

EXECUTIVE SUMMARY

For Bill Analysis

City of Charleston Late Night Bar Moratorium Ordinance

September 15, 2014

Chief Analyst: Elliott A. Smith, Esq.

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I. Current Situation.

- Currently, downtown Charleston establishments that serve on-premises alcohol after midnight (“OPAAM”) must comply with multiple state and municipal regulations.
- The 2013 Late Night Entertainment Establishment (“LNEE”) Ordinance was enacted to address the recent increase in OPAAMs, asserting that the increase harms residential quality of life and places an unnecessary burden on law enforcement.

II. Proposed Changes.

- The Bill would prevent the licensing of any new OPAAM in an area encompassing the majority of downtown Charleston.
- The purpose of the Bill is to allow for a study period in which to develop additional regulations of late night entertainment establishments.

III. Legal and Policy Analysis.

General Background

- A moratorium is a crisis-management tool to be used in the case of public necessity.
- Like zoning regulations, a moratorium is an exercise of municipal police power.

Standard

- A moratorium is valid if enacted for the general public welfare, which is historically a broadly interpreted standard. A moratorium is invalid, however, if it is arbitrary or unreasonable.
- Local planning commission regulations must be based upon “careful and comprehensive surveys and studies of existing conditions and probable future development.”

Analysis

A) PURPOSE.

The purpose of the Bill is for DPPS to conduct a study of OPAAMs in order to recommend additional regulations.

- 1) **Measure of success:** The Bill does not articulate the circumstances under which the Moratorium will have achieved its purpose, nor does it articulate any quantifiable timetables to which DPPS may be held accountable when reporting to City Council.

B) NECESSITY.

It must be necessary to implement the Moratorium in order to conduct a study period.

- 1) **Study period:** Please explain why the Bill's purpose of studying OPAAMs could not be conducted without a moratorium.
- 2) **2013 LNEE Ordinance:** Please demonstrate the studies upon which DPPS relied in order to conclude that the moratorium is necessary in spite of the existence of the 2013 LNEE Ordinance, which was enacted for a substantially similar purpose.
- 3) **Law enforcement funding model:** Please demonstrate the studies upon which DPPS relied in order to conclude either that the current law enforcement funding model is insufficient, or that modifications to the current model are unreasonable alternatives by which to address the growth of OPAAMs.

C) FINDINGS.

By voting in favor of the Bill, City Council attests that the findings asserted by the Bill are facts supported by competent evidence.

The Bill states that OPAAMs are harming **residential quality of life**.

- 1) **Law enforcement statistics:** DPPS has not presented studies indicating reliable trends that OPAAMs are causing a disproportionate increase in crime.
- 2) **Residential property values:** DPPS has not reconciled the claim that OPAAMs are substantially harming residential quality of life with data indicating an increase in residential property value in areas near the Entertainment District.

The Bill states that the Moratorium is necessary because OPAAMs are harming the **diversity of commercial use**.

- 1) **Prior uses:** DPPS has not presented data indicating that OPAAMs are consuming alternative commercial uses, as opposed to opening in previously vacant buildings, or previously nonviable businesses.
- 2) **Commercially viable alternative:** DPPS has not presented careful studies that articulate with reasonable specificity a viable alternative commercial model.
- 3) **Daytime commercial activity:** DPPS has not presented studies supporting its conclusion that the current regulatory status quo will stifle daytime commercial activity.
- 4) **Relevance of data:** The Bill is premised upon the impact of businesses open after midnight. DPPS has presented, as support for the Moratorium, a "Late Night Occupancy Map" that includes many businesses that are not open past midnight, and has not explained why these businesses were included.

- 5) **Geographic area:** DPPS has not demonstrated data or study upon which it relied to conclude that there has been a sudden, unanticipated change in the sectors outlined by the Moratorium Area as to justify the Moratorium.

IV. Economic Impact.

A) Industry Growth.

The Food and Beverage (F&B) industry is a pivotal factor in Charleston's tourism, employment, and tax revenue sectors. The successes of this growth are driven by the anticipation of continued growth. Burdensome regulations that lack a clear purpose may result in a chilling effect in this crucial industry, in turn resulting in discouraging a greater degree of growth and investment than city officials may have intended by enacting a moratorium.

B) Employment.

In 2013, the "Food Preparation and Service Related" industry employed 30,480 (10.3% of greater Charleston population); an 11.6% increase since 2000. With steadily increasing population both expected and desired, chilling the growth of a significant employer could produce unintended consequences.

C) Tax Revenue.

In 2013, Hospitality Tax revenue the City of Charleston collected approximately \$11.8 million from the F&B industry. In 2014, the City of Charleston is projected to collect more than \$13 million in Hospitality Tax revenue.

D) Commercial Property Values.

In the context of commercial zoning, regulations that prevent property from being used or sold for a viable commercial purpose tend to - as a general truism - substantially decrease the value of that property. This is especially true in Charleston where there is a very high demand for OPAAMs.

E) Attracting and Retaining a Young, Creative Work Force.

In recent years, Charleston has accomplished what cities across the country are desperate to achieve: it has successfully created an environment where young, talented, creative professionals want to live and thrive. In order to preserve this fragile ecosystem that Charleston has worked so hard to attain, it is essential to maintain F&B and nightlife sectors that are both thriving *and are perceived as such* by this demographic.

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PRELIMINARY STATEMENT

The purpose and intent of this Bill Analysis is to help provide City Council members and other interested parties with a more comprehensive understanding of the intended and unintended consequences of the moratorium ordinance (“Bill”), in order to inform a well-reasoned vote.

SUMMARY ANALYSIS

Currently, downtown Charleston establishments that serve alcohol after midnight must comply with multiple state and municipal regulations, including the Late Night Entertainment Establishment ordinance of 2013. The Bill provides for new regulation by temporarily prohibiting licensing of certain late night establishments in an area encompassing the majority of downtown Charleston. The purpose of the Bill is to allow for a study period in which to formulate additional regulations of late night establishments.

A moratorium is valid if enacted for the general public welfare, which is historically a broadly proscribed standard. A moratorium is invalid, however, if it is arbitrary or unreasonable. The Bill presents several significant concerns in this respect.

PROCEDURAL HISTORY

On **May 27, 2014**, Mayor Riley and the Department of Planning, Preservation, & Sustainability (“DPPS”) proposed the Late Night Entertainment Zoning Overlay (“Zoning Overlay”), which passed first reading with a 12-1 vote by City Council.¹

On **August 20, 2014**, Mayor Riley and DPPS recommended that the Planning Commission move to defer the Zoning Overlay, and instead recommend to City Council a 3-year Late Night Bar Moratorium (“Moratorium”). The Planning Commission voted unanimously against recommending a 3-year Moratorium. It narrowly passed a motion recommending a 1-year moratorium by a 5-4 vote, with four members voting to recommend no action. The Commission voted unanimously in favor of deferring the Zoning Overlay.²

¹ See Amended City Council Agenda & Documentation, Minutes, May 27, 2014 (available at www.Charleston-SC.gov/AgendaCenter).

² See Planning Commission Report, Aug. 20, 2014 (available at www.Charleston-SC.gov/AgendaCenter).

DEFINITIONS

- “Bill” refers to the Moratorium Ordinance prior to vote.
- “CPD” refers to the City of Charleston Police Department.
- “DPPS” refers to the Department of Planning, Preservation, and Sustainability.
- “Entertainment District” refers to the area patrolled by CPD Peninsula Patrol Division Team 2, and is generally the area outlined by the Moratorium Area.
- “F&B” refers generally to the Food and Beverage industry as a whole.
- “LNEE” refers to “**L**ate **N**ight **E**ntertainment **E**stablishments.”
- “2013 LNEE Ordinance” refers to the LNEE Ordinance passed in 2013.
- “Moratorium Area” refers to the zone outlined by the Bill.
- “OPAAM” refers to businesses serving **O**n-**P**remises **A**lcohol **A**fter **M**idnight.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. PRESENT SITUATION AND PROPOSED CHANGES.

This section describes how the Bill intends to affect the current status quo. As such, it explains the present situation of the Bill's subject matter, and then explains the proposed changes.

1. Present Situation.

Currently, a new establishment serving on-premises alcohol after midnight ("OPAAM") must comply with multiple municipal and state regulations in order to open for business.

MUNICIPAL REQUIREMENTS

a. 2013 Late Night Entertainment Establishment Ordinance.

Background

On July 1, 2013, City Council enacted the "Late Night Entertainment Establishment" ("LNEE") Ordinance.³ A LNEE is a business that:

1. Is not located in a structure that provides "accommodations";⁴
2. Is open after midnight;
3. Is licensed to allow on-premises consumption of alcoholic beverages; and
4. Is required to have a Class 7(a) business license.

