenty minutes. The City Attorney shall then be allowed a rebuttal argument not to exceed five minutes.
- (h) No oral testimony may be taken in any such proceeding; however, Council shall review any and all transcripts which were provided as part of the documentation by either side.
- (i) Failure to fully meet the provisions of this ordinance shall result in a forfeiture of the right to file unless Council agrees to late filing.

Section 2:- That this ordinance shall be in effect from the date of its adoption.

Adopted by Council May 13, 1997  
Effective May 13, 1997

TRUE COPY  
TESTE:

\_\_\_\_\_  
R. BRECKENRIDGE DAUGHTREY, CITY CLERK

BY: \_\_\_\_\_  
DEPUTY CITY CLERK

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

California Burrito

Civil Case No:

Petitioner/Appellant

v.

Norfolk City Council

Respondent / Appellee

MOTION FOR PRELIMINARY INJUNCTION

Comes now, the Petitioner and moves for an order of Preliminary Injunction as requested in the Petition for Appeal and further detailed in the attached Memorandum of Law and Declaration.

Respectfully submitted

California Burrito

By:  \_\_\_\_\_

Counsel

Timothy Anderson  
Anderson & Associates PC  
2492 N. Landing Rd 104  
Virginia Beach VA 23456  
757-301-3636 Tel  
VSB 43803

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK**

**California Burrito**

**Civil Case No:**

**Petitioner/Appellant**

**v.**

**Norfolk City Council**

**Respondent / Appellee**

**DECLARATION OF MIGUEL ANGEL ORTIZ ROLDAN**

I MIGUEL ANGEL ORTIZ ROLDAN, make the following declaration based on my personal knowledge.

1. I am the owner of California Burrito.
2. I dispute the allegations of the establishment having 131 people inside of California Burrito on October 30, 2020. However, I do acknowledge that there were electrical issues found by the Fire Marshall. Those electrical issues were corrected within 1 week of the Fire Marshall's visit, the city inspected that repair, and no further issues remain. A summons was issued for this allegation, the summons was dismissed and the city did not take any further action against California Burrito.

3. I dispute the allegations of the establishment having 108 people inside of California Burrito on July 27, 2021. A summons was issued for this allegation, the summons was dismissed and the city did not take any further action against California Burrito.
4. I dispute the allegations of the establishment having 56 people inside of California Burrito on July 31, 2022.
5. City Council did not take evidence from witnesses, provide a proper warning or other civil fine for the alleged allegations, nor did they build any record of the facts that evening. I was denied the opportunity to present evidence to the City Council during the revocation process.
6. The restaurant is approximately 2800 sq ft.
7. At all times, California Burrito has followed the security plan contained in the CUP and there has been no criminal acts of violence at any time.

I declare under penalty of perjury that the foregoing is true and correct pursuant to Virginia Code 8.01-4.3.

October 24, 2022

  
\_\_\_\_\_  
MIGUEL ANGEL ORTIZ ROLDAN

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK**

**CALIFORNIA BURRITO,**

**Petitioner/Appellant,**

**v.**

**Case No. CL22-**

**NORFOLK CITY COUNCIL,**

**Respondent/Appellee.**

**BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Petitioner, California Burrito, by counsel, for its Brief in Support of its Motion for Preliminary Injunction, states as follows:

**INTRODUCTION**

California Burrito requests that this Court grant its Motion for Preliminary Injunction to prevent the revocation of Petitioner's Special Exception Permit to operate as a nightclub. Moreover, this injunction is necessary to prevent further irreparable harm to the Petitioner due to the unconstitutional revocation of his Special Exception Permit without due process and notice of Ordinance 38,746 that specifies the procedures and time frame a Petitioner must follow to submit evidence and defend his business, and without a compelling governmental interest that was narrowly tailored.

