

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

OATES FOOD SERVICES II, LLC,
a Virginia limited liability company,

and

OATES ENTERPRISES II, LLC,
a Virginia limited liability company,

Petitioners/Plaintiffs,

v.

Case No. 22-14414

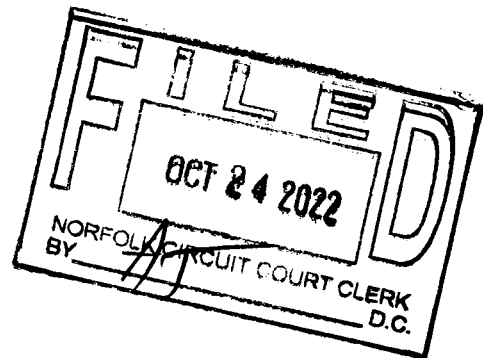
CITY COUNCIL OF THE CITY OF NORFOLK, VIRGINIA,

SERVE: Bernard A. Pishko, City Attorney
810 Union Street
900 City Hall Building
Norfolk, VA 23510

and

CITY OF NORFOLK, VIRGINIA,

SERVE: Bernard A. Pishko, City Attorney
810 Union Street
900 City Hall Building
Norfolk, VA 23510



Respondents/Defendants.

COMPLAINT AND PETITION FOR APPEAL

NOW COME Petitioners/Plaintiffs Oates Food Services II, LLC, a Virginia limited liability company (“Oates Food Services” or “Scotty Quixx”), by counsel, and Oates Enterprises II, LLC, a Virginia limited liability company (“Oates Enterprises”) (collectively, “Plaintiffs”) and file this Complaint and Petition for Appeal against the City Council of the City of Norfolk, Virginia (“City Council”) and the City of Norfolk, Virginia (“City”) (collectively, “Defendants”) and in support thereof state as follows:

Introduction

Plaintiffs are asking this Court to reverse City Council's arbitrary and capricious decision to revoke the special exception it awarded to Scotty Quixx in 2013 ("Special Exception") allowing it to operate as an entertainment establishment. City Council failed to follow its own policies and acted upon unjustified animus against, and stereotypes about, nightlife bars and restaurants in the Downtown Norfolk area and their clientele using alleged reporting inconsistencies by Scotty Quixx as a pretext for the revocation.

The Norfolk City Attorney's Office did not present to City Council any specific violation of the Special Exception and merely speculated about an alleged inconsistent reporting of sales to the City for meals tax purposes and to Virginia Alcoholic Beverage Control ("ABC") for its required mixed beverage annual review ("MBAR"). City Council passed a Resolution in 2017 that is intended to address this exact situation that provides for remedies significantly less draconian than those imposed here. Further, there has been no meals tax delinquency determination by the Norfolk Commissioner of the Revenue's office and no MBAR violation determination by ABC. And even if there were a technical violation of either, functionally shutting this business down for alleged first-offense reporting issues is inconsistent with the City's and ABC's relatively-minor existing penalties for addressing meals taxes and MBAR issues, respectively.

This dissonance exists because this unprecedented decision was not intended to address the alleged reporting anomalies. What is really going on here is that the City and City Council are targeting all nightlife bars and restaurants in the Downtown Norfolk area and searching for any technical noncompliance to use as pretext to enable them to act on their misguided animus and stereotypes against businesses like Scotty Quixx and their clientele. City Council's actions were

motivated by animus and were unreasonable, arbitrary, capricious, and not fairly debatable. This revocation should not stand.

Parties

1. Plaintiff Oates Food Services is a Virginia limited liability company. Oates Food Services operated Scotty Quixx bar and restaurant at 434 Granby Street, Norfolk, Virginia before the Special Exception was revoked by City Council on September 27, 2022, which precipitated this action.

2. Plaintiff Oates Enterprises is a Virginia limited liability company. Oates Enterprises is Oates Food Service's landlord and owns the property at 434 Granby Street, Norfolk, Virginia.

3. Defendant City is a city and a political subdivision of the Commonwealth of Virginia.

4. Defendant City Council is the governing body for the City. On September 27, 2022, City Council revoked the Special Exception.

Jurisdiction and Venue

5. This action is in part an appeal of the City Council decision of September 27, 2022 on that night's Agenda's Item PH-1 and is filed pursuant to Virginia Code § 15.2-2285(F) and other applicable law.

6. This Court has subject matter jurisdiction over this case pursuant to Virginia law, including, *inter alia*, Va. Code § 15.2-2285(F), as the land affected by the contested decision lies within the City of Norfolk, Virginia.

7. This action is timely filed within 30 days of the contested decision of the City Council.

8. This Court has personal jurisdiction over Defendant.

9. Venue is proper in this Court.

Factual Background

The Special Exception

10. On April 23, 2013, City Council adopted the Special Exception, Ordinance No. 45,078 (Exhibit 1), allowing Oates Food Services to operate an entertainment establishment known as “Scotty Quixx” at 434 Granby Street, Norfolk, Virginia.