State law requires that all establishments that serve liquor must also serve food. Class 7(a) and 7(b) essentially separates such establishments into two categories: nightclubs and restaurants. Class 7(a) defines night clubs as establishments "which derive thirty-five (35%) or more of their gross income from the sale of beer, wine and/or alcoholic beverages."

³ See Charleston, S.C., Mun. Ordinances, Chapter 17, Article VIII (available at www.MuniCode.com/library/sc/charleston)

⁴ "Accommodations" as defined in section 54-120 of the municipal zoning ordinance refers to commercial "living or sleeping units, for remuneration, to one or more individuals where the intended and/or usual occupancy would not exceed twenty-nine (29) consecutive days, including hotels, motels, inns, bed and breakfasts, rooming and boarding houses, hostels", etc.

Purpose

The purpose of the 2013 LNEE Ordinance was to address the following issues, summarized as follows:

1. In recent years, the number of establishments that offer on-premises consumption of beer, wine and alcoholic beverages in the early morning hours has increased;
2. Due to their hours of operation, the entertainment they provide and their numbers of patrons coming and going, these establishments often create:
 - Noise;
 - Litter;
 - Traffic;
 - Other deleterious effects which disturb the peace, quietude and good order of the community; and
 - Unnecessary burdens on public safety officers.

Requirements

Currently, a LNEE must submit an application to the LNEE Review Committee. The application must include, among other requirements, (1) a **security management** plan, (2) a **waste management** plan, and (3) an **emergency action** plan. The security management plan must describe with particularity how the LNEE will control crowds and underage drinking.

Once an application has been accepted, the LNEE Ordinance mandates the following Operational Regulations upon all LNEEs:

1. **Security:** LNEEs must employ door security and indoor security. The required number of such staff is calculated according to a preset occupancy level.
2. **Crowd Management:**
LNEEs must:
 - a. Monitor both on-site and off-site parking areas to prevent them from becoming “outdoor gathering areas”;
 - b. Identify off-site areas “used for parking” by patrons, and clear both said off-site parking and on-site parking areas within thirty (30) minutes of closing;
 - c. “Employ crowd management techniques to assure that patrons are adequately disbursed [sic, “dispersed”] throughout the establishment”;
 - d. Maintain patron lines outdoors so that they do not block the sidewalk;
3. **Noise:** The LNEE Ordinance requires businesses to shut their doors and windows when playing music after 11:00. Even after doors and windows are shut, the LNEE violates the Ordinance if it generates noise that can be heard within fifty (50) feet of its entrance.

4. **Waste Management:** LNEEs are responsible for maintaining sidewalks abutting the establishment.

Penalties

Livability Court

Violations of the above-referenced LNEE Operational Regulations result in citations to be heard in Charleston’s Municipal Livability Court. As a municipal court, the Livability Court has no jurisdiction over civil matters.⁵ As such, violations of LNEE Operational Regulations are criminal in nature, and may therefore result in fines and/or incarceration.

LNEE Review Committee

The LNEE Ordinance establishes a LNEE Review Committee (“LNEE Committee”). The LNEE Committee consists of seven (7) members who are appointed by the mayor.⁶

In addition to reviewing, approving, and disapproving LNEE applications, the LNEE Committee establishes guidelines and penalties for LNEE regulation. At a meeting with the undersigned on September 9, 2014, CPD officials stated that the LNEE Committee has determined that a LNEE that commits four (4) or more Operational Requirement violations is subject to having its business license revoked.

The undersigned sought further information on LNEE Committee decisions, but the committee does not appear to be referenced on the City of Charleston website, and no agenda or minutes could be located there.

b. Licensing Requirements for All Businesses.

All businesses (whether LNEEs or otherwise) operating within the City of Charleston are required to obtain a business license for each location, and must annually renew the license.⁷ This process is briefly summarized as follows:⁸

1. **Occupancy:** The building is subject to inspection by the fire marshal. If there are no issues regarding compliance, the applicant receives certificates of zoning compliance and occupancy.

⁵ See S.C. Code s. 14-25-45.

⁶ See Charleston, S.C., Mun. Ordinances, s. 17-127.

⁷ See Charleston, S.C., Mun. Ordinances, s. 17-16.

⁸ See Business License Ordinance, available at www.Charleston-SC.gov (Home > Departments > Budget, Finance & Revenue Collections > Revenue Collections Division > Business License Information > New Business Licenses).

2. **Health Inspection:** Once compliance is certified, the applicant must undergo health inspection and certification by the Dept. of Health and Environmental Control (DHEC).
3. **Auditing:** The applicant must consent to auditing and inspection of its books and records.
4. **Parking Requirements:** New businesses must also comply with municipal zoning requirements for off-street parking. The number of parking spaces required is determined by factoring the business' particular use (e.g., art gallery, restaurant, car wash) and its square footage.⁹

STATE REQUIREMENTS

Any new OPAAM must comply with the following State requirements prior to opening:¹⁰

1. **Criminal history background checks** on every principal, officer, and employee.
2. **Tax audit:** A license or permit cannot be issued if the applicant or any principal has any outstanding state tax liabilities.
3. **Sign Posting** by a SLED agent for at least 15 days.
4. **Newspaper Advertisements** for three (3) consecutive weeks.
5. **Public Protest and Administrative Hearing:** Residents of the county in which an alcohol permit is requested (or living within 5 miles of the requested location) may protest the issuance of the permit in writing. Upon the protestant's electing to attend an Administrative Law Hearing, a hearing will be held wherein the Court will determine whether a permit should be issued.
6. **Location Requirements:** Business must be at least 300 feet from a church, school or playground if located within the city.
7. **Use and Infrastructure Requirements:**
An OPAAM must:
 - a. Be primarily engaged in preparing and serving meals;
 - b. Have seating for at least 40 people;
 - c. Store non-prepackaged food stuffs to serve hot meals for 40 people; and
 - d. Maintain a separate kitchen and functioning cold storage.

2. Proposed Changes

In addition to the regulations imposed by the 2013 LNEE Ordinance, the Bill amends Article 9 of the City of Charleston's Zoning Ordinance by adding a provision mandating that for the next

⁹ See Zoning Ordinance of Charleston, Art. 3, Part 4, ss. 54-315 – 54-320 (available at www.MuniCode.com/library/sc/charleston).

¹⁰ See S.C. Code s. 61-6, "Alcoholic Beverage Control Act."

three (3) years,¹¹ the City of Charleston will not process any applications or process any business licenses if:

1. The intended use is to allow on-premises consumption of alcoholic beverages after midnight; and
2. The business is located in the Late Night Bar Moratorium Area (“Moratorium Area”).

Generally, the Moratorium Area encompasses: King St., from Broad St. to Poplar St.; Meeting St., from Broad St. to Cooper St., and; East Bay St., from Queen St. to Pinckney St.

Exemptions.

The Bill provides several exemptions for businesses that would otherwise be subject to the Moratorium.¹²

1. **Hotels:** Hotels with at least twenty (20) rooms may serve alcoholic beverages after midnight even if they are within the Moratorium Area;
2. **Existing and Pending OPAAMs:** The Bill expressly provides for certain exceptions that help to maintain the current status quo of OPAAMs in the Moratorium Area. These exceptions include current businesses, changes to current businesses, and sales of businesses:
 - a. **OPAAMs Currently Open:**
 - i. OPAAMs that are open for business on the date that the Bill is ratified are exempt from the Moratorium.¹³
 - b. **OPAAM Expansions/Modifications:**
 - i. The Bill expressly exempts existing OPAAMs that undergo expansion or modification.¹⁴
 - c. **New OPAAM Within 3 Years of Previous OPAAM:**
 - i. The Bill expressly exempts property where a lawful OPAAM was located within three [3] years of ratification of the Bill.
 - d. **Pending OPAAM:**
 - i. The Bill expressly exempts OPAAMs “on file” with DPPS and vested under statutory or common law.

¹¹ On Aug. 20, 2014, the Planning Commission voted unanimously against recommending a 3-year Moratorium. It narrowly passed a motion recommending a 1-year moratorium by a 5-4 vote, with four members voting to recommend no action.

¹² See Bill at s. 54-972., “Exemptions.”

¹³ See Drafting Comments at 22, *supra*.

¹⁴ This exception does not necessarily apply, however, if the expansion or modification requires a variance. The Bill does not make clear whether a business that requires a variance to expand or modify would also be required to close at midnight if the variance is granted.

The Bill does not clarify the effective filing date required for this exemption.¹⁵

a. Findings Asserted as Grounds for the Moratorium.