**FACTUAL BACKGROUND**

Petitioner is a restaurant operator doing business as California Burrito at 319 Granby Street, Suite 319, Norfolk, Virginia, under a Special Exception Permit issued by the City of Norfolk on June 13, 2017. In the past five years that California Burrito has been open, California Burrito received two citations for overcrowding, both of which were dismissed and nolle prosequied. In

spite of California Burrito occupying a 2,832 square foot space and attempting to increase the occupancy limit multiple times to conform with the square footage of the building, the Special Exception Permit merely granted an occupancy limit of 49 people. Owner Miguel Roldan inquired with the City in 2020 and 2021 to increase the capacity limit but was advised to wait six months. He complied and inquired again only to be advised to wait another six months. After complying once again, he then applied for a Conditional Use Permit to increase the capacity limit in late 2021 but his request was arbitrarily denied by City Council on March 8, 2022. On July 31, 2022, Miguel Roldan was on site during the time of the Fire Marshall's inspection when it was alleged that there were fifty-six patrons inside the establishment, instead of the forty-nine permitted by the Special Exception Permit. Although Mr. Roldan had ten people leave to come into compliance, a citation was issued for failure to maintain occupancy count with the matter to be heard by Norfolk General District Court on November 18, 2022.

On September 19, 2022, Petitioner was served with a "Statement of Proposed Special Exception Revocation for California Burrito, 319 Granby Street, Suite 319" with a hearing before the City Council scheduled for October 11, 2022. Norfolk Ordinance 38,746 was passed on April 30, 1997, to establish procedures for revoking permits. The Ordinance governs the procedure for proceedings in which the Council considers revocations of permits previously granted. The Ordinance requires the Statement of Proposed Revocation to be supported by appropriate documentation such as affidavits, photographs, video tapes, recordings, official reports, and compilations of statistics and other pertinent matters. The Statement of Proposed Revocation is also required to contain a concise exposition of the principles of law under which revocation of the permit is being sought. The Permit Holder thereafter is permitted to file his documents including affidavits, exhibits, photographs, compilation of statistics, etc. that constitute his



defense. The Permit Holder is also required to include a written statement of all legal authorities upon which he relies. The Response is then to be submitted to the City Clerk no later than seven days prior to the Council meeting with ten copies to be submitted to the Clerk and distributed to each City Council member and the City Attorney. Failure to follow the provisions of Ordinance 38,746 results in forfeiture of the right to file.

Neither Ordinance 38,746 nor the revocation procedures and rights of the Permit Holder were provided to the Petitioner. This Ordinance is unable to be found on the internet or the City of Norfolk's website. Instead, the Petitioner was provided with only a letter advising him that the Zoning Administrator had initiated action to revoke his Conditional Use Permit and that the public hearing would be held on October 11, 2022, with a copy of the allegations in a "Statement of Proposed Special Exception Revocation." The City Attorney did give the Respondent notice of Ordinance 38,746; however, the letter to the Petitioner made no mention of Ordinance 38,746 and instead leads Permit Owners to believe all they must do is appear at the hearing to defend their business. Consequently, the Petitioner was denied his right to present evidence and furthermore, the City of Norfolk did not follow their own procedures by presenting evidence of the Petitioner's violation.

On October 11, 2022, Petitioner appeared before the City Council and was offered a twenty-minute hearing to respond to the notice. Petitioner's Landlord testified for five minutes prior to providing his own testimony. Petitioner's Landlord testified that he has owned multiple commercial properties in downtown Norfolk for more than a decade and spoke highly of Petitioner's character and business operation, stating that he has never been late on his rent and that in the five years the business has been open for operation, Petitioner has contributed positively to the atmosphere and culture of downtown Norfolk. There has been no violence, no police calls,

no alcohol violations, no health department violations, and no noise complaints attributable to the business. Petitioner testified that he extended an offer to the City Council agreeing to change the business name and nature of the business to an upscale restaurant with a family-friendly atmosphere, agreeing to remove the nightclub elements such as the dance floor, live entertainment, and late closing hours to enhance the culture of downtown Norfolk. Petitioner further stated that the 2,832 square foot building was surveyed and found to accommodate a capacity limit of 200 but would agree to remain under the 49-person capacity limit if City Council objected to the increase in capacity limit.

