



REQUEST FOR COUNCIL ACTION

City of Greenville, South Carolina

Agenda Item No.

11b

TO: Honorable Mayor and Members of City Council
FROM: John F. McDonough, City Manager

Ordinance/First Reading Ordinance/Second & Final Reading Resolution/First & Final Reading Information Only

AGENDA DATE REQUESTED: March 22, 2021

ORDINANCE/RESOLUTION CAPTION:

ORDINANCE TO ENTER INTO A LICENSE AGREEMENT WITH 1 AUGUSTA STREET INVESTORS, LLC FOR PURPOSES OF OUTDOOR SEATING AND DINING, AND MATTERS RELATED THERETO

SUMMARY BACKGROUND:

This Ordinance approves a non-exclusive license agreement for use by 1 Augusta and its tenants of a portion of the upper plaza owned by the City for purposes of outdoor dining and seating.

NOTE REVISION: Following first reading, an amendment was made to Attachment 1 of the Ordinance providing language to address fencing.

IMPACT IF DENIED:

The License Agreement will not be entered into.

FINANCIAL IMPACT:

1 Augusta will compensate the City for non-exclusive use of the upper plaza at the rate of \$3,101.82 each year for an initial five (5) year term due each year on or before July 1st, beginning July 1, 2021. The agreement can be extended for three (3) additional five (5) year terms providing at least 60 days written notice to the City prior to the expiration of the current term.

REQUIRED SIGNATURES

Department Director Angela Prosser
DocuSigned by: A251EDD25B774BE...

OMB Director _____

City Attorney Michael Pitts
DocuSigned by: 5E0F2A267E2D413...

City Manager John McDonough
DocuSigned by: FDC2AC15040F440...

AN ORDINANCE

TO ENTER INTO A LICENSE AGREEMENT WITH 1 AUGUSTA STREET INVESTORS, LLC FOR PURPOSES OF OUTDOOR SEATING AND DINING, AND MATTERS RELATED THERETO

WHEREAS, 1 Augusta Street Investors, LLC (“1 Augusta”) is the owner of certain real property and improvements located at 1 Augusta Street, Greenville, South Carolina 29601 (Tax Map Number 0089000101700 (“1 Augusta Property”)); and

WHEREAS, the city of Greenville (the “City”) is the owner of certain real property and improvements located adjacent to the 1 Augusta Property (“City Property”) as more particularly described on Exhibit A of the License Agreement attached hereto as Attachment 1 and incorporated herein by reference; and

WHEREAS, in connection with its mixed-use building located on 1 Augusta Property (“1 Augusta Building”), 1 Augusta desires to make use of a portion the City Property comprised of +/- 1550.91 square feet and identified as the “Patio Area” as more particularly described on Exhibit B of the License Agreement (the “License Area”) for purposes of outdoor dining and seating as well as other auxiliary uses, including but not limited to access to the 1 Augusta Building, which are compatible with the mixed-use nature of the 1 Augusta Building as well as for the maintenance obligations of 1 Augusta; and

WHEREAS, the City desires to grant a License for such uses, provided the License Area is not utilized in a manner which excludes the general public from the use and enjoyment of the City Property;

WHEREAS, the City and 1 Augusta previously entered into a License Agreement governing 1 Augusta’s use of the lower plaza adjacent to the 1 Augusta Building, and in light of the fact that a patio lease between the City and one of 1 Augusta’s restaurant tenants has expired, the parties now desire to enter into a similar arrangement for the use of the License Area in substantially the same form as the License Agreement attached hereto and incorporated herein by reference as Attachment 1; and

WHEREAS, City Council finds that providing enhanced outdoor dining space will enhance Greenville’s West End as a dining destination and further the economic development of the City; and

WHEREAS, in light of the foregoing, City Council desires to approve the aforementioned License Agreement;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF GREENVILLE, SOUTH CAROLINA, City Council hereby authorizes entry into the License Agreement in substantially the same form as Attachment 1, which is attached hereto and incorporated herein by reference. The City Manager is further authorized to execute any additional documents needed to complete the transaction, provided they are in compliance with this Ordinance. The City Manager may make minor adjustments to the attached License Agreement after consultation with the City Attorney, provided they conform to the purposes of this Ordinance. Should the City Manager or City Attorney, or both, determine that any modification of previously negotiated terms is significant and warrants further action by City Council, then the matter shall be presented to Council for further review before the final execution.