The Bill states that City Council members affirm that certain statements are facts, which facts provide the grounds for the Moratorium.¹⁶ As set forth below, these findings are categorized according to their subject matter.

i. *Diversity of Commercial Use.*

The Bill states that City Council asserts the following statements as facts:

1. A predominance of one type of use or business will discourage the diversity that has made these corridors successful;
2. Over the past five years, the number of stand-alone establishments serving beer, wine or alcohol after midnight for on-premises consumption on the King, East Bay and Market corridors has greatly expanded; and
3. The continued unbridled proliferation or concentration of this use along the King, East Bay and Market corridors will change the ambiance of these corridors, diminish their diversity and vibrancy and stifle their use during daytime hours.

ii. *Residential Quality of Life.*

The Bill states that City Council asserts the following statements as facts:

1. The OPAAM expansion has caused:
 - a. An increase in noise during and beyond hours of operation;
 - b. An increase in litter and other debris along the sidewalks;
 - c. An increase in the number of police officers required to maintain the peace, good order and quality of life for nearby residents.

b. Purpose of the Moratorium.

The purpose of the Moratorium is to allow DPPS sufficient time to study the Moratorium Area in order to formulate additional regulations of OPAAMs to be recommended to City Council.

¹⁵ See “Drafting Notes” discussion, *supra*.

¹⁶ See Bill at s. 54-970, “Findings.”

The Bill provides that DPPS will consult with other city departments, business owners, and community stakeholders, and that it will report to City Council every six (6) months regarding the status of the study.¹⁷

B. COMMENTS.

1. Legal and Policy Analysis.

General Background on Land Use Moratoria

A land use moratorium is a mechanism that suspends the right of property owners to develop property in a manner that would otherwise be in compliance with all zoning requirements. While municipal power to enact moratoria is not explicit, it derives from the same source of authority as zoning regulations.^{18, 19} Zoning is a function of police power. A moratorium is therefore invalid if it “has no foundation in reason, and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense.”²⁰

Accordingly, South Carolina law provides:

Functions, powers, and duties of local planning commissions:

It is the function and duty of the local planning commission, when created by an ordinance passed by the municipal council or the county council, or both, to undertake a continuing planning program for the physical, social, and economic growth, development, and redevelopment of the area within its jurisdiction. The plans and programs must be designed to promote public health, safety, morals, convenience, prosperity, or the general welfare as well as the efficiency and economy of its area of jurisdiction.²¹

¹⁷ Presumably, if the Moratorium were amended to last for one (1) year as opposed to three (3) years, the reporting frequency would have to be adjusted accordingly.

¹⁸ See Simpkins v. City of Gaffney, 431 S.E.2d 592, 315 S.C. 26 (S.C.App. 1993) (“South Carolina’s legislature granted municipal corporations in this state the power to regulate buildings and structures within their municipal limits when, in enacting section 5-23-10 of the Code of Laws of South Carolina (1976), it authorized them to enact zoning ordinances.”).

¹⁹ See Home Rule Act S. C. Code s. 5-7- 10.

²⁰ Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926); see also Restaurant Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

²¹ S.C. Code s. 6-29-340.

Development and Interpretation

Applying this standard, the general trend over the years has been to grant municipalities wide discretion when enacting land use regulations. In the years since Euclid v. Ambler, where the U.S. Supreme Court first meaningfully examined the issue of zoning authority, “[z]oning authorities began taking initiatives that the Court . . . would never have imagined.”²² Given this evolution, municipalities have enacted, and courts have upheld, broad ranging land use regulations enacted for the purpose of protecting the public welfare.²³

Whether a particular zoning or moratoria action is indeed enacted “for the public welfare” is a notoriously abstract concept that does not easily lend itself to definitive line drawing. The U.S. Supreme Court has noted that “[t]he line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.”²⁴

On the one hand, moratoria are widely used and important tools for municipal planning that may be instrumental to preserving the public welfare when used in the appropriate circumstances. Nonetheless, this broad standard is not unlimited, and thus moratoria raise concerns with which city officials should be aware.^{25, 26} For example, the Pace Law School Land Use Law Center research aid entitled “Local Leaders Guide to Moratorium on Development” (“Guide”) – intended to provide local leaders with guidance when enacting a moratorium – notes:

A moratorium is, from one perspective, the most extreme land use action that a municipality can take because it suspends completely the rights of owners to use their property. Seen in this light, it is advisable to precede the adoption of a moratorium by findings that confirm the necessity of this action.²⁷

While the Guide recognizes that moratoria may be valuable and even necessary municipal tools, it also expressly and conspicuously advises local leaders to “USE CAUTION WHEN

²² Dukeminier, Property, Sixth Ed. at p. 872.

²³ See, e.g., Stoyanoff v. Berkeley, 458 S.W.2d 305, 308 (Mo. 1970) (upholding aesthetic regulations against unconventional architecture for the purpose of protecting the “French Provincial, English Tudor, and Colonial architecture of the community.”).

²⁴ See Euclid, 272 U.S. 365, 387 (1926).

²⁵ Nectow v. City of Cambridge, 277 U.S. 183 (1928) (“The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.”).

²⁶ All states derive their justification for enacting a moratorium from authority to exercise police power. As such, certain fundamental concepts are relevant in all states, such as the concepts referenced here.

²⁷ Pace Land Use Law Center, “Local Leaders Guide to Moratorium on Development” Cluster Development, Series III: Innovative Tools and Techniques (available at: <http://tinyurl.com/p6x8scr> (last visited August 29, 2014)).

ADOPTING MORATORIA ON DEVELOPMENT” (emphasis in original). For example, Tarrytown, NY adopted a moratorium on cellular towers in the name of protecting the public health and welfare. When the moratorium was challenged, the city admitted that it did not have *hard evidence* that the cellular towers actually posed an imminent threat to the public welfare. The court overturned the moratorium, explaining the fundamental principle that “a municipality may not invoke its police powers solely as a pretext to assuage strident community opposition.”²⁸

Applicable Standards

From a basic policy perspective, the fundamental question for a city official to consider is whether the Moratorium is arbitrary. This requires determining whether the Moratorium is supported by competent evidence of an articulable threat to the public welfare, or, in contrast, whether it is merely supported by unverified generalities.

South Carolina law provides that a local planning commission may exert state police power by enacting specific planning elements, but that those regulations “*must be based upon careful and comprehensive surveys and studies of existing conditions and probable future development and include recommended means of implementation.*”²⁹ Similarly, the South Carolina Court of Appeals recently invalidated a city Board of Zoning Appeals decision to deny a property owner’s special exception request to sell fireworks. The Court found that the decision was arbitrary and capricious, reasoning:

At the hearing, residents testified as to their concerns regarding the proposed fireworks business. These concerns included an increase in traffic, a decline in property values, and a detrimental impact on the character of the surrounding area. *The testimony proffered was based on speculation and opinion.*³⁰

Likewise, the Guide cautions local leaders to ask the following questions when considering whether to enact a moratorium:

1. What are the conditions that mandate the imposition of a moratorium?
2. Are no other alternatives available that would be less burdensome on property rights?
3. Why are the existing land use plans and ordinances not adequate?
4. What recent circumstances have occurred that justify the adoption of the moratorium?

²⁸ See *Cellular Telephone Co. v. Tarrytown*, 209 A.D.2d 57, 624 N.Y.S.2d 170 (2nd Dep’t, 1995) (available at www.Leagle.com (search “Cellular Telephone, Tarrytown”)).

²⁹ S.C. Code s. 6-29-340.

³⁰ *Wyndham Enterprises, LLC v. City of North Augusta*, 735 S.E.2d 659, 401 S.C. 144 (S.C.App. 2012) (emphasis added).

5. How serious and urgent are these circumstances? What hard evidence is there to document the necessity of the moratorium?³¹

In this regard, the Bill presents several significant concerns. Below, the undersigned quotes the Bill, followed by applicable law and policy, and then accordingly submits requests for clarification.

Analysis

A. Purpose.

“The purpose of the temporary moratorium is to allow the Department of Planning, Preservation and Sustainability, in consultation with other City departments and business and community stakeholders, sufficient time to study the areas subject to the moratorium, to include existing uses, uses known to be coming on line, development and demographic trends and such other data and information as it deems appropriate to enable it to formulate for City Council consideration recommendations regarding the reasonable regulation of businesses allowing on premise [sic] consumption of beer, wine and alcohol after midnight.

During the temporary moratorium, the Department of Planning, Preservation and Sustainability shall report to City Council every six months on the status of the study.”³²

Importantly, the more unaccountable a moratorium’s goal, the more suspect the moratorium becomes. Noting this concern, the Guide cautions:

Moratoria that have been extended for up to three years have been sustained by a showing that the community was diligently pursuing its plan and timetable and shorter moratoria have been voided because the community was making little or no progress. In the same way, the plan must be calculated to deal directly with the necessity or emergency at hand; otherwise, its reasonableness may be questioned.³³

³¹ Guide at 3, “Implementation.”

³² Bill at s. 54-972., “Purpose, Study and Interim Reports.”

³³ Guide at 4.

(1) Please articulate the circumstances under which the Moratorium will have achieved its purpose.

A potential concern is that the Bill fails to articulate under what circumstances it will be extended, such that stakeholders may reasonably rely upon the Moratorium's duration. Presumably, whether or not a moratorium will be extended past its initial sunset depends upon when it has accomplished its goal. Here, the Moratorium's goal is vaguely articulated as allowing "sufficient time" for study in order to recommend additional regulation of OPAAMs. Furthermore, the "findings of fact" to which the study pertains are characterized by multiple concerns that, even if true, are difficult to quantifiably verify so as to objectively determine when they have been successfully mitigated.³⁴

Furthermore, although the Moratorium requires DPPS to report to City Council,³⁵ there are absolutely no requirements or standards for those reports. The Moratorium does not provide for the substance of the reports, nor does it establish any timetable of goals for the reports.

Given the foregoing, please indicate what reliable mechanisms of accountability will be required of DPPS – beyond a generalized reporting requirement – so as to reassure stakeholders that DPPS will work diligently toward an articulable, measurable timetable, and that the Moratorium will not be extended further than the period for which it is originally authorized.

B. Necessity.

"City Council deems [that the Moratorium is] necessary and proper, in order to sustain the peace, good order and success of the peninsula as a desirable place to live, work and visit[.]"

While Moratoria may indeed be justified in order to conduct studies, it is nonetheless a municipal regulatory action that prevents otherwise lawful development of property, and thus must be justified by reference to some articulable public necessity.

(1) Please demonstrate why the study of additional regulations could not be accomplished without implementing a Moratorium; or, in other words, please demonstrate data indicating a public crisis.

In section C. below ("Findings"), the undersigned seeks the careful studies that DPPS conducted that support the findings it asserts as fact in the Bill. A moratorium, however, must be a

³⁴ Discussed in greater detail, *supra*.

³⁵ Presumably, if the Moratorium were amended to last for one (1) year as opposed to three (3), the reporting frequency would have to be adjusted appropriately.

necessary tool to address those finding. As such, please indicate why – *even assuming the existence of the data and studies requested in section C. below* – DPPS could not accomplish its purpose of studying additional OPAAM regulations without implementing the Moratorium.

(2) Please demonstrate the comprehensive studies conducted by DPPS indicating the effectiveness, or lack thereof, of the Late Night Entertainment Establishment Ordinance passed in 2013.

The Moratorium’s language (quoted above in italics) is very similar to the language used by the LNEE Ordinance. Passed in 2013, the LNEE Ordinance was enacted in order to address the growth of OPAAMs that “generate noise, litter, traffic and other deleterious effects which disturb the peace, quietude and good order of the community and impose unnecessary burdens on public safety officers.”³⁶

Given that the respective goals of the LNEE Ordinance and the Moratorium are substantially similar, a logical inference is that if the Moratorium is indeed necessary, then the 2013 LNEE Ordinance has been ineffective to some significant degree; or correspondingly, if the 2013 LNEE Ordinance has been effective, then the necessity for the Moratorium is significantly diminished.

In spite of this correlation, the Bill makes no reference whatsoever to the 2013 LNEE Ordinance. Furthermore, to the undersigned’s knowledge, neither City Council nor the public have been presented with competent data or other reports regarding the effectiveness of the 2013 LNEE Ordinance, or the findings and decisions of the LNEE Review Committee.³⁷

Furthermore, the Moratorium itself is expressly intended to propose even more regulations in the future.³⁸ Before stacking additional regulations, DPPS should demonstrate the studies upon which it relied in order to conclude that the 2013 LNEE Ordinance has not been sufficiently effective in addressing OPAAMs in the Moratorium Area.

³⁶ For a complete description of the LNEE Ordinance, see “2013 Late Night Entertainment Establishment Ordinance”, supra at 3; see also Charleston, S.C., Mun. Ordinances, s. 17-124 through 17-134 (2013).

³⁷ See s. 17-128, discussed supra.

³⁸ See Bill: “to enable it to formulate for City Council consideration recommendations regarding the reasonable regulation of businesses allowing on-premise [sic] consumption of beer, wine and alcohol after midnight.”

(3) Please demonstrate whether, and to what degree, the additional revenue contributed by new OPAAMs is insufficient to support additional law enforcement resources; and if it is insufficient, why measures could not be taken to account for the deficit by modifying the City of Charleston’s law enforcement funding model.

The issues raised in the Bill and during public hearings regarding noise and interference with the “peace, good order and quality of life for nearby residents” are currently violations of municipal code and state criminal law. Charleston Municipal Code prohibits the following conduct:³⁹

Offenses to the Public Peace, Health, Safety, and Morals

- Sec. 21-16. **Loud and unnecessary noises restricted;**
- Sec. 21-84. **Damaging or removing private property;**
- Sec. 21-85. **Trespassing on property;**
- Sec. 21-86. **Defacing public and private property;**
- Sec. 21-90. **Unlawful urination or defecation;**
- Sec. 21-108. **Loitering;**
- Sec. 21-109. **Disorderly conduct;**
- Sec. 21-113. **Trespass on public property and property generally open to the public;**
- Sec. 21-163. **Public intoxication;**
- Sec. 21-166. **Indecent exposure.**

Essentially in the same manner as the 2013 LNEE Ordinance, the Moratorium is implicitly premised upon a lack of resources.⁴⁰ As such, prior to concluding that the Moratorium is necessary, one issue that must be discussed in detail is the viability of the current CPD funding model.

a. *Baseline Model.*

Engaging in a productive analysis of this issue requires establishing a baseline. The Charleston Police Department (“CPD”) provided such a baseline in a meeting with the undersigned on September 3, 2014 (“CPD Meeting”). The CPD articulated a sustainable late night law enforcement model, summarized as follows:

³⁹ See Ch. 21 (“Offenses”).

⁴⁰ Citing “[a]n increase in the number of police officers required to maintain the peace, good order and quality of life for nearby residents.”

CPD currently dedicates Team 2 of the Peninsula Patrol Division to the Entertainment District.⁴¹ Team 2 consists of sixteen (16) officers (note that this *includes* those currently in training and not yet on patrol).⁴² Assuming the current quantity and concentration of OPAAMs in the Upper King area, that officer to OPAAM ratio represents an appropriate and sustainable law enforcement model.

b. Funding.

According to the CPD, the cost to hire additional officers is \$100,000.00 per officer.⁴³ The CPD is funded in part by the Hospitality Tax. The Hospitality Tax is a uniform tax of 2% on the gross proceeds derived from the sales of prepared meals, food, and beverages sold in or by establishments, or those licensed for on-premises consumption of alcoholic beverages, beer, or wine.⁴⁴

In 2014, the City of Charleston is budgeted to receive more than \$13 million in Hospitality Tax revenue from the F&B industry.⁴⁵ Of that amount, approximately 1.3% is budgeted for law enforcement and maintenance in the Entertainment District.⁴⁶ In 2013, Hospitality Tax revenue was approximately \$11.8 million.⁴⁷

c. Tourism.

The Hospitality Tax is also used to actively advertise and promote additional visitors. In 2014, \$132,000 was expended for Charleston Visitor's Bureau promotions & advertising, \$572,000 to the Visitor Center fund, \$210,000 to the Aquarium, \$210,000 to Gibbes annual capital maintenance, and \$68,000 to the Cultural Festivals fund.⁴⁸ As such, the revenue from OPAAMs themselves is utilized to increase the size of crowds in the Entertainment District.⁴⁹

⁴¹ See City of Charleston 2014 Budget at 344 (available at www.Charleston-sc.gov > Government > Transparency > Budget (last visited Sep. 10, 2014)). The "Entertainment District" is described as "established in 2012 to address the number of ABC (liquor) establishments that now exists between Market and King Streets, in the heart of the Charleston downtown."

⁴² From Meeting.

⁴³ From Meeting.

⁴⁴ See Charleston, S.C., Mun. Ordinances, s. 2-270.

⁴⁵ See 2014 Proposed Budget, City of Charleston Dept. of Finance & Revenue Collections (citing \$13,108,272.00 in Hospitality Tax Revenue), attached as App. 1.

⁴⁶ The Entertainment District appears to be a loosely defined term, referring generally to the area outlined by the Moratorium Area.

⁴⁷ See City of Charleston 2013 Budget at 90 (available at www.Charleston-sc.gov > Government > Transparency > Budget).

⁴⁸ See Charleston, S.C., Mun. Ordinances, s. 2-270(a). For full 2014 expenditures, see "Economic Impact," *infra*.

⁴⁹ "Both City Ordinance and the South Carolina Code of Laws limit expenditures in this fund to tourism-related capital projects and operating costs." See City of Charleston 2013 Budget at 56 (available at www.Charleston-SC.gov).

Given that the Bill is premised upon a lack of CPD resources, please demonstrate with specificity what studies, if any, DPPS relied upon to conclude that the revenues paid by any additional OPAAMs are insufficient to attain the baseline CPD model. Furthermore, in the event of a deficit, please explain what studies DPPS relied upon to conclude that modifications to the budget are not a preferable option when compared to the Moratorium.

C. Findings.

The Bill states that “City Council makes the following findings of fact,” and then lists several findings.⁵⁰ A moratorium is invalid if it is arbitrary or unreasonable. Local planning commission regulations must be based upon “careful and comprehensive surveys and studies of existing conditions and probable future development.” Planning decisions may be invalidated if based on “speculation and opinion” as opposed to hard evidence.⁵¹

OPAAM Impact Upon Residential Quality of Life

*“[T]his [OPAAM] expansion has caused an increase in noise during and beyond hours of operation, an increase in litter and other debris along the sidewalks, an increase in the number of police officers required to maintain the peace, good order and quality of life for nearby residents[.]”*⁵²

(1) Please demonstrate the comprehensive studies upon which DPPS relied to conclude that criminal violations in the Moratorium Area are increasing disproportionately other relevant growth, and the studies indicating that any such increase can be reasonably traced to the growth of OPAAMs in the Moratorium Area.

The Bill is implicitly premised upon a disproportionate increase in criminal violations that can be traced with reasonable certainty to the increase in number and concentration of OPAAMs in the Moratorium Area. Therefore, when drafting this analysis, the undersigned requested from the City of Charleston Police Department (“CPD”) any and all criminal statistics upon which it has relied to conclude that the Moratorium is necessary. CPD provided the following information in response to that request:

⁵⁰ See Bill at s. 54-970, “Findings.”

⁵¹ Wyndham, 735 S.E.2d at 401; see also “Applicable Standards,” discussed *supra*.

⁵² Bill at s. 54-970, “Findings.”

Offense⁵³	2013	2014
Drunkenness	182	363
Disorderly Conduct	166	268
Open Container	118	136
Simple Assault	60	73
Liquor Law Violation	15	47
Resisting Arrest	20	26
Disobeying Lawful Order	4	1
Total	565	914

In order to draw accurate conclusions from these statistics, a number of variables should be considered:

First, this data must be adjusted according to a significant variable: the enactment of the 2013 LNEE Ordinance, which specifically resolved to increase enforcement in the Entertainment District. The City of Charleston spent \$600,000 in October 2013 in order to pay for eight (8) new patrol officers in the Entertainment District.⁵⁴ An increase in criminal arrests may reflect the natural result of an increase in CPD resources and enforcement.

Second, and in the same vein, this data must be adjusted according to increases in other relevant variables. The Moratorium is premised on the growth of the industry as a whole. As such, the increase in crime should be adjusted by the increase in OPAAMs themselves, in order to analyze whether there is a disproportionate growth of crime. Likewise, the number of people visiting the City of Charleston annually grew 17% in a recent four-year span, reaching 4.8 million in 2012.⁵⁵ Given that this increase is in large part due to efforts to attract such visitors, it should be considered whether increases in arrests are to some degree a result of a proportionate – and desired – increase in visitors.

Third, although perhaps to a lesser extent, this data references a 24-hr period, as opposed to criminal activity occurring in late night hours or after midnight, which is the issue with which the Bill is concerned. It should be noted, however, that CPD stated that “most” of the data pertains to late night hours. Similarly, the undersigned has requested from CPD statistics from 2009 – 2012, so as to supplement this analysis with information that more accurately indicates reliable trends.

...

Given the limited nature of the reliable conclusions that can be drawn from the above data, if any, please demonstrate with more specificity (1) what studies DPPS conducted to conclude that

⁵³ CPS stated that it typically associates these infractions with late night activity.

⁵⁴ See “Live 5 Investigates: Charleston's Entertainment District sees increase in arrests,” July 14, 2014 (available at www.Live5News.com).

⁵⁵ See Post & Courier, March 14, 2013 (available at www.PostAndCourier.com).

there are reliable trends indicating a disproportionate increase criminal activity occurring after midnight, and (2) data indicating that any increase in such activity is reasonable traceable to an increase in OPAAMs in the Moratorium Area, as opposed to other factors such as increases in enforcement.

(2) Please reconcile the assertion that OPAAMs are decreasing residential quality of life on the Peninsula with statistics indicating increasing residential property values on the Peninsula.

The Bill is premised on the allegation that current commercial growth trends are detrimental to the “residential quality of life” on the Peninsula. While variations in “quality of life” are inherently difficult to quantify precisely, one relevant indicator is the value of residential property on the Peninsula.

Residential Property Sale Prices on the Peninsula, Inside of Crosstown

Year	Avg. sale price	Avg. price per sq. ft.
2009	\$852,269	\$378
2010	\$784,651	\$342
2011	\$606,100	\$286
2012	\$655,746	\$312
2013	\$750,935	\$355

This data indicates that residential property values in the Moratorium Area are increasing during the time that OPAAMs – according to the Bill and the 2013 LNEE Ordinance – have been increasing. This data is to some significant degree inconsistent with the assertion that OPAAMs have decreased residential quality of life. Please explain this discrepancy by demonstrating studies and data upon which DPPS relied to assert a decrease in residential quality of life as fact.

OPAAM Impact Upon Diversity of Commercial Use

“[T]he continued unbridled proliferation or concentration of this use along the King, East Bay and Market corridors will change the ambiance of these corridors, diminish their diversity and vibrancy and stifle their use during daytime hours.”⁵⁶

(1) Please demonstrate the studies upon which DPPS relied to conclude that OPAAMs are consuming alternative commercial uses.

The statement above implicitly rests upon the assumption that OPAAMs are taking over businesses that were previously thriving non-OPAAM uses.⁵⁷ This presumption fails to demonstrate that OPAAMs may be opening in property that was either:

1. Vacant;⁵⁸
2. A nonviable, non-OPAAM commercial use;⁵⁹
3. Some other commercial use that does not fit what the Bill describes as the “ambiance of the corridor.”

In other words, the Bill asserts that OPAAMs are consuming other preferable, economically viable businesses. Please demonstrate the comprehensive studies, surveys, or other data supporting that conclusion.

(2) Please demonstrate, with some reasonable specificity, the alternative model of diversity that DPPS desires, including comprehensive studies indicating the commercial viability of that model.

It should be at least considered that there are other well-documented factors that may account for OPAAM growth, other than the mere prevalence of OPAAMs. For example, brick and mortar retail is on the decline nationwide, largely due to technological advances and corresponding shifts in consumer behavior. National Real Estate Investor warned in 2011 that “[u]nless the pace of shopping center demolitions or repurposing increases, the sector may have to deal with higher average vacancy levels over the next few years,” with the prediction that “the average vacancy for neighborhood and community centers will hover around 10% from 2011 to 2015.”⁶⁰

⁵⁶ Bill at Sec. 54-970, “Findings.”

⁵⁷ *Id.* (“[T]he continued unbridled proliferation or concentration of this use”).

⁵⁸ In 1990, by comparison “forty percent of Upper King Street’s buildings were vacant; the buildings that were occupied were done so largely by low income residents rather than businesses.” See “A Brief History of Upper King Street,” Jan. 13, 2013 (available at www.PropertyInCharleston.com).

⁵⁹ See question (2), *supra*.

⁶⁰ National Real Estate Investor, “Will Electronic Commerce Kill Brick-and-Mortar Retail?” Victor Calanog, published March 8, 2011 (available at www.NREIonline.com).