The City of Norfolk's argument consisted of conclusionary and defamatory statements that, "this owner cannot be trusted to operate legally. If the special exception is not revoked, the violations will continue. Maintaining a bar room at over capacity in the back of this restaurant is not consistent with the character of this part of downtown. It threatens property values, it threatens public safety in the area, it threatens the safety of the patrons and the employees within that restaurant. The one way to end this threat is to revoke the Special Exception." To further these hypothetical and inflammatory statements made without evidence or support of any kind, the City referenced an October 30, 2020 incident when the Fire Marshall allegedly counted the occupancy over limit and found electrical violations but did not issue a summons; a July 27, 2021 incident when the Fire Marshall issued a summons for overcrowding that was nolle prosequied; and a February 26, 2022 incident when the Fire Marshall issued a summons for overcrowding that was dismissed due to the Fire Marshall's failure to appear at the court hearing. Lastly, the City referenced the July 31, 2022, incident when the Fire Marshall issued a summons for "failure to maintain count" due to allegedly having 7 patrons over the allotted 49. The City referenced four alleged incidents over a five-year span – none of which have yet to be heard in court – as

indisputable evidence and concluded that Owner Miguel Roldan “cannot be trusted to operate legally” and therefore should have his Special Exception Permit revoked without due process of law. The City finished by accusing Mr. Roldan of “willful neglect to operate as he pleases without regard for regulation or safety” and that he was “given a chance for reform without results” and as the evidence to support her statements, referenced a 2003 fire – nearly two decades ago – in a Rhode Island night club that started due to illegal pyrotechnics.

The City presented no evidence that the Petitioner violated the Special Exception Permit other than references to citations that were either not issued, dismissed, nolle prosequied, or not yet heard in court to determine if a violation had, indeed, occurred. The City made references to electrical violations being a fire hazard as evidence that Petitioner violated the Special Exception requirements, yet there are no electrical conditions listed in the Special Exception Permit and consequently, there is no violation of the Special Exception Permit for electrical violations. Instead, unfounded, inflammatory, and defamatory statements were made that the Petitioner was “untrustworthy” and was “unable to operate legally” as evidence that the Petitioner had violated the terms of the Special Exception Permit. Petitioner in fact has still not had an opportunity to be heard in court as the sole citation is still pending in Norfolk General District Court. This citation is not even a violation of the Special Exception Permit – the citation is for failure to maintain count, not for exceeding capacity. The Special Exception Permit does not require Petitioner to maintain count. Additionally, the Special Exception Permit does not require Petitioner to ensure there are no electrical issues and this is likewise not a violation of the Special Exception Permit. Petitioner acknowledges electrical violations were present two years prior, but Petitioner understood the importance of the violations and immediately worked to remedy them. The violations were completely resolved within one week and Petitioner has had no subsequent

violations. However, even if there were electrical violations, these violations do not constitute a violation of the Special Exception Permit that allows revocation of the Permit.

Norfolk City Council relied entirely on hearsay allegations from the Fire Marshall that resulted in “Over Capacity” citations that were dismissed, nolle prosequed, and a “Failure to Maintain Count” citation that was not even issued for exceeding capacity limits, and still has not yet been heard in court. The City attacked the Petitioner’s character as “untrustworthy” and “unable to operate legally” and submitted these statements as irrefutable evidence that Petitioner had violated his Special Exception Permit to revoke and shut down his livelihood. Following the hearing, because Petitioner was denied due process and the ability to submit evidence by notifying him of Ordinance 38,746 prior to the hearing, the City Council voted to approve Ordinance 48941 which revoked the Special Exception Permit authorizing the operation of an entertainment establishment with alcoholic beverages known as “California Burrito” on property located at 319 Granby Street, Suite 319.

Several facts in this case are in dispute. The following instances are detailed in the Petition for Appeal:

1. The allegations of California Burrito having 131 people inside the establishment on October 30, 2020, are false. No summons was issued for this alleged violation.
2. The electrical issues found by the Fire Marshall on October 30, 2020, were acknowledged by Owner Miguel Roldan and were corrected within one week of the Fire Marshall’s visit. The City of Norfolk inspected the repair and found no issues to be remaining. Furthermore, these electrical issues did not violate the Special Exception Permit.
3. The allegations of California Burrito having 108 people inside the establishment on July 17, 2021, are false. A summons was issued for overcrowding but was nolle prosequed.

4. The allegations of California Burrito having 56 people inside the establishment on July 31, 2022, are false. A summons was only issued for failure to maintain count.
5. California Burrito never placed patrons in danger by allegedly “exceeding capacity limits.” California Burrito operates out of a 2,832 square foot building, the square footage of which exceeds occupancy limits of 200 people. However, the City of Norfolk has arbitrarily placed a 49-person occupancy limit on the business, arbitrarily deferred and denied Petitioner’s repeated requests to expand the occupancy limit then subsequently claimed that Petitioner has placed patrons and employees “in danger of fire” by allegedly not adhering to occupancy limits too small for the square footage of the building, and lastly, arbitrarily revoked the Special Exception Permit by attempting to draw a comparison from a nightclub that actually had a fire, in a different state, nearly 20 years ago, that was started by pyrotechnics that did not have a permit, and in a building that was too small for the amount of patrons present. This situation in no way compares to the tragedy that unfolded in Rhode Island. The building California Burrito occupies can safely accommodate over three times the number of patrons currently permitted. At no point in time has Petitioner ever placed a patron or employee in danger, nor has Petitioner ever exceeded capacity limits for a 2,832 square foot building.