This Ordinance shall become effective upon passage on the second and final reading.

DONE, RATIFIED AND PASSED THIS THE _____ DAY OF _____, 2021.

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY

REVIEWED:

CITY MANAGER

ATTACHMENT 1

STATE OF SOUTH CAROLINA)
) **LICENSE AGREEMENT**
COUNTY OF GREENVILLE)

THIS LICENSE AGREEMENT (this "Agreement") is made and entered into this ____ day of _____, 2020 by and between and the **CITY OF GREENVILLE, SOUTH CAROLINA**, a municipal corporation ("City") and **1 AUGUSTA STREET INVESTORS, LLC**, a South Carolina limited liability company ("1 Augusta").

WITNESSETH:

WHEREAS, 1 Augusta is the owner of certain real property and improvements located at 1 Augusta Street, Greenville, South Carolina 29601 (TMS No. 0089000101700 ("1 Augusta Property")); and

WHEREAS, City is the owner of certain real property and improvements located adjacent to the 1 Augusta Property as more particularly described on **Exhibit A** attached hereto and incorporated herein by reference ("City Property"); and

WHEREAS, in connection with its mixed-use building located on 1 Augusta Property ("1 Augusta Building"), 1 Augusta desires to make use of a portion the City Property comprised of +/- 1550.91 square feet and identified as the "Patio Area" as more particularly described on **Exhibit B** attached hereto and incorporated herein by reference the ("License Area") for purposes of outdoor dining and seating as well as other auxiliary uses, including but not limited to access to the 1 Augusta Building, which are compatible with the mixed-use nature of the 1 Augusta Building as well as for the maintenance obligations of 1 Augusta; and

WHEREAS, the City desires to grant a License for such uses, provided the License Area is not utilized in a manner which excludes the general public from the use and enjoyment of the City Property;

WHEREAS, the City and 1 Augusta previously entered into a License Agreement governing 1 Augusta's use of the lower plaza adjacent to the 1 Augusta Building and the parties now desire to enter into a similar arrangement for the use of the License Area in light of the fact that a patio lease between the City and one of 1 Augusta's restaurant tenants has expired; and

NOW, THEREFORE, for and in consideration of a property exchange between the parties as well as other good and valuable considerations, including the promises contained herein, the receipt and sufficiency of which is acknowledged, the parties agree as follows:

1. Grant of Non-Exclusive License for Outdoor Dining and Seating. City does hereby grant, bargain, and convey unto 1 Augusta a non-exclusive license to use the License Area for purposes of outdoor dining and seating and other auxiliary uses consistent with the mixed-use nature of the 1 Augusta Building, subject to the below terms and conditions as well as for the purpose of 1 Augusta performing its maintenance obligations within the License Area. Any right granted to 1 Augusta hereunder may be exercised by its tenants, as well their respective invitees and licensees, pursuant to a separate agreement between 1 Augusta and said tenant(s), provided each such

separate agreement contains the provisions set forth herein. Nothing herein shall preclude 1 Augusta from also using the 1 Augusta Property for outdoor dining and seating and other auxiliary uses consistent with the mixed-use nature of the 1 Augusta Building. The City hereby approves 1 Augusta and its tenants placing and using a reasonable number of tables and chairs on the License Area and the 1 Augusta Property for outdoor dining and seating purposes, provided that members of the general public may use and enjoy the seating areas located within the License Area when not in use by 1 Augusta or its tenants and that neither 1 August nor its tenants shall erect any form of temporary or permanent barrier which would give the impression that the City Property is private property. The foregoing notwithstanding, no form of permanent fencing shall be erected by 1 Augusta without the consent of the Greenville City Council which such consent shall be conditioned upon 1 Augusta obtaining a Certificate of Appropriateness from Planning Staff.