11. The Special Exception provided in relevant part:

(l) The facility shall remain current on all food and beverage taxes and business personal property taxes which may become due while it is in operation.

....

(s) Any requirements, limitations, or restrictions imposed by the Virginia ABC Commission or by any provision of Virginia law upon this establishment which are more stringent than the requirements of this Special Exception shall be effective and binding. Any violation of such requirement, limitation, or restriction imposed by the 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.

The City and City Council’s Unfair Animus and Stereotypes Against Downtown Norfolk Area Nightlife Bars and Restaurants and Their Clienteles

12. In 2022, there have been multiple shootings in the Downtown Norfolk area.

13. The “Downtown Norfolk area” references the area in the City of Norfolk, Virginia bordered on the approximate east by St. Paul’s Boulevard extended to the Elizabeth River, the approximate south by the Elizabeth River, the approximate west by Duke Street, and the approximate north by US Route 58/Virginia Beach Boulevard.

14. Two of the shootings in the Downtown Norfolk area corridor occurred in the vicinities of nightlife bars and restaurants: (i) a March 2022 incident at Chicho’s Backstage (“Chicho’s”), located at 320 Granby Street; and (ii) an August 5, 2022 incident at Legacy Restaurant and Lounge (“Legacy”), located at 216 E. Plume Street.

15. “Nightlife bars and restaurants” references bars and restaurants that are open later than midnight at least one night per week.

16. Scotty Quixx is a Downtown Norfolk area nightlife bar and restaurant, but played no role in any shooting in the Downtown Norfolk area in 2022.

17. Nevertheless, in the wake of these events, the City and City Council have displayed animus towards Scotty Quixx and other Downtown Norfolk area nightlife bars and restaurants and their clientele.

18. On March 22, 2022, after the incident near Chicho’s, Councilwoman Doyle stated in a City Council work session that “we need to focus on our Downtown . . . right now we have a big issue Downtown and we need to take Downtown back. We don’t have control of our Downtown.” She suggested an emergency injunction requiring bars, restaurants and nightclubs to close at midnight. She suggested examining the conditional use permits of all Downtown bars and restaurants and opined that if they were not compliant with the conditions stated therein “we need to shut them down.” She also suggested suspending additional applications for bars, restaurants, and nightclubs. She said that she had received complaints about the “incompatibility” of the “nightclub, bar, restaurant scene with the Downtown residents.” Exhibits 2, 3.

19. Deputy City Attorney Adam Melita requested MBAR information from ABC for Hell’s Kitchen, Chicos, Waterside District, Republic, Baxter’s, Neon Liv, Caioir Bistro, Culture and Scotty Quixx by email dated August 4, 2022. Exhibit 4. Each business is a nightlife bar and restaurant located in the Downtown Norfolk area.

20. In response to the incident at Legacy, on August 5, 2022 City Manager Filer stated at a press conference, in relevant part: (ABC 13 News Now WVEC video footage of the press conference is attached as Exhibit 5):

“I think it is safe to say that every establishment in the entertainment district Downtown should begin preparing to come to this Council and explain why they should continue to operate Downtown. That explanation should include very clearly what benefits you provide to the overall culture, health and entertainment of our citizens by way of your establishment operating in the Downtown District. Make no mistake, operating Downtown in Norfolk is a privilege. With that privilege come rights that must be met. So we are now explaining to everybody today that in the next several months you should begin preparations to explain why you should continue to operate your establishment.”

“The Mayor is currently on his way back to the City. I have spoken with all City Council members this morning. We do not have a specified plan of attack but make no mistake, this latest event is now the end. We have tried cajoling. We have tried asking. We have tried incentivizing. We have tried begging. Those days are now over and the repercussions will now begin.”

“[W]e have businesses Downtown that have conditional use permits that provide above and beyond by right operations. All of those conditional use permits will be evaluated.”

“I think my comments today are very clear. Every establishment in this entertainment district will be evaluated . . . Starting immediately.”

“It’s really now incumbent upon every establishment to come before the Council as a body and explain why we [sic] they believe they should have the opportunity to do business on Granby Street.”

“This is going to take place with every single establishment. . . . Everyone is going to have to explain why they should have the opportunity and the right and privilege to operate Downtown.”

“The point that I’m making today and Council has made and will make when they come back from the recess is the obligation is no longer on us to say you’re doing something wrong. The obligation from this point forward beginning today is on establishments to tell us why they believe they have the right to do business Downtown.”

[When asked about what the City would be examining]: “The easiest place to start for every business owner is to look at every single condition in your conditional use permit. Every single one of them. And most of those conditional use permits, if you haven’t seen them, contain far more than 2 or 3 conditions. There are a lot of conditions in there. I think the easiest place to start is to look at that and ask a very real question: do I feel confident that on Friday/Saturday nights I’m adhering to everything that’s in this document? And if you can’t answer yes with a straight face, I would strongly urge you to pivot and to figure out how you can answer yes.”

