IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN B. GRAVES and GENEVIEVE M. GRAVES
(d/b/a Waterfront Bar & Grill) and
GRAVES INVESTMENT, INC.,

Plaintiffs,

v.

VILLAGE OF LAKE NEBAGAMON,
ROBERT ANDERSON, RAY ENRIGHT,
TIM FITZGERALD, PERRY FLEMMEN,
HOWARD LEVO and AL LISDAHL,

Defendants.

OPINION and ORDER

11-cv-309-slc

In this civil action for monetary, injunctive and declaratory relief, plaintiffs John Graves, Genevieve Graves (d/b/a Waterfront Bar & Grill) and Graves Investment, Inc. allege that defendants violated their rights under the First Amendment in enacting and applying the Village of Lake Nebagamon's noise and cabaret ordinances.[1] The parties' cross motions for summary judgment are before the court. Dkts. 14 and 23. In an order entered on August 24, 2012, I found that defendants were entitled to summary judgment with respect to plaintiffs' arguments that the ordinances are content-neutral and impose unreasonable time, place and manner restrictions. Dkt. 37. However, I stayed ruling on the motions because I determined that the court needed additional information from the parties on the issue of whether the ordinances unconstitutionally grant village officials unfettered discretion in granting licenses or enforcing the ordinances. I also required plaintiffs to clarify their theory of recovery and show what harm they believe that they sustained.

[1] Plaintiffs have voluntarily dismissed their Fourteenth Amendment claims and their official capacity claims against the individual defendants.

After reviewing the parties' supplemental briefing, I conclude that the discretionary provision in § 9 and the time restriction provision in §§ 4(A)(3) and 10(E) of the cabaret ordinance and the exemption provision in § 12(A) of the noise ordinance are unconstitutional because they grant village officials unfettered discretion in violation of the First Amendment. Although I conclude that § 12(A) of the noise ordinance is severable from the remainder of the noise ordinance, at least § 9 of the cabaret ordinance is not, rendering the entire cabaret ordinance unconstitutional. Finally, with respect to damages, even though plaintiffs have identified their theory of recovery, they have failed to explain why they believe that the unconstitutional provisions of the ordinances caused them harm. Therefore, before allowing the parties to proceed to trial on the issue of damages, I am requiring plaintiffs to proffer their evidence in support of their assertion of causation.

The undisputed facts set forth in the August 2011 order are incorporated into this order by reference.

OPINION

I. Unfettered Discretion

An ordinance granting officials unfettered or unbridled discretion to grant or deny a permit constitutes an unconstitutional prior restraint. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1976); *MacDonald v. City of Chicago*, 243 F.3d 1021, 1034 (7th Cir. 2001). The Supreme Court has "consistently condemned licensing systems which vest in an administrative official discretion to

grant or withhold a permit upon broad criteria unrelated to proper regulation of public places."[2] *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 153 (1969) (citations omitted).

> The reasoning is simple: If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' . . . by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted.
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> *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (internal citations omitted).

To withstand constitutional scrutiny, an ordinance must contain "narrow, objective, and definite standards to guide the licensing authority." *Id.*

Plaintiffs have challenged three sections of the cabaret ordinance and the exemption provision in the noise ordinance. I will address each ordinance separately:

A. Cabaret Ordinance

Plaintiffs assert that the following sections of the cabaret ordinance fail to include any objective criteria, thus permitting or even encouraging village officials to discriminate against certain types of protected speech based on its content rather than its volume:

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[2] Although neither party raised the issue, I note that "unbridled discretion" challenges typically arise when discretion is delegated to an individual administrator or official. *See, e.g., Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042 (9th Cir. 2009). Here, the discretion to issue permits rests in the hands of the elected, legislative body of the village. However, courts addressing the issue have found this distinction to be irrelevant. *See id.* ("If a legislative body retains discretion to make an important decision as part of that permitting scheme . . . that discretion is distinct from the general discretion a legislative body has to enact (or not enact) laws. Absent a preexisting permitting scheme, a city council could not in advance impose service charges or other fees on a group seeking to hold a demonstration in a public forum."); *ACORN v. Municipality of Golden*, 744 F.2d 739, 747 (10th Cir. 1984) ("We fail to see how it matters for First Amendment purposes whether unguided discretion is vested in the police or the city council. Vesting either authority with this discretion permits the government to control the viewpoints that will be expressed."). *See also Shuttlesworth*, 394 U.S. at 148 (striking ordinance conferring unbridled discretion on city commission, which was city's "governing body.").

- Section 9 of the cabaret ordinance allows the village board to deny a cabaret license based on the "unsuitability" of the proposed location or the "undesirability or unreliability of the applicant or manager." The ordinance does not define these terms and it does not provide criteria for determining unsuitability, undesirability or unreliability.

- Sections 4(A)(3) and (10)(E) of the cabaret ordinance give the village board discretion to allow an outdoor cabaret to exceed the maximum noise ordinance levels and establish the time restriction for a one-day special event cabaret. The ordinance does not provide criteria for making such determinations other than stating that the sound must be "reasonable under the circumstances."

- Section 12(A) of the cabaret ordinance allows any village resident to file a sworn complaint with the village clerk and then shifts the burden onto the licensee to appear before the board to show cause why the license should not be revoked or suspended. The ordinance does not specify what constitutes a legitimate sworn complaint or cause and does not require a complainant to specify what provision(s) of the ordinance allegedly were violated.

Plaintiffs argue that the broad standards in §§ 9 and 10 of the cabaret ordinance are analogous to those that have been struck down by the Supreme Court in three cases: *Shuttlesworth*, 394 U.S. 147; *Staub v. City of Baxley*, 355 U.S. 313 (1958); and *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147 (1939).

In *Shuttlesworth*, 394 U.S. at 149-50, the Court considered the constitutionality of a Birmingham, Alabama ordinance that required the city commission to issue a parade permit unless in "its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience required that it be refused." The Court struck the ordinance because it conferred the commission with unbridled discretion to determine what those terms meant. *Id.* at 150.

In *Schneider*, the Court struck down a municipal ordinance that allowed the chief of police to deny a permit to door-to-door solicitors if he determined the speaker was "not of good character."

In *Staub*, 355 U.S. at 321, the Court invalidated a city ordinance because of the unfettered discretion granted to the mayor, who could deny permits to applicants requesting permission to solicit others to join their organization based on the "character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley."

In each case, the Court was concerned with how government officials, without any further guidance or limitation, would define broad terms such as "public welfare," "character" and "decency." *Shuttlesworth*, 394 U.S. at 153 ("[A] municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak . . . according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."

Defendants argue that the ordinance in this case differs from the above cases because it delineates specific criteria—"unsuitability of the location" and "undesirability or unreliability of the applicant or manager"—and does not grant the village board broad discretion to determine generally what is against the public interest. However, as in *Shuttlesworth*, *Staub* and *Schneider*, the cabaret ordinance allows the village board members to define what is "unsuitable," "undesirable" and "unreliable" based on their own opinions, and to limit or outright prohibit the playing of music based on these opinions. Defendants encourage the court to give the terms found in the ordinance their normal and ordinary meaning. This doesn't help because the

ordinary meaning of each of these terms encompasses a value judgment. For example, the common definition of "unsuitable" is "not appropriate." *The American Heritage Dictionary* 1888 (4th ed. 2000). Similarly, "undesirable" means "not likely to please" and "objectionable." *Id.* at 1878. "Unreliable" means "exhibiting a lack of reliability," with "reliable" then defined as dependable or trustworthy. *Id.* at 487, 1474 and 1886.