2. Term and Termination. The license rights granted by this Agreement shall be for a period of five (5) years beginning July 1, 2021, provided further that, in light of 1 Augusta's investment in certain improvements to the aforementioned lower plaza, 1 Augusta may extend this Agreement for three (3) additional five (5) year period by providing written notice to the City at least sixty (60) days prior to the expiration of the current term, except that they shall terminate upon the first to occur of the following:

(a) In the event 1 Augusta is in material breach of this Agreement, City shall provide written notice to 1 Augusta setting forth the nature of the material breach in reasonable detail. Should 1 Augusta fail to cure the material breach within thirty (30) days after receipt of said notice, City may terminate this Agreement; provided, however, if the material breach is not reasonably capable of being cured within thirty (30) days and 1 Augusta commences efforts to cure the material breach within said thirty (30) day period and thereafter diligently and continuously continues its cure efforts, the cure period shall be extended for an additional one-hundred twenty (120) days before the City may terminate this Agreement.

(b) In the event that the License Area is damaged by fire, weather events, human actions, or any other occurrences (including damages caused by the contemplated improvements referenced below in Section 5), to the extent that such damage has substantially destroyed the License Area so as to render its restoration uneconomic, then City, at its option, may terminate this Agreement by sending a termination notice to 1 Augusta; provided, however, if the City exercises such option, 1 Augusta shall have the option to restore the damaged portion of the License Area at 1 Augusta's sole expense by sending written notice of such election to City and this Agreement shall not terminate so long as 1 Augusta undertakes and completes such repairs in a commercially reasonable manner. Should City not elect to terminate this Agreement, and instead undertake the restoration of the License Area, then it is agreed that City, during the course of such restoration, shall not be in violation of any of City's obligations to 1 Augusta by virtue of City's restoration efforts. In no event shall the City have an obligation to repair, restore or replace any personal property, fixtures or other improvements placed or installed by 1 Augusta.

(c) Upon demolition of the 1 Augusta Building or upon its material alteration in such fashion as to render it impossible or impractical to continue to use the License Area for the purposes permitted under this Agreement, this Agreement and the rights granted hereunder shall terminate. Nothing in this Agreement shall impose any obligation on the City to maintain the 1 Augusta Building or 1 Augusta Property.

The City may exercise its right of termination of this Agreement, subject to the above conditions precedent, by recording a notice of termination in the Greenville County Register of Deeds Office. Upon termination in any event, 1 Augusta shall, at its sole expense, remove all of its personal property from the License Area, and if this Agreement is terminated under Subsection 2(a) above, 1 Augusta shall restore the License Area to its original condition, ordinary wear and tear accepted, at its sole expense within a reasonable period not to exceed sixty (60) days.

3. Consideration. For the rights conferred herein, 1 Augusta shall compensate the City in the amount of \$3,101.82 each year (\$2.00 per square feet) due each year on or before July 1st, beginning July 1, 2021.

4. Use Restrictions. The license granted to 1 Augusta under this Agreement is subject to the following restrictions:

(a) 1 Augusta and its tenants, may use the License Area for outside dining and seating, including the selling and serving of alcohol, provided that 1 Augusta and its tenants comply with all State and local requirements regarding the serving of alcohol.

(b) To accomplish its purpose of outside dining, 1 Augusta and its tenants may place tables and chairs within the License Area. Tables and chairs must be matching and must be made of safe, sturdy and durable material, such as wood, steel, or wrought iron. All furniture shall be commercial grade and manufactured for outdoor commercial use. Breakable plastics, unfinished lumber, and furniture that structurally or by its finish are inappropriate for a public patio are prohibited. 1 Augusta and its tenants will maintain at their sole expense all furnishings located in the License Area in good repair at all times and will clean the furnishings regularly. 1 Augusta and its tenants assume the sole risk of costs and damages incurred as a consequence of vandalism or theft. Neither 1 Augusta nor its tenants shall make, or suffer to be made, any alterations to the License Area, other than as set out herein, without prior written approval and consent of the City through its regular process of design approval in the Central Business District. As stated above in Section 1 of this Agreement, the general public may make use of said furnishing within the License Area when not in use by 1 Augusta or its tenants.