21. A special exception was the prior name the City used for what it now calls conditional use permits.

22. The City and City Council have followed through on the City Manager's statements and targeted nightlife bars and restaurants in the Downtown Norfolk area.

23. On August 12, 2022, Deputy City Attorney Melita wrote a memorandum giving permission for the Commissioner of the Revenue and the City Attorney to discuss tax information with ABC regarding MBAR for the Downtown Norfolk area nightlife bars and restaurants listed in the August 4, 2022 FOIA request. Exhibit 6.

24. On August 25, 2022, the City initiated action to revoke Legacy's conditional use permit for allegedly not abiding by the required security plan, hurting property values and generally having a negative effect on the neighborhood and City. Exhibit 7.

25. On September 13, 2022, City Council passed changes to zoning ordinance regulations targeting nightlife bars and restaurants by imposing more stringent requirements. Exhibit 8.

26. Also on September 13, 2022, City Council voted 7-1 to revoke Legacy's Conditional Use Permit to operate as an entertainment establishment. Exhibit 9. Legacy is challenging City Council's decision in this Court: CL22001320100.

27. On September 7, 2022, the City's Zoning Administrator revoked the restaurant zoning certificate for Downtown Norfolk area nightlife bar and restaurant Culture Lounge & Restaurant, located at 814 Granby Street in Norfolk for alleged ABC violations, failure to pay food and beverage taxes, and improperly providing entertainment in a restaurant facility.

28. On September 19, 2022, the City's Zoning Administrator issued a Statement of Proposed Revocation to revoke the conditional use permit issued to Downtown Norfolk area nightlife bar and restaurant California Burrito, LLC, located at 319 Granby Street in Norfolk for numerous

alleged violations including allegedly exceeding the maximum occupancy in its nightclub. Exhibit 10. City Council revoked the conditional use permit on October 11, 2022.

Revocation of Scotty Quixx's Special Exception

29. On September 10, 2022, ABC and Norfolk Police conducted an "Observation-Joint Operation" at Scotty Quixx with at least 5 ABC officers involved. Exhibit 11. Upon information and belief, there were no violations found as a result of this observation.

30. The City issued a Statement of Proposed Special Exception Revocation ("Statement") to Scotty Quixx on September 12, 2022. Exhibit 12.

31. Revealingly, the cover letter for the Statement indicated that the City "has initiated action to revoke the Conditional Use Permit granted to Legacy,"—an apparent typographical error that is revealing of the City's true intentions, to effectively close all nightlife bars and restaurants in the Downtown Norfolk area regardless of the severity of the alleged wrong. Exhibit 12 (emphasis added).

32. The Statement stated in relevant part:

Upon comparing the MBAR submitted by Scotty Quixx to the Virginia ABC and the Meals Tax reports to the Commissioner of the Revenue, the City finds that the MBAR complies with the 45 percent food and non-alcoholic beverage sales, but Meals Tax reports to the City are significantly lower than the amount reported to the ABC.

Therefore, Scotty Quixx is in violation of its Special Exception, regardless of whether the Meals Tax reports or the MBAR (if either) is accurate. If the amount reported to ABC is true and correct, then the operator has failed to correctly and completely collect and report Meals Tax to the City of Norfolk. If the amount reported to the Commissioner of the Revenue is true and correct, then it has failed to correctly report its food sales to comply with the statutory 45% requirement. If neither the sales reported in the Meals Tax reports nor in the MBAR are accurate, then the operator has committed multiple violations of the conditions required by the Special Exception. Under no set of circumstances can the operator be in compliance with both Sections 2(l) and (s) of the Special Exception.

In all possible cases, Scotty Quixx is in violation of the conditions of its Special Exception and the City proposes that the Special Exception be revoked.

33. As part of discussions between the City and owners of Scotty Quixx in the wake of the issuance of this Statement, City Attorney Bernard Pishko stated in an email that “While not included as a part of the basis [for revocation], I understand there was a shooting inside Scotty Quixx in 2019 which would have been after you became the owner. Did you make changes to prevent a similar incident, if so, what were the changes?” Every City Council member, including the Mayor and Vice Mayor were copied on that email. Exhibit 13.

34. There was no shooting inside Scotty Quixx in 2019. A copy of a Stipulation of Facts regarding the event that the City is mistakenly referring to is attached here to Exhibit 14.

35. Scotty Quixx issued Freedom of Information Act (“FOIA”) requests to ABC, the City of Norfolk Police Department and the City dated September 20, 2022, with the intent of receiving more information about the alleged violations before the City Council meeting. Both the City and ABC invoked statutory extensions of the time to respond, leaving Scotty Quixx without the information requested to enable it to prepare its defenses and better understand the vague and unsupported charges against it before City Council. Exhibits 15-18.

36. The parties appeared at City Council on September 27, 2022. A video of relevant proceedings is included as Exhibit 19. Letters submitted to City Council by Scotty Quixx and Oates Enterprises in advance of the hearing are attached hereto as Exhibits 20 and 21, respectively.

37. At the hearing, counsel for Scotty Quixx moved for a deferral of the decision in light of the vagueness of the allegations against it and the fact that it had not received responses to the FOIA requests. City Council and the Mayor sat silently and did not respond to this request.

38. Assistant City Attorney Taylor made the following statements during her presentation to City Council:

That City Council had access to otherwise confidential tax information.

- “Yes, it was violence in Downtown Norfolk that caused the City to take a closer look at their conditional use permit and special exception holders.”
- “[T]here was a murder inside of Scotty Quixx—a shooting back in early 2019.”
- She stated that the procedure for delinquent meals taxes “has nothing to do with Scotty Quixx. Scotty Quixx has paid meals taxes when due. We just don’t know if those numbers are correct or not. We do know that they are different than what was reported to the ABC.”
- “It is Scotty Quixx that needs to commit to what their violation is. . . . They did not tell us, was it the MBAR that was wrong, was it the meals taxes that they reported to the Commissioner that was wrong?”

39. Again, there has never been a shooting inside Scotty Quixx, much less a murder.

40. Ms. Taylor made the untrue statement about a murder and shooting happening inside Scotty Quixx during her rebuttal time. Counsel for Scotty Quixx attempted to correct the record about the incorrect statement, but Mayor Alexander refused to allow counsel to speak. Thus, in an environment in which the City and City Council has great concern with gun violence in nightlife bars and restaurants in the Downtown Norfolk area, City Council proceeded to a vote after being presented a falsehood by Assistant City Attorney Taylor that a shooting and murder had occurred inside Scotty Quixx. Such statement, especially since it was not allowed to be controverted, likely inflamed the existing animus against nightlife bars and restaurants immediately before City Council voted.

41. Notably, City Spokesperson Chris Jones sent a text message to a reporter after the meeting

(Exhibit 22):

[Assistant City Attorney] Kat[herine Taylor] said tonight that there was a murder at SQ a while back.
She misspoke. Event was a shooting with a malicious wounding conviction inside Scotty Quixx.

42. While Mr. Jones correctly noted that Ms. Taylor’s statement to counsel was factually inaccurate, his account of the events in 2019 were also inaccurate. There was no shooting, malicious wounding or murder inside Scotty Quixx in 2019 or any other time.

43. City Council voted 5-2 in favor of revocation. Yays: Mayor Alexander, Councilwoman Doyle, Councilwoman McClellan; Councilwoman Johnson; Councilman Smigiel. Nays: Councilman Riddick, Councilwoman Royster. Abstaining: Vice Mayor Thomas.

44. No councilperson voting in favor of revocation provided any discussion or explanation of his or her vote.

45. The revocation ordinance, No. 48928 (Exhibit 23) provides in relevant part that “The City of Norfolk has received complaints and identified issues concerning Oates Enterprises II, LLC on property located at 434 Granby Street and known as ‘Scotty Quixx’” and that “the appropriate City investigators and officers have investigated the complaints and have carefully reviewed the operations of said establishment.”

46. Upon information and belief, there have been no complaints from the community about Scotty Quixx and no investigation of whether there was a meals tax or MBAR violation other than an apparent determination that the numbers submitted did not match.

The City Has Neither Found Nor Alleged a Meals Tax Violation and, Even if it Did, the City and City Council Failed to Follow Its Own Policy for Addressing Discrepancies in Meals Tax and MBAR Reporting or Delinquent Meals Taxes

47. The City has never found or alleged a meals tax delinquency.

48. On July 18, 2017, City Council passed a “A Resolution Approving the Protocol for Delinquent Meal Taxes and Special Exceptions” to address the very situation that is alleged here. Exhibit 24.

49. Revocation of an existing special exception is not a remedy for a reporting inconsistency as has been alleged by the City here.

50. Minutes and video of City Council discussions with staff regarding this Resolution state that it was intended to create certainty for special exception holders in instances of noncompliance in paying meals taxes or inconsistencies in reporting. The audit portion of the Resolution was

created for exactly this situation—inconsistencies in sales reports submitted to ABC and to the City. Businesses that hold special exceptions and submitted conflicting numbers for their sales would be referred to the City Attorney’s office and then the Zoning Administrator and would be flagged in case the business applied for a special exception or modification to their existing one in the future. Exhibits 24, 25.

51. To address delinquency in payment in the special exception context, the Resolution stated:

If meal taxes are not remitted by the due date, a Ten-Day Letter is sent to the operator by the Commissioner of the Revenue. The Ten-Day Letter requires all meals taxes to be paid within ten days of the letter. The Zoning Administrator and Treasurer are copied on the letter.

If the delinquency is not paid in the ten days:

- A criminal summons is issued;
- The Treasurer may impose tax liens;
- And zoning staff conducts an inspection by the 15th of the following month and a Special Exception Notice of Violation is issued with a compliance date.
- Zoning staff performs a re-inspection after the compliance date expires and if violations are found, a Final Letter is sent to the special exception holder by the City Attorney providing thirty days to comply and advising that the special exception may be revoked for non-compliance.
- If meals taxes are still outstanding thirty days after the Final Letter, City staff will prepare the packet for a revocation hearing before City Council.