The fixed cost of real estate combined with inventory and personnel have all been disrupted by online shopping growth. This will continue to force many retailers to reengineer their business in 2014, and for many that will mean consolidation/store closings. It's already begun. ... For these BAMs [brick-and-mortars] who are up against the proverbial wall, the first step will be to take the blinders off. Many have chosen to ignore, downplay, or even cover-up the impact of e-commerce. Thinking in-store shopper experience or more television advertising will solve the problem will only hasten the decline and not stop the trend.⁶¹

The trend is not unique to large retailers and shopping centers, but includes boutiques and small businesses that may occupy storefronts in downtown Charleston:

At smaller private retailers, the numbers are worse. Sales growth at these companies is less than 1%, and mom-and-pop stores with sales below \$5 million annually have seen sales contract by 2% so far this year, the slowest rates since 2009, according to research from Sageworks, which analyzes private companies.⁶²

Local planning commissions must base regulations on “studies of existing conditions and probable future development and include recommended means of implementation.”⁶³ Assuming for the sake of argument that OPAAMs are opening in buildings that previously housed a more preferable retail business, DPPS should articulate a commercially viable alternative. As such, please also identify the studies upon which DPPS relied in order to conclude that OPAAMs are consuming otherwise viable retail uses, as opposed to the increase in OPAAMs resulting from other retail trends.

(3) Please explain and document the studies upon which DPPS relied to conclude that the growth of OPAAMs will “stifle daytime commercial activity.”

Currently, there are approximately one hundred sixteen (116) commercial spaces in the Upper King St. area.⁶⁴ Of those commercial spaces, there are approximately sixteen (16) OPAAMs. Of these sixteen OPAAMs, nine (9) are open for business beginning at lunchtime.⁶⁵

⁶¹ See Forbes Magazine, “Year of Reckoning for Brick and Mortar Retailers,” Gary Drenik, February 3, 2014 (available at www.Forbes.com).

⁶² See Fortune Magazine, “Is brick-and-mortar retail in a death spiral?” Jennifer Reingold, November 26, 2013 (available at www.Fortune.com).

⁶³ S.C. Code s. 6-29-340.

⁶⁴ “Upper King St.” is defined here as businesses bordering King St. from Calhoun St. to Carolina St.

Please identify what studies that DPPS conducted which indicated that: (1) the presence of these sixteen OPAAMs, nine of which are open during the daytime, are “stifling daytime commercial activity,” or (2) that reliable models and predictions indicate that if the current model continues, they will “stifle daytime commercial activity” in the near future.

(4) Please explain why, in referencing the “Late Night Occupancy Map” as support for the Bill, DPPS considered the presence of businesses that do not serve alcohol past midnight to be relevant to the necessity of the Moratorium.

The “Late Night Occupancy Map”⁶⁶ cited by DPPS includes reference to many businesses that are not in practice open after midnight. For example, the map indicates approximately thirty-two (32) OPAAMs on Upper King St. between Calhoun St. and Carolina St. In contrast, a review of actual closing times in this area results in approximately sixteen (16) OPAAMs.⁶⁷ Please explain why, when considering the impact of the concentration of businesses serving alcohol past midnight, businesses that are not open past midnight were considered relevant evidence.

(5) Please demonstrate what data DPPS relied upon to conclude that there was a sudden change in the sectors outlined by the Moratorium Area.

Moratoria are characterized by a response to a sudden, unanticipated change. In this case, that sudden change is being defined as the sudden increase in OPAAMs. The Moratorium Area includes the Lower King St. area, the Market area, and the East Bay area. Please demonstrate what data DPPS relied upon, if any, to indicate that these areas have undergone sudden, unanticipated changes in the number and concentration of OPAAMs.

2. Drafting Comments.

a. Does the exemption run with the business or with the property?

The Bill provides that “[t]he temporary moratorium shall not apply to establishments in the study area that are permitted by law to allow on-premise consumption of beer, wine or alcohol after midnight that are open for business as of the date of ratification of this ordinance[.]”

Please clarify whether “establishment” refers to the property used as an OPAAM, or to the OPAAM as a business. In other words, if a business owner currently operating an OPAAM

⁶⁵ The undersigned reviewed the published opening times of sixteen (16) OPAAMs in the Entertainment District.

⁶⁶ See Late Night Occupancy Map, attached as App. 2.

⁶⁷ The undersigned reviewed the published closing times of sixteen (16) OPAAMs in the Entertainment District.

desired to relocate to a different property, and that different property was *not* being used as an OPAAM, would the business owner be permitted to relocate?

b. When is the effective date of filing for the exemption?

The Bill expressly exempts OPAAMs “on file” with the Department of Planning, Preservation, and Sustainability (“DPPS”) and vested under statutory or common law. The Bill does not state the effective filing date required for this exemption. Presumably, the exemption is intended to refer to “on file *as of the date of ratification of this ordinance.*” Please clarify the drafter’s intent.

II. ECONOMIC IMPACT ANALYSIS.

A. INDUSTRY GROWTH.

Background

In 2013, Tourism spending in South Carolina reached a record \$16.5 billion.⁶⁸ This feat is in no small part thanks to Charleston, the state’s leading tourist destination. Last year, Charleston was named the #1 U.S. City by Condé Nast Traveler Readers’ Choice Awards for the third consecutive year.⁶⁹

While tourists and tastemakers alike champion the city for many reasons, chief among them is the internationally lauded F&B scene. Home to four James Beard Award winning restaurants,⁷⁰ Charleston’s constantly evolving culinary landscape is cited in every “best of” award and television feature the city receives. While impossible to replicate, the one-of-a-kind gastro-culture is no accident. The city has actively sought out and celebrated this success, consistently striving to bolster tourism and annually honoring local hospitality leaders for their contributions.⁷¹

Analysis

Given this context, city officials should be reasonably mindful of the public perception of the Moratorium. When a local F&B scene gains the sort of attention that Charleston’s has, it is

⁶⁸ See www.TheState.com (search “SC Visitor Spending Reaches Record 2013”).

⁶⁹ See www.CharlestonCVB.com, “The Third Time is Charming for Charleston: South Carolina’s Historic Coastal Destination Named #1 U.S. City by Condé Nast Traveler Readers’ Choice Awards for Third Consecutive Year” Oct. 2013.

⁷⁰ See <https://www.jamesbeard.org> (search “2013 JBF AWARD WINNERS”); Post & Courier “Charleston earns six semi-finalist slots in James Beard awards” Hanna Raskin, Feb. 19, 2104 (available at www.PostandCourier.com).

⁷¹ See Charleston CVB, “Local Hospitality and Tourism Leaders Honored for Dedicated Service” June 2014 (available at www.CharlestonCVB.com); see also Hospitality Tax expenditures, *supra*.

driven by the excitement and anticipation of continued growth among potential investors and stakeholders.

Confidence in this expectation may be undermined, however, where the purpose of a substantially burdensome regulation is perceived to be unclear.⁷² Such circumstances result in the infamous and well-documented “chilling effect,” wherein *uncertainty causes a broader discouragement of business and investment than may have been intended by city officials when enacting the regulation.*⁷³

As such, because the continued development of Charleston’s F&B industry is so integral to tourism, employment, tax revenue, and a sustainable work force⁷⁴ – sectors that are both individually and collectively vital to the sustainability of Charleston’s economy – city officials should be mindful not only of the Moratorium’s intentions, *but also of the way in which it is perceived by the public.*

B. EMPLOYMENT.

Present Situation

In 2013, the “Food Preparation and Service Related” industry employed 30,480 (10.3% of greater Charleston population); an 11.6% increase since 2000. Correspondingly, population in Peninsular Charleston has grown rapidly in the past decade and is projected to continue that trend in the future. The tri-county area is growing by approximately 14,000 people each year, meaning there could be another 210,000 residents over the next 15 years.⁷⁵ The City of Charleston estimates that the population of the peninsula grew 1.4% between 2012 and 2013, meaning an approximately 495 additional people moving to the Peninsula.⁷⁶ Given this projected increase in population and the significance of the F&B industry as an employer, the Moratorium may have a negative impact upon the future employment rate.

C. TAX REVENUE.

Hospitality Tax

The City of Charleston’s commendable and concerted efforts in promoting tourism, local culture, history, and the arts depend substantially upon the tax revenue derived specifically from the F&B industry via the Hospitality Tax. The Hospitality Tax is a uniform tax of 2% on the gross

⁷² See analysis of Bill’s purpose, *supra* at 12.

⁷³ Examples of uncertainty producing a chilling effect are legion. Google “chilling effect and uncertainty.”

⁷⁴ See discussion, *supra*.