(c) No bars or forms of entertainment are permitted within the License Area without City approval in the normal course, not to be unreasonably withheld. The parties acknowledge the City currently issues special permits on a function by function basis allowing for the temporary use of bars and entertainment on City property for special events such as festivals or private events.

(d) 1 Augusta and its tenants shall not use the License Area, or allow same to be used, for the treatment, storage, use or disposal of toxic or hazardous waste or substances, or any other substance that is prohibited by any governmental entity having jurisdiction thereof.

(e) Notwithstanding the foregoing, the License Area shall not be used for any offensive, noisy or dangerous trade or business, as determined by the sole and reasonable judgment of City, or in violation of any law, ordinance, or regulation of any governmental body or authority having jurisdiction.

(f) In the event that City reasonably establishes that the business activities of 1 Augusta or its tenants within the License Area are promoting, on a recurring basis, the gathering in the License Area of persons whose conduct harasses or intimidates other persons in lawful use of the surrounding areas, then 1 Augusta and its tenants shall, upon City's request, secure the services of security personnel to give notice to the persons engaged in such harassment and/or intimidation to leave the License Area or be placed on trespass notice.

(g) No signs of any type shall be installed or otherwise placed on the License Area without prior written approval and consent of City, through its regular process of sign approval in the Central Business District.

(h) All property of 1 Augusta or its tenants kept or maintained within the License Area shall be so kept or maintained at the sole risk of 1 Augusta and its tenants. With respect to the License Area, 1 Augusta shall maintain at its sole cost and expense a general liability policy or policies of insurance with the City named as an additional insured, to cover all claims, demands or actions for personal injury (including death) and/or property damage arising from, related to, or in any way connected with this Agreement or the use of the License Area by 1 Augusta in an amount not less than \$1,000,000 per occurrence. During such periods that 1 Augusta leases premises on its adjacent property to tenants and allows such tenants to make use of the License Area for the purposes permitted under this Agreement, 1 Augusta shall cause such tenants allowed to make use of the License Area under an agreement with 1 Augusta to maintain a general liability policy or policies of insurance, to include liquor liability insurance (to the extent alcohol is served by such tenants within the License Area), at the sole cost and expense of such tenants with the City named as an additional insured, to cover all claims, demands or actions for personal injury (including death) and/or property damage arising from, related to, or in any way connected with this Agreement or the use of the License Area by 1 Augusta's tenants, in an amount not less than \$1,000,000 per occurrence. Further, During such periods that 1 Augusta leases premises on its adjacent property to tenants and allows such tenants to make use of the License Area for the purposes permitted under this Agreement, 1 Augusta shall cause such tenants allowed to make use of the License Area under an agreement with 1 Augusta to maintain, at the sole cost and expense of its tenants, Employer's Liability in the amount of \$500,000/\$500,000/\$500,000, and Worker's Compensation Insurance at statutory limits for all of employees and such insurance shall comply with all applicable state laws and provide a waiver of subrogation against the City, its officers, officials, agents and employees. The policy or policies, or duly executed certificate(s) for same, together with satisfactory evidence of the payment of the premium thereon, required to be maintained by 1 Augusta above shall be deposited with the City at the time of 1 Augusta's execution of this Agreement, and annually thereafter, and shall contain, in addition to the matters customarily set forth in such certificate(s) under standard insurance industry practices, an agreement by the insurer to give the City not less than thirty (30) days' prior written notice of any cancellation, nonrenewal, or change in scope or amount of coverage of such policy to the extent such insurer is willing to give such notice, which 1 Augusta and/or its tenants (as the case may be) will use best efforts to obtain such notice. With respect to the policies required to be maintained by tenants of 1 Augusta who are required to maintain insurance policies under this provision, such policies, or duly executed certificate(s) for same, together with satisfactory evidence of the payment of the premium thereon, will be deposited with the City prior to such tenants opening for business and using the License Area, and so long as such tenants continue to be allowed under their Agreement with 1 Augusta to use the License Area provided annually thereafter, and shall contain, in addition to the matters customarily set forth in such certificate(s) under standard insurance industry practices, an agreement by the insurer to give the City not less than thirty (30)