52. None of the required notices were sent, and Scotty Quixx was never given an opportunity to address any alleged delinquencies before its Special Exception was revoked.

53. Under the City and City Council’s own Resolution, revocation of an existing special exception is not a remedy for reporting inconsistency or even delinquency in payment, without proper notice and opportunity to address the issue.

54. Thus, the City and City Council failed to follow their own policy for instances of reporting inconsistencies as has been alleged here

ABC Has Never Alleged or Determined that there Was an MBAR Violation, and Has Relatively Minor Penalties for First Time MBAR Violators

55. ABC has not charged or found Scotty Quixx in violation of any MBAR requirements.

56. If ABC had alleged an MBAR violation, Scotty Quixx would have an opportunity to contest such allegations through an administrative process before the ABC board, the determination of which is appealable to circuit court. Va. Code § 4.1-227; *see also* Virginia Alcoholic Beverage Control Authority, The Hearings Process, <https://www.abc.virginia.gov/enforcement/hearings-and-appeals/hearings-process> (last visited October 19, 2022).

57. Further, if Scotty Quixx was charged by ABC, it would be a first-time offender of the MBAR rules and would be able to resolve the charge against it by accepting a 10-day suspension or paying a \$1,000 civil penalty as long as the ratio was 30% or higher. 3 VAC § 5-70-210.

58. The City and City Council have intentionally ignored several crucial steps and apparently determined that it has authority to render violation determinations and impose the harsh penalty of revoking Scotty Quixx's Special Exception, a remedy grossly in excess of those imposed by the City under its Resolution and imposed by ABC for MBAR issues. The City and City Council's goal was not to remedy a possible reporting error, but instead to effectively put Scotty Quixx out of business.

COUNT/BASIS FOR APPEAL I- The Revocation Was Invalid, Unreasonable, Arbitrary, Capricious, Not Fairly Debatable and Violated Plaintiffs' Substantive Due Process Rights Because the City Failed to Show an Adequate Trigger for Revocation (Against City Council)

59. Plaintiffs re-allege and incorporate by reference the allegations in the foregoing paragraphs as if fully set forth herein.

60. Plaintiffs have/had a property interest in the revoked Special Exception. *See Ruttenberg v. Jones*, No. 07-1037, 283 Fed. Appx. 121, 129 (4th Cir., June 17, 2008) ("Appellant's admittedly have a property interest in both the ABC license and the conditional-use permit.").

61. The Statement did not affirmatively state that there was a violation of either the meals tax requirements or the ABC MBAR requirements, but rather stated that the numbers were inconsistent and placed the burden on Plaintiffs to prove a negative: that Scotty Quixx did not violate either provision.

62. There was no attempt by the City to show that Scotty Quixx was not current on food and beverage taxes.

63. Rather at the City Council meeting, Assistant City Attorney Taylor admitted, “We just don’t know if those [meals tax] numbers are correct or not.”

64. The City and City Council did not follow its own procedures in instances where there was allegedly an apparent discrepancy between sales figures submitted for meals tax purposes and those submitted to ABC for MBAR or the City’s procedures for addressing potentially delinquent meals taxes.

65. Similarly, regarding the MBAR figures, ABC has not found a violation under its procedures or even alleged one against Scotty Quixx.

66. There was no attempt by the City to show that Scotty Quixx’s MBAR reporting was inaccurate.

67. Therefore, neither of the provisions cited as the bases for revocation of the Special Exception has been triggered and revocation was improper.

68. Because the City failed to show a violation of either provision, City Council’s decision to revoke the Special Exception was unreasonable, arbitrary, and capricious and did not meet the fairly debatable standard.

69. The revocation violated Plaintiffs' substantive due process rights under the 5th and 14th Amendments of the Constitution of the United States and Article I, § 11 of the Constitution of Virginia.

70. An actual, justiciable, and substantial controversy exists between the parties concerning the issues set forth above, and this Court has authority to review the City Council's decision under Virginia Code § 15.2-2285(F) and issue a declaratory judgment regarding same pursuant to Va. Code § 8.01-184.

COUNT/BASIS FOR APPEAL II- City Council's Decision Was Invalid, Unreasonable, Arbitrary, Capricious, Not Fairly Debatable, and Violated Plaintiffs' Substantive Due Process Rights Because Even if There Was an MBAR or Meals Tax Reporting Inconsistency or Violation, Revocation Was An Unduly Harsh Penalty that Was Imposed Due to the City's Animus Against Nightlife Bars and Restaurants In the Downtown Norfolk Area and Their Clienteles and Not Due to Any Rational Basis (Against City Council)

71. Plaintiffs re-allege and incorporate by reference the allegations in the foregoing paragraphs as if fully set forth herein.

72. Assuming *arguendo* that there was a meals tax violation or inconsistency between ABC and meals tax reporting, the City and City Council should have followed the procedures set forth in its resolution discussed above.