Defendants correctly point out that many considerations concerning suitability, desirability and reliability have nothing to do with the applicant's speech. For example, they indicate that a suitable location might mean that the event venue is large enough to host the expected crowd. The problem at this juncture is that the defendants needed to specify such legitimate objective considerations in the ordinance itself.

Defendants assert that it is not possible to describe in detail every scenario that should factor into the board's decision. However, other governmental entities have been able to craft ordinances that set forth standards that are objective and definite enough to pass constitutional muster but still allow the licensing authority to have enough discretion to ensure that regulatory interests are being met. *See*, *e.g.*, *MacDonald v. City of Chicago*, 243 F.3d 1021, 1026 (7th Cir. 2001) (requiring official to consider whether proposed parade will "substantially or unnecessarily interfere with traffic," whether there are available "sufficient city resources to mitigate the disruption" or a "sufficient number of peace officers to police and protect lawful participants and non-participants from traffic-related hazards" and whether concentration of persons will "prevent proper fire and police protection or ambulance service"); *Graff v. City of Chicago*, 9 F.3d 1309, 1317-19 (7th Cir. 1993) (Chicago ordinance regulating licenses for newsstands contained appropriate criteria, such as whether design, materials and color scheme comport with and

enhance quality and character streetscape; whether services offered by newsstand were already available in area; and whether newsstand endangered public safety or property or interfered with traffic or use of display windows). As the Supreme Court has explained, the doctrine prohibiting unbridled discretion "requires that the limits the [village] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. This Court will not write nonbinding limits into a silent state statute." *Plain Dealer*, 486 U.S. at 770 (citing *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Kunz v. New York*, 340 U.S. 290 (1951)).

Although § 10 of the ordinance provides specific time periods for the operation of indoor and outdoor cabarets, it leaves it to the discretion of the village board to establish the time restrictions for a special event outdoor cabaret based on what is "reasonable under the circumstances." Unlike "unsuitable" or "undesirable," the term "reasonable" does not necessarily involve a value judgment. In fact, courts have considered words like "unreasonably" as setting an appropriate measure that actually limits an official's discretion. *Gumz*, 266 Wis. 2d at 786 (citing *MacDonald*, 243 F.3d at 1028, which approved terms like "substantially" and "unnecessarily"). The problem with the provision in this case, however, is that it fails to offer the board any objective guidance; there is no indication what metrics the board should be measuring or what circumstances that it should be considering. The Supreme Court reached a similar conclusion in *Plain Dealer*, where the ordinance allowed the mayor to condition permits for news racks on terms that he deemed "necessary and reasonable":

> The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor

> will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. *E.g., Freedman v. Maryland*, 380 U.S. 51 (1965).

Plain Dealer, 486 U.S. at 770.

Finally, § 12 of the cabaret ordinance allows a village resident to file a sworn complaint against a person believed to have violated the cabaret ordinance:

> Said complaint shall set forth the offense allegedly committed, the date, time and place of said offense and the facts constituting said alleged offense. Upon the filing of the complaint, the Safety Committee shall issue a notice signed by the Chair of the Safety Committee and directed to be served by any police officer in the County or Village. The notice shall command the licensee complained of to appear before the Village Board on the day and place named in the summons and show cause why, his or her license should not be revoked or suspended.
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> * * *
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> If the licensee appears as required by the notice and denies the complaint, both the complainant and the licensee may produce witnesses. If, upon a hearing, and the Village Board approves such finding that the complaint is true, the license shall either be suspended or revoked.

Plaintiffs assert that the complaint provision does not contain clear standards to guide or constrain the discretion afforded the village board in deciding whether the licensee has shown adequate cause to maintain the license. However, as defendants point out, the ordinance requires the complaint to provide specific details about the alleged violation and the accused licensee is given an opportunity to respond at a hearing on the matter.