days' prior written notice of any cancellation, nonrenewal, or change in scope or amount of coverage of such policy to the extent such insurer is willing to give such notice, which 1 Augusta and/or its tenants (as the case may be) will use best efforts to obtain such notice.

All insurance required under this Agreement shall be placed with insurers with a current A.M. Best's rating of not less than A:VII and licensed to do business in the State of South Carolina, unless otherwise approved by City, and 1 Augusta and/or its tenants (as the case may be) shall not self-insure in satisfaction of any insurance requirement set out herein without the express, written consent of City. 1 Augusta and/or its tenants (as the case may be), shall be fully and solely liable for any costs or expenses arising as a result of a coverage deductible, co-insurance penalty, or self-insured retention, including any loss not covered because of the operation of such deductible, co-insurance penalty, or self-insured retention. All required insurances certificates and notes shall be transmitted to the City via email at inscerts@greenville.gov.

5. Maintenance and Repairs; Contemplated Improvements. At its sole expense, 1 Augusta and its tenants permitted to use the License Area under an agreement with 1 Augusta shall maintain, or cause to be maintained, the License Area in a clean and presentable condition at all times, free of any accumulated dirt, trash, including, but not limited to, food, paper, grease containers, or other waste materials. Further, 1 Augusta and such tenants shall be responsible for any damage caused by their use of the License Area and shall promptly repair same at their sole expense. The parties acknowledge that repairs and routine maintenance to the City Property may necessitate closure of the License Area (other than as a result of casualty or force majeure pursuant to Section 2 above in which case this Agreement may be terminated by City as provided in Section 2 without further liability or obligation on the part of the City). Further, the parties acknowledge that the City is contemplating improvements to the License Area at some point in the future which, if undertaken, will necessitate its closure for some extended period of time. During the course of such improvements, the City shall not be in violation of any of City's obligations to 1 Augusta by virtue of City's renovation efforts, and further, 1 Augusta hereby waives, holds harmless and releases the City from any claims associated with such closures including, including but not limited to, loss of business by 1 Augusta or its tenants. Similarly, the parties acknowledge that 1 Augusta may desire to make improvements at its sole expense to the License Area at some point in the future as well. All such improvements must be constructed in a workmanlike manner and in accordance with all applicable codes and regulations. 1 Augusta will informally confer with City staff on the design of the improvements and the final design is subject to all City approvals required in the normal course including, but in no way limited to, obtaining a Certificate of Appropriateness from the Design Review Board. 1 Augusta hereby waives, holds harmless and releases the City from any claims associated with any closure of the License Area while such improvements are constructed, including but not limited to, loss of business by 1 Augusta or its tenants. All improvements made to the License Area by 1 Augusta shall become the property of the City upon termination of the Agreement.

6. Taxes. 1 Augusta shall promptly reimburse the City for payment of all current real estate taxes and assessments of any type which may become due and payable for the License Area, if at all, upon and after the date of the commencement of this Agreement, and that may hereafter become due and payable during the term of this Agreement, whether now known or unknown.

7. Notices. Any notice, demand or other instrument or written communication required or permitted to be given, served, made, or delivered hereunder may be given, served, made, or delivered by hand delivering same, or by mailing same in the United States Mail, postage prepaid, addressed to the following:

City: City of Greenville
Attention: City Manager
Post Office Box 2207
Greenville, SC 29602

1 Augusta: 1 Augusta Street Investors, LLC
Attention: Manager
1708-C Augusta Street, Suite #322
Greenville, SC 29605

Parties may change their address for notice purposes by sending a change of address notice to the other party.

8. Indemnification. Notwithstanding anything herein to the contrary, 1 Augusta shall indemnify and hold the City free and harmless from and against any and all liabilities, losses, claims, judgments, suits, causes of action and/or expenses of any kind or nature, to include personal injury and/or death to persons or property damage, resulting from or in any way arising out of this Agreement or the use of the License Area by 1 Augusta and its tenants, or their respective employees, contractors and/or agents, invitees or licensees, including the payment of reasonable attorneys' fees, except where such injury or damage is caused by the gross negligence or willful misconduct of the City. Should the City be named in any suit, action or claim under the terms hereof, then 1 Augusta shall appear and defend the City at its sole cost and expense; provided that the City shall always have the option to appear and defend such action or claim on its own behalf, and all reasonable costs for same shall be borne by 1 Augusta. The foregoing indemnity shall survive the expiration or termination of this Agreement.

9. City Right of Use. City shall retain the right to make all use of the License Area so long as such use shall not unreasonably interfere with the rights granted to 1 Augusta herein.

10. Miscellaneous. If any part or provision of this Agreement is held invalid or unenforceable under applicable law, such invalidity or unenforceability shall not in any way affect the validity or enforceability of the remaining parts and provisions of this Agreement. The waiver of a breach of this Agreement by either Party shall not operate as a waiver of any subsequent breach, and no delay in acting with regard to any breach of this Agreement shall be construed to be a waiver of the breach. Headings are inserted for convenience only and shall not be considered for any other purpose. No modification, amendment or waiver of any provision of this Agreement shall be binding upon the Parties unless the same is first reduced to writing in a document having the same formality as this Agreement and executed by the duly authorized officer for each Party. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement, but this Agreement does not amend, replace or supersede the license reserved in the deed from 1 Augusta to the City with respect to the City Property. All prior negotiations and representations of the Parties are merged into this Agreement, and no prior statement, whether written or oral, shall be binding upon either party unless reduced to writing and contained in this Agreement. This Agreement shall be subject to, and interpreted under, the laws of the State of South Carolina without regard to conflict of laws principles. Any dispute arising out of, or related in any manner to, this Agreement must be brought exclusively in the Greenville County Court of Common Pleas.

[Signatures begin on next Page]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal on the date first above written.

WITNESSES:

CITY OF GREENVILLE, SOUTH CAROLINA

Witness #1

By: _____
Name: John F. McDonough
Title: City Manager

Witness #2

(L.S.)

STATE OF SOUTH CAROLINA)) COUNTY OF GREENVILLE)	ACKNOWLEDGMENT
<p style="text-align: center;">The foregoing instrument was acknowledged before me this ____ day of _____, 20__ by _____, City Manager for the City of Greenville, South Carolina.</p>	
<p>SWORN to before me this _____ day of _____, 20__ .</p>	
<p>_____ NOTARY PUBLIC FOR SOUTH CAROLINA (Signature)</p>	
<p>_____ (Printed Name of Notary)</p>	
<p>My Commission Expires: _____</p>	

1 AUGUSTA STREET INVESTORS, LLC

By: Hondo Partners, LLC
Its: Manager

By: ASD State Street, LLC
Its: Sole Member

By: _____
Name: E. Mitchell Norville
Title: Manager

Witness #1

Witness #2

(L.S.)

STATE OF SOUTH CAROLINA)	
)	
COUNTY OF GREENVILLE)	ACKNOWLEDGMENT
<p>The foregoing instrument was acknowledged before me this ____ day of _____, 20__ by E. Mitchell Norville, the Manager of ASD State Street, LLC, in its capacity as the sole member of Hondo Partners, LLC, in its capacity as Manager of 1 Augusta Street Investors, LLC.</p>	
<p>SWORN to before me this _____ day of _____, 20__ .</p>	
<p>_____ NOTARY PUBLIC FOR SOUTH CAROLINA (Signature)</p>	
<p>_____ (Printed Name of Notary)</p>	
<p>My Commission Expires: _____</p>	

EXHIBIT A
(Property Description)