73. Under the policy, if there is an inconsistency between meals tax and MBAR reporting, the special exception is not revoked. Instead, the special exception holder is flagged in case it seeks a new special exception or modification of the existing one.

74. The City and City Council alleged that there was a reporting inconsistency but improperly failed to follow their own policy.

75. Further, its own Resolution, the City and/or City Council does not revoke a special exception because of a single meals tax delinquency without giving the holder an opportunity to correct the issue.

76. Additionally, assuming *arguendo* that there was an ABC MBAR issue, ABC allows first-time violators to pay a minor civil penalty or serve a short suspension period.

77. Both the ABC and the City Council recognize that reporting issues like those alleged do not create emergent, dangerous situations that threaten public safety or health where the right to operate must be revoked expeditiously. Rather, they impose relatively minor consequences that encourage compliance, not shut a business down.

78. Nevertheless, based on an alleged first-offense of a mere reporting issue and without giving Scotty Quixx an opportunity to remedy the situation, the City and City Council have decided to violate their own Resolution and revoke the Special Exception and effectively shut Scotty Quixx down.

79. Further, the City's and City Council's actions are not motivated by any rational basis. The alleged reporting issue(s) did not cause imminent health or safety concerns of such extent that revocation for a single offense without an opportunity to cure is a reasonable or appropriate recourse.

80. Rather, as shown by things such as (i) Councilwoman Doyle's comments in March 2022; (ii) the comments of the City Manager on August 5, 2022, (iii) City Council's September 13, 2022 ordinance tightening rules governing nightlife bars and restaurants; (iv) the fact that the Statement issued to Scotty Quixx was mistakenly addressed to Legacy, (v) the Assistant City Attorney's statements before City Council advising that these examination of the records of entities were motivated by recent violent incidents in the general area; (vi) the City's request for MBAR

information for nightlife bars and restaurants in the vicinity of the Downtown Norfolk area; (vii) the ABC and the City's joint operation at Scotty Quixx on September 10, 2022; and (viii) the City and City Council's action(s) against other nightlife establishments in the Downtown Norfolk area since August 5, 2022, the City and City Council harbor a misdirected animus toward nightlife bars and restaurants in the Downtown Norfolk area and their clientele triggered by recent incidents that had nothing to do with Scotty Quixx. Plaintiffs' investigation continues and will continue in the discovery process, and they may discover additional instances where the City and/or City Council articulated or acted upon such animus and stereotypes.

81. The City and City Council's action was not consistent with law, or proportional to or intended to address alleged reporting issues. The alleged reporting issues were a mere pretext for the City and City Council to act on their animus and inaccurate stereotypes about Downtown Norfolk area nightlife bars and restaurants and their clientele and wrongfully target Scotty Quixx. Notably, such pretext was only found after the City Manager stated that staff would be scouring conditional use permits, and implicitly the synonymous special exceptions, of Downtown Norfolk area businesses in search of violations and City staff followed through on these directives.

82. "[G]overnment officials cannot simply act solely in reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety or otherwise dealing with zoning. Simply put, the dispositive principle is that private biases may be outside the reach of the law, but the law cannot, directly, or indirectly, give them effect." *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989) (citations, alteration marks, and internal quotation marks omitted).

83. City Council's decision was unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare of the community.

84. City Council's revocation of the Special Exception was arbitrary, capricious and violated the fairly debatable standard.

85. The revocation violated Plaintiffs' substantive due process rights under the 5th and 14th Amendments of the Constitution of the United States and Article I, § 11 of the Constitution of Virginia.

86. An actual, justiciable, and substantial controversy exists between the parties concerning the issues set forth above and this Court has authority to review the City Council's decision under Virginia Code § 15.2-2285(F) and issue a declaratory judgment regarding same pursuant to Va. Code § 8.01-184.

COUNT/BASIS FOR APPEAL III- City Council's Decision Violated Plaintiffs' Equal Protection Rights (Against City Council)

87. Plaintiffs re-allege and incorporate by reference the allegations in the foregoing paragraphs as if fully set forth herein.

88. City Council's actions in revoking the Special Exception because of mere alleged reporting inconsistencies was in violation of Scotty Quixx's equal protection rights under the 14th Amendment to the Constitution of the United States.

89. City Council has established a Resolution for how to address similarly-situated businesses with alleged reporting inconsistencies providing that in the event there was an inconsistency between meals tax numbers and MBAR numbers, the business would be flagged in the event that it sought a new special exception or modification to the existing one. That policy did not provide for revocation of a special exception because of a single reporting inconsistency.

90. Upon information and belief, under current law, City Council has not revoked a business's special exception or conditional use permit for a single reporting inconsistency like it has here.

91. Upon information and belief, under current law, City Council has not revoked a business's special exception or conditional use permit for a single meals tax delinquency without following its required procedure in its Resolution.

92. Upon information and belief, under current law, City Council has not revoked a business's special exception or conditional use permit for a single MBAR reporting issue or violation.