⁷⁵ <http://tinyurl.com/lmg3f9k>

⁷⁶ <http://www.charleston-sc.gov/DocumentCenter/View/1425>

proceeds derived from the sales of prepared meals, food, and beverages sold in or by establishments, or those licensed for on-premises consumption of alcoholic beverages, beer, or wine.⁷⁷

In 2013, Hospitality Tax revenue was approximately \$11.8 million.⁷⁸ In 2014, the City of Charleston is projected to collect from the F&B industry more than \$13 million in Hospitality Tax revenue.⁷⁹ Expenditures for this budget are as follows:

- \$5,658,566: General fund;
- \$4,529,000: Capital Improvements fund;
- \$750,000: Gaillard Center operating start-up costs;
- \$572,000: Visitor Center fund;
- \$269,742: Energy Performance fund;
- \$150,000: Daniel Island Tennis Center maintenance;
- \$100,000: Ballpark fund;
- \$210,000: Aquarium annual capital maintenance;
- \$210,000: Gibbes annual capital maintenance;
- \$170,000: Entertainment District law enforcement & maintenance;
- \$132,000: CVB promotions & advertising;
- \$130,000: International African-American Museum;
- \$83,164: Parking facilities fund;
- \$68,000: Cultural Festivals fund;
- \$35,000: CVB Gaillard exhibit hall event marketing support;
- \$19,500: Angel Oak;
- \$17,500: Black expo;
- \$3,800: Riverwalk maintenance.⁸⁰

Given that the Hospitality Tax is so instrumental in the City of Charleston's budget, city officials should consider the impact of both temporarily halting – as well as chilling long-term⁸¹ – the continued growth of that source of revenue.

⁷⁷ See Charleston, S.C., Mun. Ordinances, s. 2-270; City of Charleston Department of Budget, Finance & Revenue Collections.

⁷⁸ See City of Charleston 2013 Budget at 90 (available at www.Charleston-sc.gov > Government > Transparency > Budget).

⁷⁹ See 2014 Proposed Budget, City of Charleston Dept. of Finance & Revenue Collections (citing \$13,108,272.00 in Hospitality Tax Revenue), attached as App. 1.

⁸⁰ *Id.*

⁸¹ See “Industry Growth”, *supra* at 23.

D. COMMERCIAL PROPERTY VALUES.

In the context of commercial zoning, regulations that prevent property from being used or sold for a viable commercial purpose tend to – as a general truism – substantially decrease the value of that property. This is especially true in Charleston where there is a very high demand for OPAAMs, and property owners are precluded from meeting that demand.

City officials should also be mindful that even though a commercial property owner's rights have not vested does not mean that he or she has not made substantial investments in the property in reliance on the future ability to sell the property for its most viable commercial use. In other words, commercial property owners who are not exempted by law may fall through the cracks.

E. ATTRACTING AND RETAINING A YOUNG, CREATIVE WORKFORCE.

“Fast-forward more than a decade and you'd hardly recognize [Charleston, SC]. A booming tech start-up economy and a thriving arts and restaurant scene have helped this old Civil War tourist magnet do something that places across the USA have been trying to do for decades: attract young, college-educated workers and keep them there as they start families.”⁸²

- USA Today, "Post-College Towns Brim With Youth, Jobs," April 27, 2014.

In recent years, Charleston has accomplished what cities across the country are desperate to achieve: it has successfully created an environment where young, talented, creative professionals want to live and thrive. This demographic is the most highly sought after in the country, and a demographic particularly vital to Charleston's burgeoning technology sectors and knowledge economy.

It is not likely a coincidence that Charleston's success in attracting this valuable demographic has occurred during the same period that so many unique, high quality OPAAMs have opened for business. As such, city officials should be mindful of chilling the very type of growth that it desires.

By its nature, creating a particular type of city environment – like any environment – depends on a delicate ecosystem. Sustainable success thus entails cultivating a wide variety of highly volatile and interconnected variables. For example, Cleveland has only recently dialed in the right mix after years of struggling, ultimately realizing that the goal is to create “places where young

⁸² USA Today, "Post-College Towns Brim With Youth, Jobs," April 27, 2014 (available at www.USAtoday.com).

professionals want to be.”⁸³ As Richard Florida states in The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community, and Everyday Life: “[T]here are no magic bullets. Growing an organic ecosystem is an organic process. Each place has unique assets to do this.” As such, if Charleston's important, fragile, and remarkable achievement is to be maintained, the vital factors of its cultural ecosystem must be identified and preserved.

City officials should therefore meaningfully consider whether a thriving nightlife is a vital factor to the fragile ecosystem it has fought so hard to attain; and if so, whether it is wise to implement a moratorium upon that vital industry.

/s/ Elliott A. Smith
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This Bill Analysis was commissioned by the Greater Charleston Restaurant Association, Inc. and BACE League of Charleston, Inc.

⁸³ See "If You Build It, They Will Come: How Cleveland Lured Young Professionals Downtown" (available at www.CityLab.com (search for article title)).

Department: Budget, Finance & Revenue Collections

Activity: Hospitality Fee Fund

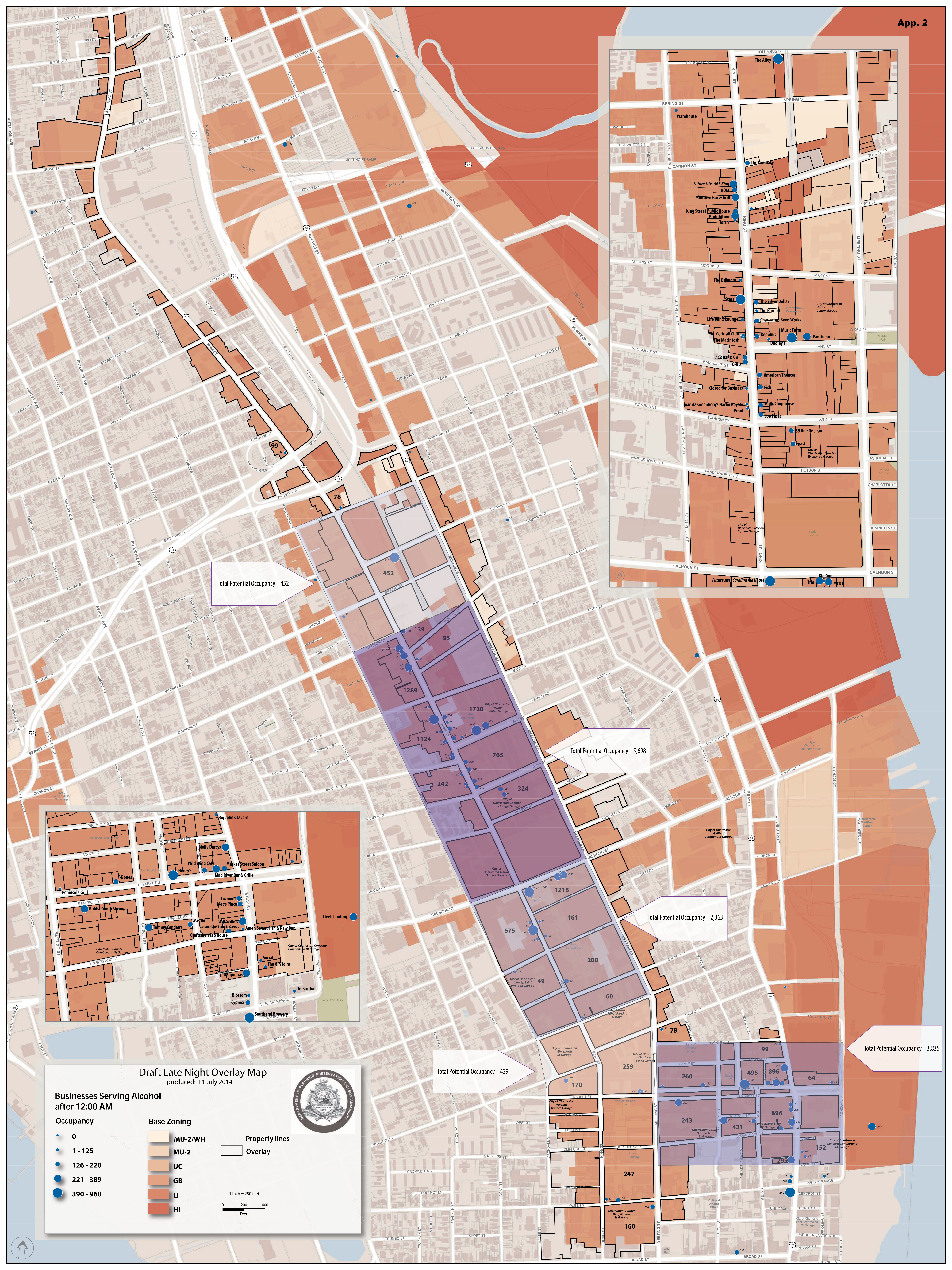
REVENUES

<u>Revenue Detail</u>	2014 Proposed Budget
41401 HOSPITALITY FEE	12,810,000
46103 INTEREST INCOME	10,000
31000 FUND BALANCE	<u>288,272</u>
TOTAL REVENUES	13,108,272

EXPENDITURES

Operating

ENTERTAINMENT DISTRICT POLICE & MAINTENANCE	170,000
RIVERWALK MAINTENANCE	3,800
CHARLESTON BLACK EXPO	17,500
GIBBES ANNUAL CAPITAL MAINTENANCE	210,000
AQUARIUM ANNUAL CAPITAL MAINTENANCE	210,000
INTERNATIONAL AFRICAN-AMERICAN MUSEUM	130,000
GAILLARD CENTER OPERATING START-UP COSTS	750,000
CVB - GAILLARD EXHIBIT HALL EVENT MKTG SUPPORT	35,000
CVB- PROMOTIONS AND ADVERTISING	<u>132,000</u>
	1,658,300
<i>SUBTOTAL</i>	
TRANSFER OUT GENERAL FUND	5,658,566
TRANSFER OUT ENERGY PERFORMANCE FUND	269,742
TRANSFER OUT CAPITAL IMPROVEMENTS FUND	4,529,000
TRANSFER OUT CIF-DANIEL ISLAND TENNIS CENTER MAINTENANCE	150,000
TRANSFER OUT BALLPARK FUND	100,000
TRANSFER OUT VISITORS CENTER FUND	572,000
TRANSFER OUT ANGEL OAK	19,500
TRANSFER OUT PARKING FACILITIES FUND	83,164
TRANSFER OUT CULTURAL FESTIVALS FUND	<u>68,000</u>
<i>SUBTOTAL TRANSFERS OUT</i>	11,449,972
TOTAL EXPENDITURES	13,108,272



Total Potential Occupancy 452

Total Potential Occupancy 5,698

Total Potential Occupancy 2,363

Total Potential Occupancy 429

Total Potential Occupancy 3,835

Draft Late Night Overlay Map
produced: 11 July 2014

Businesses Serving Alcohol
after 12:00 AM

Occupancy

- 0
- 1 - 125
- 126 - 220
- 221 - 389
- 390 - 960

Base Zoning

- MU-2/WH
- MU-2
- UC
- GB
- LI
- HI

- Property lines
- Overlay

1 inch = 250 feet
0 200 400
Feet



AN ORDINANCE

TO AMEND CHAPTER 54 OF THE CODE OF THE CITY OF CHARLESTON (ZONING ORDINANCE) BY ADDING TO ARTICLE 9 THEREOF A NEW PART 6 PROVIDING FOR A TEMPORARY MORATORIUM OF THIRTY-SIX (36) MONTHS ON THE PROCESSING OF DEVELOPMENT APPLICATIONS AND ISSUING OF PERMITS FOR NEW BUSINESSES THAT INTEND TO ALLOW ON-PREMISE CONSUMPTION OF BEER, WINE OR ALCOHOL AFTER MIDNIGHT AT LOCATIONS WITHIN THE SHADED AREA ON THE MAP ENTITLED “LATE NIGHT BAR MORATORIUM AREA”, ATTACHED.

BE IT ORDAINED BY THE MAYOR AND COUNCILMEMBERS OF CHARLESTON, IN CITY COUNCIL ASSEMBLED:

Section 1. Chapter 54 of the Code of the City of Charleston (Zoning Ordinance) is hereby amended by adding to Article 9 thereof a new Part 6 providing for a temporary moratorium on the processing of development applications and issuing of permits for new businesses that intend to allow on-premise consumption of beer, wine or alcohol after midnight at locations within the shaded area on the map entitled “Late Night Bar Moratorium Area”, attached, which Part 6 shall read as follows:

“Part 6: Temporary Moratorium

Sec. 54-970 Findings.

City Council makes the following findings of fact:

The commercial corridors of King, East Bay and Market Streets are, and have been, the primary centers of retail and commercial activity on the peninsula. City Council has worked diligently to assure the success of these corridors by commissioning and implementing studies and making significant investments in infrastructure improvements such as undergrounding utility lines, repaving rights-of-way, installing or restoring curbs and sidewalks, planting trees and installing drainage facilities, all to make these corridors attractive places to visit, conduct business and recreate.

These efforts of Council have produced tremendously positive results. Today these corridors are vibrant, vacancy rates are low and more and more businesses seek to locate or relocate on or near these corridors. King Street is nationally acclaimed and is ranked as one of the top ten shopping districts in America. Charleston recently being voted the number one tourist destination in the world by Conde Nast underscores the attraction of the peninsula on a national and international level. A major draw of these

peninsula corridors is the variety of experiences they offer. The varied antique shops, jewelry shops, apparel stores, restaurants, hotels, bars, parks, civic uses and the viable neighborhoods along or near these corridors are unique to Charleston, make them interesting places to be and are directly related to their success.

City Council is mindful that, to preserve this level of interest and success, it is vital that a balance of uses along the corridors be maintained, between residential and commercial, and among commercial uses themselves. It is critical that these primary commercial corridors of the peninsula remain desirable destinations for residents and visitors at all times of the business and weekend days and into the evening hours. A predominance of one type of use or business will discourage the diversity that has made these corridors successful. It is also critical that the types of businesses and manners in which they are operated be respectful to the nearby residential neighborhoods.

Over the past five years, the number of stand-alone establishments serving beer, wine or alcohol after midnight for on-premises consumption on the King, East Bay and Market corridors has greatly expanded. This expansion has improved the tax base and accommodated the creation of a vibrant night life. By the same token, this expansion has caused an increase in noise during and beyond hours of operation, an increase in litter and other debris along the sidewalks, an increase in the number of police officers required to maintain the peace, good order and quality of life for nearby residents, and significantly, threatens to dominate the identity of the corridors as simply places to party. The continued unbridled proliferation or concentration of this use along the King, East Bay and Market corridors will change the ambiance of these corridors, diminish their diversity and vibrancy and stifle their use during day time hours, results that are detrimental to the interests and welfare of the public and results which can be mitigated, if not avoided, with proper time for evaluation and study.

City Council deems it necessary and proper, in order to sustain the peace, good order and success of the peninsula as a desirable place to live, work and visit, and in furtherance of the powers of home rule devolved upon it by S. C. Code Ann. §5-7- 10 *et seq* and the land use, planning and zoning authority devolved upon it by S. C .Code Ann. § 6-29-310 *et seq* (South Carolina Local Government Comprehensive Planning Act) to enact a temporary moratorium for thirty-six (36) months on processing development applications and issuing permits for new stand-alone businesses that intend to allow on-premise consumption of beer, wine or alcohol after midnight at locations within the shaded areas delineated on the map entitled “Late Night Bar Moratorium Area”, attached.

Sec. 54-971. Temporary Moratorium.

A temporary moratorium of thirty-six (36) months is hereby imposed on the processing of development applications and issuing permits for new businesses that intend to allow on-

premise consumption of beer, wine or alcohol after midnight at locations within the shaded areas delineated on the map entitled “ Late Night Bar Moratorium Area”, attached hereto and made a part hereof.

Sec. 54-972. Purpose, Study and Interim Reports.

The purpose of the temporary moratorium is to allow the Department of Planning, Preservation and Sustainability, in consultation with other City departments and business and community stakeholders, sufficient time to study the areas subject to the moratorium, to include existing uses, uses known to be coming on line, development and demographic trends and such other data and information as it deems appropriate to enable it to formulate for City Council consideration recommendations regarding the reasonable regulation of businesses allowing on-premise consumption of beer, wine and alcohol after midnight.

During the temporary moratorium, the Department of Planning, Preservation and Sustainability shall report to City Council every six months on the status of the study.

Sec. 54-972. Exemptions.

The temporary moratorium shall not apply to establishments in the study area that are permitted by law to allow on-premise consumption of beer, wine or alcohol after midnight that are open for business as of the date of ratification of this ordinance, to the expansion or modification of any such establishments if such extension or modification otherwise complies with the provisions of the zoning ordinance without the necessity of a variance or to any replacement establishment at the locations of such establishments. The temporary moratorium shall not apply to any location in the study area that, within three (3) years of the ratification of this ordinance, housed a duly and legally licensed business that allowed on-premise consumption of beer, wine or alcohol after midnight. The temporary moratorium shall not apply to establishments now or hereafter housed within a place of accommodations that has twenty or more rooms. The temporary moratorium shall not apply to development plans or permit applications for establishments intending to allow on-premise consumption of beer, wine or alcohol after midnight on file with the Department of Planning, Preservation and Sustainability that are vested under statutory or common law.

Sec. 54-973. Expiration.

The provisions of this Part 6 shall expire on _____, 2017.”

Section 2. This Ordinance shall become effective upon ratification.

Ratified in City Council this _____ day of
_____ in the Year of Our Lord, 2014,
and in the _____th Year of the Independence of
the United States of America

Joseph P. Riley, Jr., Mayor

ATTEST:

Clerk of Council