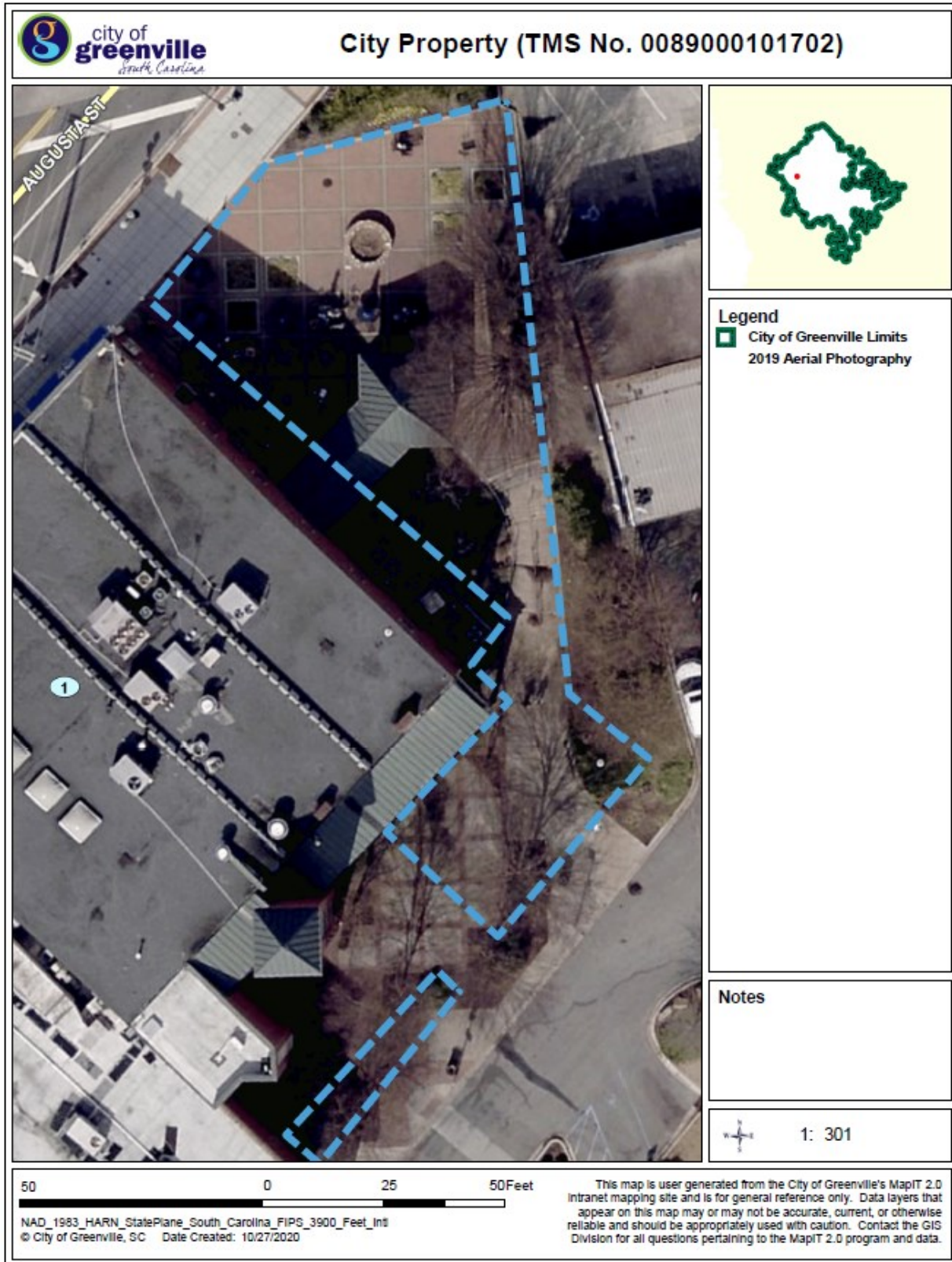


EXHIBIT B (Delineation of License Area)