93. The City and City Council's violation of their own policy and disparate treatment of similarly-situated businesses versus Scotty Quixx is due to the City and City Council's animus towards nightlife bars and restaurants in the Downtown Norfolk area and their clientele and has no rational basis.

94. An actual, justiciable and substantial controversy exists between the parties concerning the issues set forth above and this Court has authority to review the City Council's decision under Virginia Code § 15.2-2285(F) and issue a declaratory judgment regarding same pursuant to Va. Code § 8.01-184.

COUNT/BASIS FOR APPEAL IV- Violation of Plaintiffs' Procedural Due Process Rights (against City Council)

95. Plaintiffs re-allege and incorporate by reference the allegations in the foregoing paragraphs as if full set forth herein.

96. City Council violated Plaintiffs' procedural due process rights by proceeding to a revocation without providing notice of the specific violation that was allegedly the basis for revocation.

97. City Council violated its own Ordinance No. 38,746 ¶ (c), that requires it to include a concise explanation of the principles of law under which revocation of the permit is being sought.

98. City Council violated Plaintiffs' procedural due process rights by refusing to continue the scheduled public hearing to a later date to enable Scotty Quixx's FOIA requests to be answered and for Plaintiffs to otherwise understand the basis of the desired revocation.

99. City Council violated Plaintiffs' procedural due process rights by refusing to allow Scotty Quixx's counsel to speak after Assistant City Attorney Taylor's rebuttal to correct an egregious misrepresentation that there had been a shooting and murder inside of Scotty Quixx in 2019. After hearing and being influenced by this egregious misrepresentation, City Council proceeded to a vote without giving Scotty Quixx an opportunity to controvert this clear misrepresentation. This misrepresentation by the City, especially when combined with City Council's not giving Plaintiffs an opportunity to controvert the misrepresentation was particularly damaging in the current environment where City Council is concerned about gun violence associated with nightlife bars and restaurants in the Downtown Norfolk area. Thus, the misrepresentation itself coupled with City Council's refusal to allow Scotty Quixx's counsel to even attempt to address it violated Plaintiffs' procedural due process rights.

100. City Council violated Plaintiffs' procedural due process rights by not giving them a meaningful opportunity to be heard before it revoked the Special Exception.

101. The City Attorney's email message wherein City Council members were copied that stated a similar falsehood also violated Plaintiffs' procedural due process rights.

102. Upon information and belief, City Council violated Plaintiffs' procedural due process rights by reviewing material presented by the City Attorney's Office that was not made publicly available, including to Plaintiffs.

103. Therefore, the revocation violated Plaintiffs' procedural due process rights under the 5th and 14th Amendments of the Constitution of the United States and Article I, § 11 of the Constitution of Virginia.

104. An actual, justiciable, and substantial controversy exists between the parties concerning the issues set forth above and this Court has authority to review the City Council's decision under Virginia Code § 15.2-2285(F) and issue a declaratory judgment regarding same pursuant to Va. Code § 8.01-184.

COUNT V- Liability Pursuant to 42 U.S.C. § 1983 (against both Defendants)

105. Plaintiffs re-allege and incorporate by reference the allegations in the foregoing paragraphs as if fully set forth herein.

106. The City and City Council's actions in revoking the Special Exception were done under color of state and local law and pursuant to the official policies and practices of the City Council and the City.

107. City Council's revocation of the Special Exception violated Plaintiffs' substantive due process rights, equal protection rights, and procedural due process rights.

108. City Council's revocation of the Special Exception has violated and continues to violate Plaintiff's rights, privileges, and immunities secured by the Fifth and Fourteenth Amendments to the United States Constitution and by the Civil Rights Act, 42 U.S.C. §§ 1981-1983.

109. Scotty Quixx has and will suffer damages in the form of lost sales, lost profits, loss of reputation, loss of employees, loss of inventory, harm to its marketing efforts, and potentially other damages because of the City and City Council's unconstitutional actions of at least \$1,000,000.00, the exact amount to be proven at trial.

110. Oates Enterprises will suffer damages in the form of lost rental income and diminished real property value because of the City and City Council's unconstitutional action of at least \$1,000,000.00, the exact amount to be proven at trial.

111. As Plaintiffs' constitutional rights were violated and Defendants are liable under 42 U.S.C. § 1983, Plaintiffs are entitled to payment of its attorney fees and costs pursuant to 42 U.S.C. § 1988.

COUNT VI- Preliminary Injunction (against both Defendants)

112. Plaintiffs re-allege and incorporate by reference the allegations in the foregoing paragraphs as if fully set forth herein.

113. Given that its business has been functionally shut down, Scotty Quixx is suffering and will continue to suffer irreparable harm if a preliminary injunction is not granted. The longer this business is prevented from operating, the more it will be damaged and the more difficult it will be to reopen profitably because of spoliation of product, difficulty in retaining key employees that will be forced to seek other employment, harm to its existing customer relationships, and harm to its brand and reputation. It is likely that an extended closure pending trial will cause irreparable harm to Scotty Quixx.

114. Scotty Quixx's business model does not allow it to operate profitably under its by-right use only without the Special Exception.

115. Oates Enterprises is suffering and will continue to suffer irreparable harm if a preliminary injunction is not granted. The longer Scotty Quixx is prevented from operating, the more Oates Enterprises risks losing significant rental income. If Scotty Quixx is damaged by a long closure while this case is pending, as stated above, Oates Enterprises risks losing a quality long-term tenant. A long period of closure is likely to diminish the real property value and decrease

Oates Enterprises's revenue. It is likely that an extended closure pending trial will cause irreparable harm to Oates Enterprises.

116. The balance of the equities is in Plaintiffs' favor.

117. The City and City Council will suffer minimal harm if the requested injunctive relief is granted. The City has alleged no danger to health or safety because of this business being open.

118. Plaintiffs will likely succeed on the merits of their claims.

119. The public interest will be served by granting a preliminary injunction in favor of Plaintiffs. Scotty Quixx operates a restaurant and bar that pays governmental entities, including the City, tax revenue and serves the community of Norfolk. Further, numerous employees depend on Scotty Quixx for their livelihoods.

120. Additionally, having a closed commercial space in the Downtown Norfolk area while this case is pending would be contrary to the public interest.

COUNT VII- Permanent Injunction (against both Defendants)

121. Plaintiffs re-allege and incorporate by reference the allegations in the foregoing paragraphs as if fully set forth herein.

122. It is appropriate for this Court to grant a permanent injunction in favor of Plaintiffs to prevent the City and City Council from executing its improper revocation of the Special Exception and taking similar action in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and hold as follows:

A. That City Council's revocation of the Special Exception violated Plaintiffs' substantive due process rights under the 14th Amendment of the Constitution of the United States and Article I, § 11 of the Constitution of Virginia;

B. That City Council's revocation of the Special Exception was unreasonable, arbitrary, and capricious and did not meet the fairly debatable standard;

C. The City Council's revocation of the Special Exception violated the City and City Council's own policy and procedure as set forth in the Resolution;

D. That City Council's revocation of the Special Exception violated Plaintiffs' equal protection rights under the 14th Amendment of the Constitution of the United States;

E. That City Council's revocation of the Special Exception violated Plaintiffs' procedural due process rights under the 5th and 14th Amendments of the Constitution of the United States and Article I, § 11 of the Constitution of Virginia;

F. That the City Council's revocation of the Special Exception is invalid and void;

G. That Plaintiff Scotty Quixx is entitled to damages payable by the City and City Council, jointly and severally, under 42 U.S.C. § 1983 in the amount of at least \$1,000,000.00, the exact amount to be proven at trial, due to its constitutional rights being violated;

H. That Plaintiff Oates Enterprises is entitled to damages payable by the City and City Council, jointly and severally, under 42 U.S.C. § 1983 in the amount of at least \$1,000,000.00, the exact amount to be proven at trial, due to its constitutional rights being violated;

I. That Plaintiffs are entitled to have their attorney fees and costs incurred in this action paid by the City and City Council, which are jointly and severally liable, pursuant to 42 U.S.C. § 1988;

J. That a preliminary injunction order be issued: (i) enjoining the City and City Council from enforcing the revocation of the Special Exception; (ii) requiring the City and City Council to allow

Plaintiff Oates Food Services to operate Scotty Quixx in accordance with the Special Exception; and (iii) enjoining the City and City Council from interfering with such operation during the pendency of this case due to the alleged bases set forth in the Statement.

K. That a permanent injunction order be issued: (i) enjoining the City and City Council from enforcing the revocation of the Special Exception; (ii) requiring the City and City Council to allow Plaintiff Oates Food Services to operate Scotty Quixx in accordance with the Special Exception; and (iii) enjoining the City and City Council from interfering with such operation due to the alleged bases set forth in the Statement.

L. Such other relief that this Court deems just and proper.

RULE 3:21 Jury Demand: Plaintiffs demand a trial by jury on all issues so triable.

RULE 3:25 Notice: Plaintiffs seek recovery of its attorney fees and costs incurred in this case pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

OATES FOOD SERVICES II, LLC,

a Virginia limited liability company,



Of Counsel

Richard H. Ottinger, Esq. (VSB No. 38842)
W. Thomas Chappell, Esq. (VSB No. 87389)
WOODS ROGERS VANDEVENTER BLACK PLC
101 W. Main Street, 500 World Trade Center
Norfolk, VA 23510
(757)446-8600- Telephone
(757)446-8670- Facsimile
richard.ottinger@wrvblaw.com
thomas.chappell@wrvblaw.com

OATES ENTERPRISES II, LLC,
a Virginia limited liability company,



Of Counsel

Kevin E. Martingayle, Esq. (VSB No. 33865)
BISCHOFF MARTINGAYLE PC
3704 Pacific Avenue, Suite 300
Virginia Beach, Virginia 23451
(757)416-6009- Telephone
(757)428-6982- Facsimile
martingayle@bischoffmartingayle.com

4890-7239-7627, v. 1