

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

WYNON CORP., A Delaware Corporation	:	
Registered to do Business in Pennsylvania,	:	
Plaintiff	:	
	:	
v.	:	No. 05-01,011
	:	
ARMSTRONG TOWNSHIP, a	:	
Pennsylvania Municipal Corporation,	:	
Defendant	:	

**OPINION and ORDER**

This case involves two motions for injunctions. The first was filed by the plaintiff, Wynon Corporation [Wynon], which operates a retail business selling and renting various items of a sexually explicit nature, and providing private viewing booths for individuals to watch films, videotapes, or DVDs containing sexually explicit material. Wynon recently opened the store at a location in Armstrong Township, without first obtaining a zoning permit or certificate of occupancy, in violation of the Township Zoning Ordinance and the Pennsylvania Construction Code, adopted by Armstrong Township. Wynon asks this court to issue an injunction preventing the Township from enforcing the Zoning Ordinance, claiming that the Zoning Ordinance is unconstitutional. Armstrong Township has filed its own motion for an injunction, requesting the court to enjoin Wynon from operating its store until there is full compliance with the Zoning Ordinance, the Pennsylvania Municipalities Planning Code, and the Pennsylvania Construction Code.

After oral argument and consideration of all documents filed by both parties, the court finds that Wynon has failed to establish the elements necessary for an injunction. We further find that Armstrong Township has established its right to an injunction, and will therefore grant it.

## **DISCUSSION**

The purpose of an injunction is to preserve the status quo as it exists or previously existed until the merits of the controversy can be fully heard and determined, and to prevent a party from gaining any advantage by its own wrongful act. It is a temporary remedy, granted until the dispute can be completely resolved based upon the merits. Appeal of Little Britain Township from Decision of the Zoning Hearing Board of Little Britain Township Lancaster County, 651 A.2d 606 (Pa. Commw. 1994). To obtain a preliminary injunction, the moving party must demonstrate that: (1) The injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages, (2) Greater injury would result from refusing an injunction than from granting it, and that issuance of an injunction will not substantially harm other interested parties in the proceedings, (3) An injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct, (4) The moving party is likely to prevail on the merits, (5) The injunction is reasonably suited to abate the offending activity, and (6) The injunction will not adversely affect the public interest.

### **A. Wynon's Motion**

Wynon has failed to establish the elements of an injunction primarily because it has failed to show the ordinance is unconstitutional. This court is constrained to acknowledge that courts on both the federal and state level have found that the material Wynon offers for sale and rent is “expressive conduct,” constitutionally protected under the freedom of speech protections contained in Article I, §7 of the Pennsylvania Constitution and in the First Amendment to the United States Constitution. However, Wynon has failed to establish that the Zoning Ordinance is an unconstitutional infringement upon those rights.

Wynon's argument has several components. First, Wynon claims the Zoning Ordinance precludes all sale of adult material within the Township; therefore, Wynon is "zoned out." In support of this argument, Wynon points to §440, "Adult Entertainment Establishments," which states that such businesses may only be permitted as a Special Exception in those districts specified in Article 3. The Highway Commercial District is the only place in the Township where retail uses are permitted. Wynon then turns to §307, which lists the permitted uses in the Highway Commercial District, and disallows "the sale of pornographic materials" as a permitted principal use. Therefore, Wynon concludes, the sale of such materials is not allowed anywhere in the Township.

In response to this argument, the Township points out that §440 clearly permits adult entertainment establishments as Special Exceptions, and in fact goes into great detail about them. This clearly shows the intent of the Zoning Ordinance to permit such uses, subject to the limitations contained in §440. The Township further points out that §307 permits "Public entertainment establishments" as a Special Exception, and argues that Adult Entertainment Establishments are a type of public entertainment establishment. In support of this argument, the Township cites §603.1 of the Municipalities Planning Code (53 P.S. §10603.1), which provides,

In interpreting the language of a zoning ordinance to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

The court finds this argument highly convincing, and further notes that 1 Pa.C.S.A. §1932 states:

Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both.

This rule should be applied to ordinances, as well as statutes. Francis v. Corleto, 211 A.2d 503 (Pa. 1965). For these reasons, the court finds that Adult Entertainment

Establishments are permitted as a Special Exception in the Highway Commercial District, and therefore are not banned completely by the Zoning Ordinance.

Wynon next argues that even if Adult Entertainment Establishments are permitted by Special Exception, they are effectively prohibited by §440(C), which lists various distance requirements from certain other uses. Wynon claims there is no place within Armstrong Township that meets these distance requirements. Both parties have submitted affidavits on this issue, and the court finds that the affidavits submitted by Michael Cioffi and Clifford A. Kanz of the Lycoming County Department of Planning and Community Development create a factual dispute which the Township is likely to win. To pass constitutional muster, the Zoning Ordinance need only allow for “reasonable alternative avenues of communication” within the Township. City of Renton et al. v. Playtime Theatres, Inc., et al., 475 U.S. 41, 106 S.Ct. 925 (1986). It appears the Township has done so.

Wynon next argues that the special requirements of §440(C) are unconstitutional. That section imposes distance requirements from residences, churches, schools, establishments selling liquor, grocery stores, other adult entertainment establishments, and various other facilities. Section §440(C) states the purpose of these requirements is to protect the public from the detrimental effects that occur when adult entertainment establishments are allowed to locate within close proximity to other uses. The court finds nothing amiss in imposing such distance requirements, and notes that the requirements imposed by §440(C) are very similar to the ones approved by the United States Supreme Court in City of Renton, supra. In that case, the U.S. Supreme Court held that such restrictions are “content neutral” speech regulation, subject to the intermediate scrutiny test, and specifically,

The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication.

Id. at 50. Here, Armstrong Township’s distancing requirements are clearly designed to serve its substantial government interest of regulating the secondary effects of adult entertainment establishments. The regulations are narrowly tailored to affect only those locations that would produce the unwanted secondary effects, and as discussed earlier, the Ordinance provides reasonable alternative places for an adult entertainment establishment to locate.

Wynon next argues the Special Exception procedure is unconstitutional because it grants “unfettered discretion” to the Zoning Hearing Board. To the contrary, appellate courts have ruled that once a Special Exceptions applicant complies with the specific criteria of the ordinance, the Zoning Hearing Board may deny the use only upon proof it would create an adverse effect on the public welfare in a way not normally associated with the proposed use. Ruddy v. Lower Southampton Twp. Zoning Hearing Board, 669 A.2d 1051 (Pa. Commw. 1995). Moreover, the objectors have the burden of showing a high degree of probability that the proposed use will substantially affect the health and safety of the community, which must be more than mere speculation. Johnson v. North Strabane Township, 546 A.2d 1334 (Pa. Commw. 1988).

Wynon next argues the Zoning Ordinance is unconstitutional because it fails to guarantee the Zoning Hearing Board will approve or deny a Special Exception within a constitutionally permissible period of time. The court sees no merit in this argument. We are convinced there are sufficient procedural safeguards within the Municipalities Planning Code, as well as the Zoning Ordinance and Pennsylvania caselaw, that will adequately protect Wynon’s due process rights. Should the Zoning Hearing Board unreasonably delay the hearing(s) and/or its decision to the extent Wynon’s rights are being violated, Wynon may well have a cause of action at that time. Wynon makes a similar argument as to the variance process and the licensing process, which the court rejects for the same reason.

The court therefore finds that Wynon has failed to establish the elements for an injunction. Since Wynon has not shown its constitutional rights are being violated, it has failed to establish an injunction is necessary to prevent immediate and irreparable harm that cannot adequately be compensated by damages, that greater injury would result from refusing an injunction than from granting it, that it is likely to prevail on the merits of the declaratory judgment issue, or that there is any offending activity by the Township that should be abated. Moreover, granting an injunction for Wynon would not restore the parties to their status before Wynon began operating its store. On the contrary, it would reward Wynon for opening an adult entertainment establishment in clear violation of the local zoning ordinance and without obtaining an occupancy permit.

And finally, granting an injunction for Wynon would adversely affect the public interest. The citizens of Armstrong Township have every right to require businesses to follow their ordinances, and adult entertainment establishments are no different. Our legislature has emphatically stated that one of the purposes of zoning ordinances is “to promote, protect and facilitate . . . the public health, safety, morals, and general welfare.” 53 P.S. §10604(1). To rule in favor of Wynon at this point would frustrate that purpose.

**B. Armstrong’s Motion**

The court finds Armstrong Township has established the elements of an injunction. Wynon’s failure to obtain permits as required by the Zoning Ordinance is a clear violation of the Ordinance, constituting immediate and irreparable injury for the Township, and this violation is a proper subject for injunctive relief. As the Pennsylvania Commonwealth Court stated in Little Britain, supra, 651 A.2d 606 at 611, “Appellants’ continuing violation of the Township’s ordinances is unlawful conduct of a most serious nature and a threat to the health, safety, and welfare of the remainder of

the Township populace.” *See also* South Fayette Tp. V. Boy’s Home, 376 A.2d 663 (Pa. Commw. 1977).

Secondly, since Wynon has failed to establish an injury, greater injury would result from refusing the Township’s request for an injunction than from granting it, and issuance of an injunction will not substantially harm Wynon. Thirdly, an injunction for Armstrong will properly restore the parties to their status as it existed prior to the wrongful conduct. Moreover, as discussed above, Armstrong is likely to prevail on the merits of the declaratory judgment issue on the constitutionality of the Ordinance. And finally, the injunction is reasonably suited to abate the offending activity, and will not adversely affect the public interest.

### **Conclusion**

In conclusion, the court finds Wynon has failed to establish that the Armstrong Township Zoning Ordinance is clearly unconstitutional. Therefore, Wynon must proceed like every other business wishing to establish itself in Armstrong Township—it must comply with the Zoning Ordinance and Construction Code. In granting Armstrong Township’s injunction, the court is doing nothing more than requiring such compliance. The purpose of a preliminary injunction is to return parties to the position they were in before the improper conduct occurred. The court so rules today.

**ORDER**

AND NOW, this 30<sup>th</sup> day of June, 2005, for the reasons stated in the foregoing opinion, the motion for preliminary injunction filed by the plaintiff, Wynon Corporation, is denied and the motion for injunctive relief filed by the defendant, Armstrong Township, is granted. It is further ordered that Wynon Corporation, its officers, agents, and employees shall immediately cease and desist from conducting business at 960 Route 15 Highway, South Williamsport, and specifically, close the business known as the Adult Outlet.

BY THE COURT,

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Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk  
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