Although the village board has the ultimate discretion to continue or revoke the license, that discretion is guided by the ordinance as a whole. Therefore, if a resident complains that a licensee exceeded the permissible time period for a cabaret, the board will decide whether that

is true based on evidence presented at a hearing. This poses quite a different scenario than allowing the board members to form their own opinions as to the meaning of terms within the ordinance. Here, the requirements of the ordinance itself provide objective criteria for the board to follow. (Of course if a licensee were to have been accused of violating conditions set as a result of §§ 4, 9 or 10 of the ordinance, then a finding against the licensee could not stand because this court has found these sections unconstitutional.)

Without any explanation, plaintiffs cursorily state that the complaint provision is silent on whether a licensee has a right to seek prompt judicial review of a license suspension or revocation as required under *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228-30 (1990). However, the Court made clear in *FW/PBS* that procedural safeguards, such as judicial review, were necessary where a prior restraint fails to place time limits on the time within which the decisionmaker must issue a license. *Id.* at 226-27 (citing *Freedman v. Maryland*, 380 U.S. 51, 59 (1965)) ("Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion."). The complaint provision in this case is not a prior restraint or censorship system because it involves only the revocation of licenses that already have been issued. Therefore, it would seem that the requirements described in *FW/PBS* do not apply in this case. Without more from plaintiffs on this issue, this court will not impose a requirement for judicial review. *See Long v. Teachers' Retirement System of Illinois*, 585 344, 349 (7th Cir. 2009) (unsupported and undeveloped arguments are waived; a party may waive an argument by disputing a district court's ruling in a footnote or a one-sentence assertion that lacks citation to record evidence); *Garg v. Potter*, 521F.3d 731, 736 (7th Cir. 2008) (undeveloped arguments are waived).

B. Noise Ordinance

The noise ordinance generally sets the maximum noise levels for residential areas at 55 decibels (dB(A)) between 7 am and 10 pm, and 45 dB(A) between 10 pm and 7 am. In commercial areas, the volume limit is 60 dB(A) from 7 am to 10 pm and 55 dB(A) from 10 pm to 7 am. As discussed in the previous order, this particular provision is constitutional because it is content-neutral and narrowly tailored to serve a significant governmental interest. *See Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 509 (6th Cir. 2001) (ordinance narrowly drawn to regulate decibels at certain hours does not burden content of protected speech or permit unfettered official discretion).

However, § 3(I)(7) of the ordinance allows exclusions for noises "associated with a public or private meeting, concert, parade or other similar event, with prior approval of the Village of Lake Nebagamon Board." This section provides no criteria or guidance for granting an exemption. Although defendants suggest that § 9 of the cabaret ordinance limits the discretion of the board, that argument is a nonstarter. Nothing in either ordinance states that the board must use the criteria outlined in § 9 of the cabaret ordinance when granting or denying approval under § 3(I)(7) of the noise ordinance. Further, even if the cabaret ordinance could be read as limiting the noise ordinance, I have concluded that the criteria in § 9 do not pass constitutional muster.

Equally unpersuasive is defendants' argument that the exemption does not regulate speech because it relates only to the volume of noises associated with certain events. Although defendants try to define "noises" as crowd noise, the ordinance states no such limitation. It refers to "noises associated" with any event. Music and a host of other protected speech certainly constitute noise associated with a public or private event. In addition, the fact that the

ordinance only limits volume is irrelevant; it is still a government restriction on protected speech that must remain content-neutral, be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information. *See Ward v. Rock Against Racism*, 491 U.S. 781, 784 and 791 (1989) (applying same test to ordinance that regulated volume of amplified music at band shell in a city park).

Defendants' principal argument seems to be that the provision is only an exception—to an otherwise valid ordinance—that plaintiffs did not even apply for. As discussed at length in the previous order, and as defendants themselves note in their supplemental brief, when a licensing statute allegedly vests officials with unbridled discretion, a party may challenge it facially without first applying for and being denied the license. *See* dkt. 43 at 2 (citing *Plain Dealer*, 486 U.S. at 760). Therefore, it does not matter that plaintiffs never applied for an exemption.