Furthermore, several errors were made by the Norfolk City Council. The following instances are detailed in the Petition for Appeal:

1. The Municipal Code of Norfolk bypasses its Board of Zoning Appeals for a complete record with evidence to be presented related to allegations. Instead, the Municipal Code allows an ad hoc proforma hearing involving a twenty-minute restricted hearing where no record can be developed, witnesses called, or positions to be established. The only way for

a Petitioner to submit evidence and have his side fairly heard is to have knowledge of Ordinance 38,746, notice of which is not provided to Petitioners prior to the hearing, nor is the process incorporated into the Municipal Code or Zoning Ordinance Manual. This is a fundamentally punitive and prejudicial procedural system for any business facing the most extreme sanction of revocation of its operating permit to have to navigate in an extremely short window of time. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolf v. McDonnell*, 418 U.S. 539, 558 (1974), quoting *Dent v. West Virginia*, 129 U.S. 114 (1889). This understanding of due process has led the Court to require that government afford minimum procedural safeguards when it seeks to deprive a person of life, liberty, or property. The City of Norfolk has divested Petitioner the right to conduct lawful business operations simply from hearsay statements and conclusionary allegations and denied him the right to present evidence supporting his position and defending his business by failing to provide him due process and notice of Ordinance 38,746. Therefore, the Municipal Code creates a defective procedure to revoke a Special Exception or Conditional Use Permit void of basic due process. The City Council did not establish a clear record of a Special Exception Permit violation by the Petitioner through the City Council hearing; therefore, the actions of the City Council were unlawful.

2. The City of Norfolk violated its own procedures by failing to follow Ordinance 38,746 and by failing to provide notice of this obscure Ordinance to the Petitioner. By doing so, the City guaranteed that Petitioner would never have a chance to defend his position and livelihood and that the only result of the City Council hearing would be a revocation of the Special Exception Permit.

3. There was no factual or evidentiary record to establish the Petitioner breached his Special Exception Permit issued in this matter as required by Ordinance 38,746.
4. The manner in which the subject ordinance was presented and voted on violated applicable law, procedure, and fundamental notions of due process, equal protection, and there was no compelling state interest to warrant the revocation of the Special Exception Permit.
5. The City Council's process to pass Ordinance 48,941 was patently unfair, arbitrary, capricious, and by no means did the revocation serve a compelling state interest. Norfolk City Council was required to show that no less restrictive alternative would serve its purpose. *Central Radio Company, Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4<sup>th</sup> Cir. 2016). The City Council had less restrictive alternatives available to remedy the alleged overcrowding situation that did not involve revoking Petitioner's Special Exception Permit which resulted in the complete revocation of his livelihood and ability to support his family.
6. The passage of Ordinance 48,941 immediately places the Petitioner out of business, and as such, the Petitioner had to close its doors which caused irreparable harm to the Petitioner and that harm is ongoing daily.
7. The actions of the Norfolk City Council violate the fairly debatable standard related to the lack of sufficient facts or the establishment of a record to warrant the revocation of the Petitioner's Special Exception Permit.

Based on these facts, the Petitioner is entitled to an entry of an order declaring the actions of the Norfolk City Council unlawful, invalid, void and in violation of the Petitioner's rights, including due process, equal protection, and treatment, and in no way serve a compelling state interest; an entry of an order declaring the actions of enacting Ordinance 48941 a violation of the fairly debatable standard; entry of an order scheduling a prompt evidentiary hearing concerning

the issues raised in the Petition; entry of an order enjoining the City of Norfolk from imposing Ordinance 48941 on Petitioner; and any further relief that may be requested.

### ARGUMENT

In determining whether an injunction is appropriate, courts in Virginia consider the following factors: "(1) the likelihood that the plaintiff will suffer irreparable harm without a preliminary injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the likelihood that the plaintiff will prevail on the merits of the claim; and (4) the impact of an injunction on the public interest." *Villalobos v. City of Norfolk*, 62 Va. Cir. 158, 159 (Norfolk 2003) (citing *Hughes Network Sys. v. Interdigital Commc'ns Corp.*, 17 F.3d 691 (4th Cir. 1994)); see also *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). Because "there are no Virginia Supreme Court cases directly setting forth the standard for an injunction," Virginia Circuit Courts have consistently applied federal preliminary injunction law when analyzing Virginia preliminary injunctions. *McEachin v. Bowling*, 84 Va. Cir. 76, 77 (Richmond 2011) (citing *Winter v. Nat. Res. Def Council*, 555 U.S. 7 (2008)); see also *Freemason St. Area Ass'n, Inc. v. City of Norfolk*, 100 Va. Cir. 172, 183 (Norfolk 2018). Taking these factors into consideration, issuance of a preliminary injunction against the Respondent/Appellee is appropriate in this case.

#### **Balancing the Potential Harm Favors Issuing an Injunction**

California Burrito has suffered and will continue to suffer irreparable harm in the absence of an injunction. "Under traditional applications, irreparable injury means that an award of money or monetary damages alone cannot make the [plaintiff] whole." David W. Lannetti & Jennifer L. Eaton, *Making the Case to Avoid Entering the eBay Marketplace: A Recommended Analytical Framework/or Evaluating Requests for Permanent Injunctions in Virginia*, 32 Regent U. L. Rev.



1, 16 (2019-20). Some courts have found irreparable injury when the plaintiff demonstrated that it sought to avoid some harm in addition to difficult-to-calculate damages. *Dillon v. Northam*, 105 Va. Cir. 402, 411 (Norfolk 2020). Further, courts normally rely on the difficulty of ascertaining damages as proof of irreparability only when the damages are inherently difficult to measure, such as when a plaintiff asserts a damage claim based on lost goodwill, damage to reputation, or an attenuated impact on corporate operations or profits. Douglas Laycock & Richard L. Hasen, *Modern American Remedies: Cases and Materials*, 396-97 (5th ed. 2018) (emphasis added).

When evaluating preliminary relief, the irreparable injury the Court analyzes is the potential harm to the plaintiff without the preliminary relief. *Dillon* at 411. Granting a motion for a temporary injunction implies that judicial intervention will prevent the irreparable injury about which the plaintiff is concerned. *Id.* Courts have found irreparable harm if an injunction is not granted in cases where Plaintiffs were unlikely to recover money damages against a county due to its sovereign immunity and the balance of hardships tips in the favor of the Plaintiffs because they were likely to succeed on the merits given Virginia law limited the county's authority. *O'Brien v. Appomattox County*, 213 F. Supp. 2d 6276 (W.D. Va. 2002). It is not necessary that a plaintiff aver or prove that he cannot obtain adequate compensation in damages. Whenever a substantive value of the right in the character in which it is enjoyed is imperiled, that is sufficient to invoke a court's jurisdiction to grant injunctive relief. *Anderson v. Harvey*, 51 Va. (10 Gratt.) 386 (1853). Furthermore, when the General Assembly determines that certain conduct is inimical to the public interest, a petition for an injunction need not contain an allegation of irreparable injury. *Carbaugh v. Solem*, 225 Va. 310 (1983).

Here, California Burrito asks solely for an injunction, not monetary damages, as it is the proper remedy to address the issues outlined in the Petition. California Burrito is concerned with

the harm already suffered by the Respondent revoking California Burrito's Special Exception Permit which directly caused the closure of the Petitioner's business. Petitioner has and will continue to suffer irreparable harm financially due to the shutdown of his business, loss of patrons to other establishments and loss of livelihood of employees of the business if the injunction is not granted.

In addition to clear irreparable injury stated, the General Assembly determined that proper notice for a public hearing regarding the adoption or amending of zoning ordinances is in the public interest in the Code of Virginia § 15.2-2285. Because Norfolk does not have operating ordinances that substantially comply with the Virginia Code, Petitioner was denied due process in violation of the *Dillon Rule* and the public interest favors the granting of an injunction.

By contrast, Respondent can show no evidence of competing harm. Respondent has only been able to reference a hypothetical future incident that may or may not occur based on a completely separate incident in a different state with completely different circumstances and causes that in no way translate or apply to Petitioner's situation. Respondent can present no evidence of actual harm.

### **California Burrito is Likely to Prevail on the Merits**

Petitioner is likely to prevail on the merits for multiple reasons: (1) Petitioner has upheld the terms of its Special Exception Permit and Respondent has failed to establish that its terms were violated, (2) Respondent has failed to follow the Code of Virginia § 15.2-2285 for amending zoning ordinances which has violated Petitioner's right to due process; and (3) the Municipal Code of Norfolk is procedurally defective and denied Petitioner due process by failing to provide him notice of Ordinance 38,746 which denied him his right to submit evidence and defend his position,

and (4) the Norfolk City Council has failed to narrowly tailor the restriction to serve a compelling governmental interest.

### **Petitioner has Upheld the Terms of the Special Exception Permit**

The City of Norfolk alleged in the City Council Meeting that Petitioner violated the Special Exception Permit yet did not follow the required Revocation Procedure established in Ordinance 38,746 which requires the City's revocation be supported by affidavits, photographs, video tapes, recordings, official reports, and compilations of statistics and other pertinent matters. The City did not produce the required documentation to prove that the Petitioner violated the terms of the Special Exception Permit and instead made defamatory statements about the Petitioner's character, referenced four incidents over a five-year time frame that were never heard or proven in a court of law, and cited hypothetical situations that may or may not occur based on a tragedy that happened nearly 20 years ago in a different state with completely different circumstances. Petitioner disputes all but one of the incidents which involved electrical violations, which were remedied within one week, and of which are not a violation of the Special Exception Permit. Petitioner has upheld the terms of the Special Exception Permit and would have been able to prove this had City Council followed the procedures of Ordinance 38,746 and had City Council not denied Petitioner due process and actually provided Petitioner notice of Ordinance 38,746.

### **Respondent Failed to Follow the Code of Virginia**

Virginia Code § 1-248 precludes a local governing body from enacting ordinances inconsistent with state law. An ordinance, however, may prohibit an act upon which state law is silent, or proscribe conduct already proscribed by state law where the ordinance is not inconsistent with state law. If both the statute and ordinance can stand together, courts are obliged to harmonize them, rather than nullifying the ordinance. Nevertheless, an ordinance may not conflict with state

law. *Board of Supervisors v. Pumphrey*, 221 Va. 205 (1980). The Code of Virginia § 15.2-2285(B) outlines the procedure for amendments to a zoning ordinance in the state of Virginia: "No zoning ordinance shall be amended or reenacted unless the governing body has referred the proposed amendment or reenactment to the local planning commission for its recommendations. The governing body shall hold at least one public hearing on a proposed reduction of the commission's review period. The governing body shall publish a notice of the public hearing in a newspaper having general circulation in the locality at least two weeks prior to the public hearing date and shall also publish the notice on the locality's website, if one exists."

Under § 2.2.2(A) "City Council Powers and Duties," the City Council is permitted to review and decide whether to revoke a Special Exception Permit. This is inconsistent with the Code of Virginia § 15.2-2285(B) which requires the zoning ordinance to be referred to the local planning commission for its recommendations in addition to the governing body publishing a notice of the public hearing in a newspaper for two weeks prior to the hearing date and notice on the locality's website. The Norfolk Municipal Code circumvents this requirement by permitting the City Council to unilaterally make decisions to revoke Special Exception Permits and pass Zoning Ordinances without affording the Petitioner due process. The City of Norfolk did hold a hearing on the proposed ordinance on October 11, 2022, at 7:00 P.M. during a City Council meeting. However, the City of Norfolk did not provide Petitioner with notice of Ordinance 38,746 which details the required procedures that Petitioner must follow in order to defend his position, thus denying him the opportunity to produce evidence, and no evidence was produced that the proposed amendment to the ordinance was referred to the planning commission for its recommendations.

### **The Municipal Code of Norfolk is Procedurally Defective**

The City of Norfolk's Municipal Code is further procedurally defective as it permits the revocation of a Special Exception Permit by the City Council without permitting a complete record to be developed with evidence to be presented related to the allegations. Instead, the Municipal Code allows an ad hoc pro forma hearing involving a twenty-minute restricted hearing where no record can be developed, witnesses called, or positions to be established. The only way for a Petitioner to present evidence and defend his position is to have knowledge of an obscure ordinance that cannot be found on the internet, the Municipal Code, the Zoning Ordinance Manual, or the City of Norfolk Website unless the Petitioner has previous knowledge of Ordinance 38,746. This is a fundamentally punitive and prejudicial system for any business facing the most extreme sanction of revocation of its operating permit to have to navigate in a short amount of time. Consequently, this process has divested the Petitioner the right to conduct a lawful business operation simply based on conclusionary allegations that stemmed from statements obtained from the Fire Marshall over a five-year period that ultimately never made it to court, and as a result, has failed to establish a fairly-compiled record. Furthermore, the City of Norfolk failed to establish a clear record of a Special Exception Permit violation by the Petitioner which ultimately resulted in unlawful actions by the City Council.

#### **Norfolk City Council Has Failed to Narrowly Tailor the Restriction**

Norfolk City Council was required to narrowly tailor the restriction to serve the compelling governmental interest. While the City has a compelling interest in protecting the public from harm, the Petitioner's establishment is 2,800 sq ft. Have 56 people in the establishment, instead of 49, is a technical violation at best. No harm to the public exists. To close the Petitioner down for a technical violation is not a narrowly tailored legitimate government function.

California Burrito is likely to succeed in demonstrating that it has upheld all the conditions in the Special Exception Permit, its rights to due process were violated, and that Respondent has infringed upon those rights.

### **The Public Interest Favors Issuing an Injunction**

"The irreparable harm to the plaintiff and the harm to the defendant are two most important factors. If, after balancing those two factors, the balance "tips decidedly" in favor of the plaintiff, a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation." *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4th Cir. 1991). Courts have found that when provisions of a statute or ordinance raise serious constitutional problems, plaintiffs would be irreparably harmed if enforcement of the statute was not enjoined, and the public interest would be served by the injunction. *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954 (S.D.W. Va. 1996). *See also Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996)<sup>1</sup> and *Deveney v. Bd of Educ.*, 231 F. Supp. 2d 483 (S.D. W. Va. 2002).<sup>2</sup>

Here, the unconstitutional actions of the City of Norfolk's City Council have divested the Petitioner of his right to conduct lawful business operations simply from defamatory accusations and hearsay statements that were not established in a fairly compiled record. The arbitrary actions of the City Council denied Petitioner due process and consequently deprived Petitioner of his

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<sup>1</sup> The court finding that churches found to be in violation of zoning ordinances that limited activities was entitled to a temporary restraining order because the zoning ordinance prohibited the church from the free exercise of religion and raised serious, substantial questions regarding whether the zoning ordinance was the least restrictive means, and the public interest was clearly served by providing a forum to address the important question.

<sup>2</sup> Plaintiff was entitled to a temporary restraining order to enjoin a county board of education from presenting an invocation during the plaintiff's high school graduation because the public interest weighed in favor of protecting a student's first amendment right to be free from the unwanted intrusion of religion.

property. Therefore, the public interest is best served by granting a preliminary injunction against adoption and enforcement of Ordinance 48941.

### CONCLUSION

As set forth above, the factors weigh in favor of granting California Burrito's motion for a preliminary injunction. First, balancing the harms to both parties favors issuing an injunction. Second, California Burrito is likely to succeed on the merits in showing that Petitioner has upheld the terms of the Special Exception Permit and Respondent has failed to establish that its terms were violated. Furthermore, Respondent failed to follow the Code of Virginia 15.2-2285 for amending zoning ordinances which resulted in a violation of Petitioner's due process rights; and the Municipal Code of Norfolk is procedurally defective. Lastly, the public interest favors issuing an injunction due to the denial of the constitutional protection of due process.

For the foregoing reasons, California Burrito respectfully requests this Court enjoin enforcement of Ordinance 48941, grant the relief requested in the Motion for Injunction for such a period of time until a full hearing on the claims referenced in the petition for appeal can be adjudicated.

Respectfully Submitted,  
California Burrito

By:



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Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that I emailed a copy of this notice to: Adam Melita, Assistant City Attorney, at [adam.melita@norfolk.gov](mailto:adam.melita@norfolk.gov) and Katherine Taylor, Assistant City Attorney, at [katherine.taylor@norfolk.gov](mailto:katherine.taylor@norfolk.gov) on this 25<sup>th</sup> day of October, 2022.



Timothy Anderson