Defendants' second point also is without merit: the fact that the challenged provision is only an exemption is irrelevant. "[A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-786 (1978)). "Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth.'" *Id.* (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980)). *See also Saia*, 334 U.S. at 559 (striking city ordinance prohibiting use of sound amplification devices *except with* permission from police chief); *Service Employees Intern. Union, Local 5 v. City of Houston*, 595 F.3d 588 (5th Cir.

2010) (analyzing ordinance exempting 16 sounds from permitting requirements). If an exception to an ordinance is unconstitutionally broad, then the exception could invalidate the ordinance by undermining its legitimate and content-neutral time, place and manner restrictions; in essence, the exception would swallow the rule. *Service Employees*, 595 F.3d at 599-600 (citing *Knowles v. City of Waco, Tex.*, 462 F.3d 430, 436 (5th Cir. 2006)).

In this case, the noise ordinance does not provide any objective criteria or guidance for granting an exemption, instead allowing the village board to base its decision on any reason it deems relevant. With this unlimited discretion, the board has the ability to favor certain applicants over others based on the content of their proposed speech. *See Brandt v. Village of Winnetka*, 2007 WL 844676, *28 (N.D. Ill. Mar. 15, 2007) (noting in dicta that ordinance giving village manager authority to waive permit requirements and fees if event "will encourage the economic development of the Village, provide safe activities for the children of the community, promote citizen involvement or otherwise benefit the health, safety or welfare of the Village and its citizens" could enable village to favor or disfavor events based on content). As a result, the provision is unconstitutional.

II. Severability

Because the noise ordinance has a severability provision, defendants assert that the court only has to strike the exemption provision as unconstitutional and not the remainder of the ordinance. Severability of a local ordinance is a matter of state law. *Plain Dealer*, 486 U.S. at 772. Under Wisconsin law, the existence of a severability clause is entitled to great weight in deciding whether the legislative body intended that the portions not invalidated remain as an effective ordinance. *Town of Clearfield v. Cushman*, 150 Wis. 2d 10, 24, 440 N.W.2d 777 (1989)

(citing *Madison v. Nickel*, 66 Wis.2d 71, 78, 223 N.W.2d 865 (1974)). However, the remaining portions of the ordinance must leave "a living, complete law capable of being carried into effect 'consistent with the intention of the legislature which enacted it.'" *Cushman*, 150 Wis. 2d at 23-24 (citing *Nickel*, 66 Wis. 2d at 79-80).

As discussed at length in the prior order, I found that apart from the exemption provision, the noise ordinance meets applicable First Amendment standards. Severing the unconstitutional exclusion in § 3(I)(7) poses no problem because the exclusion is not necessary to the overall implementation of the ordinance and is not required to make the ordinance a valid time, place and manner regulation under the First Amendment. *See Gumz*, 266 Wis. 2d at 827 (finding same with respect to open-air assembly ordinance's advance filing requirement, certification provision, license fee requirement and prohibition against advertising, promotion, and selling tickets before license issued).

The unconstitutional provisions of the cabaret ordinance, on the other hand, cannot be severed. Not only does the cabaret ordinance not have an explicit severability provision, but the ordinance as a whole would lose its purpose without the discretionary provision in § 9. The entire purpose of § 9 is to provide the criteria for granting cabaret licenses. Without § 9 there are no criteria at all to govern the board's decision making. Therefore, the entire cabaret ordinance must be stricken as unconstitutional.

III. Plaintiffs' Harm

In the court's previous order, I asked plaintiffs to explain their theory of recovery and to support it with a showing of the harm they claim to have sustained before this court will hold

a trial on the issue of damages. Plaintiffs have responded that in addition to declaratory and injunctive relief, they are seeking the following:

- Approximately $96,000 in lost profits they sustained because the ordinances curtailed outdoor music concerts that they have held or would have held but for the ordinances;

- Reimbursement of approximately $28,000 in construction costs that they incurred in 2007 and 2008 for their outdoor deck and Tiki bar, which could not be used as profitably as planned after the ordinances were enacted in 2010; and

- Damages for emotional distress that they have suffered as a result of defendants enacting and applying the ordinances.

This is the type of information the court sought, but what remains unclear is causation. How do plaintiffs intend to prove that these alleged losses resulted from the enactment and application of the invalid portions of the ordinances? Put another way, how did the exemption provision of the noise ordinance, the discretionary cabaret licence provision and the time restriction provisions related to special event outdoor cabarets cause plaintiffs to lose money?

Both the noise ordinance and the cabaret ordinance generally allow outdoor music to be played until 10pm.[3] As discussed above, plaintiffs failed to establish that this time restriction was unconstitutional. Plaintiffs obviously wanted to play outdoor music in their outdoor Tiki bar for longer periods of time in order to make more money. In order to do this, they would have to apply for a special event outdoor cabaret license. According to the record before the court, however, plaintiffs only applied for a special outdoor cabaret license for the nights of September 11, 2010 and July 23, 2011, and defendants *granted* both licenses. No harm there. Plaintiffs seem to be arguing, at least in part, that by limiting how late the concert could run, the

[3] Plaintiffs applied for and received general indoor and outdoor cabaret licenses for a period of one year beginning on May 3, 2011.

board limited the profits that plaintiffs could make. However, without the licenses, plaintiffs would have had to end their concerts even earlier, at 10pm. It is unclear why plaintiffs believe that they lost income as a result of two licenses that actually provided them with a longer period of time to play outdoor music.

Plaintiffs also mention concerts that they "would have held," implying that defendants either denied them a license or somehow prevented them from applying for one in the first place. However, at least according to the facts before the court, neither of these things happened.

It is true that "constitutional violations may arise from the 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of first amendment rights." *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990) (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972)); *see also Staub*, 355 U.S. at 319 ("failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance").

In order to rely on this theory, however, plaintiffs must show that a "credible threat" existed that the village would deny them a special event outdoor cabaret license. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010). At this point there are no facts in the record from which a jury could conclude that plaintiffs faced a genuine risk of being denied special event licenses. Therefore, before allowing the parties to proceed to trial on the issue of damages, I am requiring plaintiffs to make a proffer of the evidence they have in support of causation. Plaintiffs' evidence need not be in admissible *form* at this point; it would suffice for plaintiffs to provide a thorough summary of the admissible evidence that they intend to offer at trial to provide a causal link between the unconstitutional portions of defendants' ordinances

and their claimed losses. Without meaning to make this a big production, if I'm going to allow such a proffer from the plaintiffs, then even-handedness suggests that I allow defendants to weigh in, if they wish, on whether a damages trial actually is necessary on the proffered evidence.

ORDER

IT IS ORDERED that:

(1) Defendants' motion for summary judgment, dkt. 14, is DENIED and plaintiffs' motion for summary judgment, dkt. 23, is GRANTED in the following respects:

(A) Section 12(A) of the noise ordinance is struck as unconstitutional under the First Amendment. The remainder of the ordinance remains valid.

(B) Because sections 4(A)(3), 9 and 10(E) of the cabaret ordinance are unconstitutional under the First Amendment and cannot be severed from the ordinance as a whole, the cabaret ordinance is struck in its entirety.

(2) Pursuant to plaintiffs' request, their individual capacity claims and Fourteenth Amendment equal protection claims are DISMISSED with prejudice.

(3) Plaintiffs' motion for summary judgment is DENIED in all other respects.

(4) Plaintiffs may have until December 3, 2012 to proffer to the court of the evidence they intend to introduce in support of damages causation that would entitle them to a trial. Defendants may have until December 10, 2012 to respond. No reply from plaintiff is necessary.

Entered this 13th day of November, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge