WHYNON CORPORATION,	: IN THE COURT OF COMMON PLEAS OF
	: LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:
	:
vs.	: NO. 05-01,011
	:
ARMSTRONG TOWNSHIP,	: CIVIL ACTION
LYCOMING COUNTY,	:
PENNSYLVANIA,	: CROSS MOTIONS FOR
Defendant	: SUMMARY JUDGMENTS
	: OPINION AND ORDER

Date: December 31, 2007

OPINION

Before the court are cross motions for summary judgment. Plaintiff, Whynon Corporation (hereafter "Whynon"), asks this court to declare it has a constitutional right to open an adult bookstore in Armstrong Township, Lycoming County and that the zoning ordinance under which the Defendant, Armstrong Township (hereafter "Township"), seeks to prohibit from opening is unconstitutional. The Township's motion seeks a permanent injunction to prohibit Whynon from opening the bookstore until such time as it applies for an appropriate zoning permit and license to operate under the provisions of its zoning ordinance.

At oral argument, held on September 11, 2007, both parties submitted that all of the essential facts were uncontested and that their respective claims were appropriate to resolve on the summary judgment motions. The parties agreed the court should consider as evidence in support of the motions the depositions, affidavits, exhibits, and other matters filed of record. It is undisputed that the Township's zoning ordinance serves a substantial government interest and is narrowly tailored. Accordingly, the only issue before the court is whether the ordinance leaves open reasonable alternative avenues of communication and whether the regulations are

justified or vague and overly broad. We have found after an examination of the materials submitted that we are unable to make a determination as to whether or not there are any lots in the Township which are able to be developed as an adult entertainment establishment. We are also unable to determine whether or not there are sufficient alternative avenues of communication, that is locations either within Armstrong Township given its size and population and other unique characteristics that provide adequate alternative locations for retail establishments such as Whynon's in the Township or in nearby neighboring municipalities

We acknowledge many of the relevant facts are undisputed and many of the issues raised in each of the summary judgment motions can now be determined. Facts relating to the availability of appropriate lots in Armstrong Township which could be used for an adult bookstore business as well as whether or not alternative means of communication-specifically other adult bookstore establishments-are sufficiently available in adjoining or nearby municipalities are in dispute. Although some evidence thereof has been produced the factual record is not complete. Therefore, a determination of the entire case on the motions for summary judgment is not appropriate. A further evidentiary hearing will be needed, and will be scheduled for January 25, 2008.

BACKGROUND

On June 3, 2005, Plaintiff, Whynon Corporation, opened a retail store named "Adult Outlet" at 960 Route 15 Highway, South Williamsport, which was located within Armstrong Township, Lycoming County, Pennsylvania. Armstrong Township is a second class township and a municipality and allows the Commonwealth of Pennsylvania. The Township had adopted the applicable zoning ordinance in 1994. The area in which the Whynon retail store lot was

located is in a HC (Highway-Commercial) zoning district. Upon opening its business, Whynon instituted legal action the same day by filing a Complaint seeking declaratory injunctive relief, attorney's fees, and costs asserting that the Armstrong Township zoning ordinance was unconstitutional and deprived it of its right to open its store. The Complaint was accompanied by Whynon's motion seeking a preliminary injunction to prohibit enforcement of the zoning ordinance against it.

The Township zoning officer upon learning of the opening of the Whynon store issued a zoning violation notice dated June 6, 2005 which alleged as a specific violation that Whynon had commenced business as an adult entertainment establishment without applying for a special exception in obtaining a zoning occupancy permit in violation of sections 440 and 307 of the zoning ordinance. The notice directed Whynon to seize all operations immediately and to remove any signs that had been erected. Township also filed a response to Whynon's complaint and cross-motion for an injunction on June 7 to prohibit Whynon from operating until such time as it complied with the zoning ordinance requirements.

Following a hearing, the Honorable Richard A. Gray issued an opinion and order on June 30, 2005 which granted the Township's request for a preliminary injunction and denied Whynon's request for a preliminary injunction. In making his determination, Judge Gray concluded that

> "…(T)he 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…."

Opinion, 6/30/07, pp. 3, 4. In reaching this conclusion, Judge Gray made a determination that the retail store operated by Whynon would be permitted as a "public

entertainment establishment" a special exception in a highway commercial district under section 307 of the zoning ordinance. In doing so, Judge Gray also appropriately articulated Pennsylvania Law as set forth in Municipal Planning's Code that is applicable to this case as being found in section 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 and enacted by the governing body, in favor of the property owner against any implied extension of the restriction."

Id. at 3. Judge Gray also appropriately utilized the statutory construction language 1 Pa.C.S. § 1932, which states:

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

Ibid.

Judge Gray deemed that the zoning ordinance was ambiguous as to whether the business operated by Whynon and deemed to be an "adult entertainment establishment" under the zoning code was also a "public entertainment establishment" set forth under section 307 of the code. Judge Gray made a conclusion that Whynon's "Adult Outlet" was a "public entertainment establishment" under the zoning ordinance.

Not only do we feel bound by Judge Gray's prior determinations as being rules of law that apply to this case but we also agree with Judge Gray's interpretations.

After completing discovery in this matter, the Township filed a motion for summary judgment on July 2, 2007 and Whynon filed its motion for summary judgment on July 6, 2007.

Without reiterating all of the facts set forth in those respective motions, the court will rely upon those facts as submitted by each party but not necessarily the conclusions that are drawn in the motions from the facts.

We will rule on the issues raised by the parties, which may be appropriately disposed of through their summary judgment filings. In ruling upon those matters, we determine that the Township zoning ordinance and its restrictions which apply to Whynon under sections 307 and 440 of the Townships Zoning ordinance are valid under the Constitutions of the United States and Pennsylvania and do not violate Whynon's rights. Accordingly, we will conclude that Whynon, will be required to comply with the requirements of the zoning ordinance if the Township ultimately prevails on its contentions that the zoning ordinance provides sufficient area for adult entertainment establishments and does not prohibit "reasonable alternative avenues of communication". See, ***City of Renton et al v. Playtime Theatres, Inc. et al***, 106 S.Ct. 925 (1986).

DISCUSSION

The burden is on the Township to prove its zoning ordinance provisions are constitutional, when applied as a prescriptive restriction upon Whynon's First Amendment Rights.

"It is well established that the burden of proof is on the County to justify a regulation which burdens the freedom of expression." ***Alameda Books v. City of Los Angeles,*** 222 F.3d 719, 724 (9th Cir. 2000), citing ***Clark v. Community for Creative Non-Violence***, 468 U.S. 288, 293, n.5, (1984). Whether or not the zoning ordinance is a valid regulation of Whynon's right to conduct its "Adult" retail business is governed by several well established principles.

i) "Zoning ordinances designed to combat the undesirable secondary effects of business that purvey sexually explicit material are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. ***City of Renton v. Playtime Theaters, Inc.***, 475 U.S. 41 (1986).

ii) This is an intermediate scrutiny standard and is applicable to such measures in ***Mitchell v. Comm'n on Adult Entertainment Establishments***, 10 F.3d 123, 130 (3rd Cir. 1993).

iii) Reasonable time, place and manner regulations of protected speech are valid if: (1) they are justified without reference to the content of the speech; (2) they are narrowly tailored to serve a significant or substantial government interest; and (3) they leave open ample alternative channels for communication. ***Id.***

DISCUSSION

The Zoning Code restrictions on Whynon's operation as a special exception in the HC Zoning District are valid.

Section 440 of the zoning code defines "adult entertainment establishments" and permits them as special exceptions. Under section 440 "adult entertainment establishments" are only permitted if they are: (1) located in a district specified in article 3 and (2) meet all the standards of a special exception and (3) obtain an annual license.

Article 3, however, does not include "adult entertainment establishments" as a listed use, neither as permitted use nor as a special exception or otherwise in any district. Section 401 states that "Any use not otherwise expressly permitted in any district shall be prohibited." What article 3 does do is to limit stores and retail establishments to the HC area of the

township. Under section 307, stores and retail businesses are permitted uses, however, the sale of pornographic materials specifically excepted.

Section 307, does permit "public entertainment establishments". A "public entertainment establishment" is not defined or otherwise identified in the ordinance. The only other use of the phrase "entertainment establishment" appears in section 440, regulating and defining "adult entertainment establishments". Under section 440, adult entertainment establishments include and define "adult bookstores", "adult cabaret", four types of "adult theaters", "adult arcade", and "massage parlor".

The store at issue which Whynon opened qualifies as an adult bookstore under section 440(A)(1). An adult cabaret under 440(A)(2) would also apply to the viewing booths Whynon has in its establishment.

Section 440(C)(1) through (6) describes the distance requirements for adult entertainment establishments.

Section 440(F) is the requirement that all adult entertainment establishments obtain a license from the Township Board of Supervisors to be renewed annually.

Section 440(G) provide that only after completing and filing an application with the Township Zoning Officer will a license be issued.

Sections 440(H)(1) through (6) describe the application information requirements.

Section 440(J) mandates that a license shall be issued no later than 30 days after the application has been made if the information is complete, correct and an investigation of the business has been conducted confirming the truthfulness of the application and good character of the applicant. If the application is denied the applicant has 20 days to file an appeal to the

Zoning Hearing Board.

The zoning code is ambiguous because Adult entertainment establishments, adult bookstores and cabarets in particular are not a listed use in Article 3, section 307 expressly prohibits the sale of pornographic material in article 3 districts and "public entertainment establishments" are not defined.

Ambiguities should be resolved in favor of Whynon as landowner. 53 P.S. § 10603.1. "Under Pennsylvania law, zoning ordinances must be strictly construed because they are derogation of the common law. When a term has not been defined in a zoning ordinance, it must be construed so that the land owner receives the benefit of the least restrictive use of his property. Moreover, undefined terms are to be given their plain meaning rather than a strained meaning; any doubt should be resolved in favor of the owner and the court should not find a prohibition by implication." ***Brown v. Pornography Com. Of Lower Southampton Township***, 620 F.Suff. 1199, 1209 (1985). Therefore, "adult entertainment establishments" must be construed as a subcategory of "public entertainment establishments". In so holding, we note that the phrase "entertainment establishment" does not appear in the zoning ordinance except under section 307 and 440. Whynon's store may operate lawfully in an HC location as a permitted special exception. The prohibition of article 307 against selling pornographic materials is limited to prohibiting stores and retail businesses from such sale as a permitted use.

Whynon's failure to apply for a special exception by challenged the zoning ordinance unconstitutional by bringing suit does not estop Whynon from pursuing this action nor is it an automatic bar to its conducting business.

In ***Jay-Lee, Inc. v. Municipality of Kingston Zoning Hearing Bd.***, 799 A.2d 923 (Pa.

Cmwth. 2002) the Plaintiff brought a facial challenge to an ordinance which required him to apply for a special exception to run an adult cabaret in the city. The Plaintiff argued that he should be able to challenge the ordinance on its face because it left no alternative place for Plaintiff to operate within the city, the process for obtaining a permit would subject the Plaintiff to undue delay, and the ordinance did not leave Plaintiff with a way to appeal. The court upheld the litigation procedure, stating, "Although facial challenges to legislation are generally disfavored, they have been permitted on the First Amendment context where the licensing scheme vests unbridled discretion in the decision maker. ***Id***. at 929, citing ***FW/PBS Inc. v. City of Dallas*** 493 U.S. 215, (1990). "Thus, where a licensing scheme creates a 'risk of delay' such that 'every application of the statute creates an impermissible risk of suppression of ideas,' the Supreme Court has permitted parties to bring facial challenges." ***FW/PBS,*** 493 U.S. at 223. ***Ibid.*** There is a sufficient question in this case that zoning ordinance special exception requirements are unconstitutional in (a) placing unfettered discretion in the hands of officials to deny or accept the application (b) failing to place limits on the time within which the decision maker must issue the license to warrant Whynon's facial challenge to the ordinance.

The licensing and special exception procedures under the zoning ordinance section 307 and 440 are valid.

Any system of prior restraints upon expressed bears a heavy presumption against constitutional validity. ***FW/PBS,*** 493 U.S. at 224. "The United States Supreme Court, in addressing prior restraints, has identified two scenarios that will not be tolerated. First, a licensing scheme that placed unbridled discretion in the hands of a government official or

agency constitutes a prior restraint and may result in censorship. ***Id.*** at 224-25. "For example an ordinance that makes the peaceful enjoyment of constitutionally-guaranteed freedoms contingent upon the uncontrolled will of an official by requiring a permit or license which may be granted or withheld in the discretion of such official, is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." ***Id.*** at 226. Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is not permissible. ***Id.***

"To be constitutional, laws regarding prior restraints must have sufficient procedural safeguards to combat these problems. These safeguards include: (1) licensor must decide whether to issue the license within a specified and reasonable time period during which the status quo is maintained; and (2) a prompt judicial review of that determination must be available." ***Pennsylvania Pride, Inc. v. Southampton Township***, 78 F. Supp. 2d. 359, 363 (1999), citing ***FW/PBS***, 493 U.S. at 228.

Unfettered Discretion of Officials to Deny or Accept Application

"In assessing the appropriateness of the permitting scheme as a time, place, and manner regulation, the Supreme Court noted that 'even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression' where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit. ***Thomas v. Chicago Park District***, 534 U.S. 316, 323 (2002) (citing ***Forsyth County v. Nationalist Movement***, 505 U.S. 123, 131 (1992) ***County v. Nationalist Movement***, 505 U.S. 123, 131 (1992)). Thus, the regulation in question must contain adequate standards to guide the official's decision and render it subject to effective judicial review." ***Id.*** See also, ***Diener***

v. Reed, 77 Fed. Appx. 601 (3d Cir. 2003).

"The Supreme Court has recognized that '[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." ***Forsyth***, 505 U.S. at 130-131. (quoting ***Heffron v. International Society for Krishna Consciousness, Inc.,*** 452 U.S. 640, 649 (1981).

" 'To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain narrow, objective, and definite standards to guide the licensing authority.'" ***Hefforn***, 505 U.S. at 131. Otherwise, 'if the permit scheme 'involved appraisal of facts, the exercise of judgment, and the formation of an opinion'…by the licensing authority, 'the danger of censorship and of abridgement of our previous First Amendment freedoms is too great' to be permitted.**"** ***Id. Reil v. City of Bradford***, 2005 U.S. Dist. LEXIS 18704 (3d Cir. 2005).

"A use permitted by special exception is presumptively consistent with the public health, safety, and welfare; the denial of a special exception can be based only on proof that the use 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, 1057 (1995); See also ***Kern v. Zoning Hearing Board of Tredyffrin Township***, 449 A.2d 781, 783 (1982) An applicant, by showing that the proposed use is permitted by special exception and that it complies with the specific requirements of the ordinance, identifies the proposal as one which the municipal legislative body has determined to be appropriate in the district and therefore presumptively consistent with the health, safety and general welfare of

the community.

We find the licensing procedures under section 440 to be sufficiently specified. We also find that generally the special exception procedures under Article 10, Section D of the zoning ordinance are also appropriate. Many of the requirements which Whynon must meet to obtain a special exception, however, are not valid as a prior restraint upon Whynon's freedom of expression and must be stricken from the ordinances. The Township's zoning ordinance requirements for issuance of a special exception as set forth in Article 10, section in ruling upon the issuance of a special exception the Zoning Hearing Board is mandated to consider the Planning Commission comments, the other zoning ordinance provisions and the following requirements under section D(1)(a)-(f):

> a. "That the use is so designed, located and proposed to be operated that the public health, safety, welfare and convenience will be protected;
> b. That the use will not cause substantial injury to the value of other property in the neighborhood where it is to be located;
> c. That the use will be compatible with adjoining development and the proposed character of the zone in a district where it is to be located
> d. That adequate landscaping and screening is provided as required herein
> e. That adequate off-street parking and loading is provided and ingress and aggress is designed to cause minimum interference with traffic on abutting streets;
> f. That the use conforms with all applicable regulations governing the district where located.
>
> … "In approving a special exception, the Zoning Hearing Board may attach whatever reasonable conditions and safeguards as it deems necessary in order to insure that the proposed development is consistent with the purposes of this ordinance.

These general requirements under sub-paragraphs a., b., c., d., and e. above are too broad to be constitutionally applied to Whynon as they would empower the Zoning Hearing Board to "…covertly discriminate against adult entertainment establishments under the guise

of general "compatibility" or "environmental considerations". ***Lady J. Lingerie v. City of Jacksonville***, 176 F.3rd 1358, at 1362(11th Cir, 1999). Therefore, the "discretion" of the Zoning Hearing Board is not sufficiently limited and is unconstitutionally broad, under Article 10, Section D, 1., a.-e., and those requirements need not be met by Whynon. Whynon by obtaining the license required by section 440 satisfies the determination the use is consistent with the public health, safety and welfare and is otherwise a suitable use.

The time limits in the zoning ordinance are constitutionally adequate.

In ***FW/PBS***, the Court considered the First Amendment's application to a city ordinance that "regulates sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections." 493 U.S. at 220-21. A Court majority held that the ordinance violated the First Amendment because it did not impose strict administrative time limits of the kind described in ***Freedman*** where the ordinance directly censored speech. In doing so, three members of the Court wrote that "the full procedural protections set forth in ***Freedman*** are not required," but that nonetheless such a licensing scheme must comply with ***Freedman's*** "core policy" including (1) strict administrative time limits and (2) "the possibility of prompt judicial review in the event that the license is erroneously denied." ***Id.*** at 228.

Subsequently, the Supreme Court in ***City of Littleton v. Z.J. Gifts D-4, LLC,*** 541 U.S. 774 (2004), modified the rule set out in ***FW/PBS*** in the respect that within neutral and objective licensing/zoning schemes which affect adult business, the ***Freedman*** requirement that special judicial review rules apply is withdrawn.

In ***City of Littleton***, the Supreme Court found that the city's licensing scheme was constitutional because (1) it applied reasonable objective, nondiscretionary criteria unrelated to

the content of the expressive materials of the plaintiff; and (2) the state courts had judicial tools sufficient to avoid undue delay. Prompt judicial review provisions as described in ***Freedman v. Maryland,*** 380 U.S. 51 (1965) and ***FW/PBS, Inc. v. Dallas***, 493 U.S. 215 (1990) were necessary because the ordinances in question had subjective standards with the effect that a denial would censor the speech at issue. The ordinance in ***Littleton*** conditioned the acceptance of the license on neutral and nondiscriminatory criteria, therefore the state's ordinary rules of judicial review were adequate for the purpose of facial challenges to the ordinance.

The argument in ***Littleton*** centered around the question of whether it was necessary for the ordinance to have measures providing "prompt judicial review" for the issuance of adult licenses. In our case such measures are contained in the ordinance. The question in our case is somewhat different. It is whether the administrative timeline causes undue delay. The court in ***Littleton*** recognized that the undue delay requirement for licenses suppressing speech applied to both judicial review and administrative procedures. See ***Littleton***, 541 U.S. at 780 ("These words pointing out that ***Freedman's*** 'judicial review' safeguard is meant to prevent 'undue delay,' 493 U.S. at 228, include **judicial** as well as **administrative**, delay." (emphasis in original)).

Whynon cites other cases where specific time requirements for administrative procedures are found unconstitutional, specifically, ***Teitel Film Corp. v. Cusack***, 390 U.S. 139 (1968). ***Teitel*** deals with an ordinance that directly censors speech and is not an objective zoning standard. The Court in that case found that 50-57 days to finish administrative procedures for the issuance or denial of a license was not a brief enough period of time to satisfy constitutional requirements for prior restraints on speech. ***Id.*** at 141-42. See also,

Freelance Entertainment, LLC v. Sanders, 228 F. Supp. 2d 533 (N.D. Miss. 2003) (76 days unconstitutional); ***Franklin Equities, LLC v. City of Evanston,*** 967 F. Supp. 1233 (D. wyo. 1997) (90 days unconstitutional); and ***Cascade News, Inc. v. City of Cleveland***, 1992 WL 808790 (N.D. Ohio 1992) (60 days unconstitutional).

The timeline for applying for a special exception and appealing from an adverse decision from the Zoning Hearing Board in the Township Zoning ordinance can be summarized as follows:

1. Adult bookstores are "special exceptions" under the ordinance. They also are subject to an "adult license" requirement.

2. Upon receipt of the adult license application, the Township has 30 days to accept or deny the license based on the criteria in 440.H.1 (applicant's name, form of business, criminal record of applicant, names/addresses of employees).

3. If the Zoning Officer denies the application the applicant has 20 days in which to file an appeal.

4. Special exceptions cannot be approved by the Zoning Board until the Township Planning Commission has given an advisory report. The Planning Commission has 30 days from the date of the receipt of the application to file a report. If they fail to do so the application shall be deemed to constitute no comment by the Planning Commission.

5. Before rending a decision the Zoning Hearings Board shall hold a hearing on the special exception application. (Hearings are standard for all decisions). The Zoning Board has 60 days from the receipt of the application to fix a time and place for the hearing.

6. The Zoning Hearings Board shall render a decision or make written findings on any

application within 45 days after the date of the last hearing on said application.

7. Any person aggrieved by any decision of the Zoning Hearing Board may appeal within 30 days to the Court of Common Pleas of Lycoming County.

We do not find these time limits to be indefinite nor unconstitutionally prolonged when applying the ***Littleton*** considerations.

The Ordinance is not impermissibly vague and overbroad in its terminology.

We also hold the Township Zoning ordinance is not otherwise impermissibility vague and overbroad in its terminology. A law is unconstitutional if its provisions are so vague and imprecise that persons of ordinary intelligence must guess at its meaning and differ as to its application. ***Coates v. Cincinnati***, 402 U.S. 611, 614 (1971). Where a term in a zoning ordinance is undefined, the term must be given its usual and ordinary meaning. ***Kratzer v. Bd. of Supervisors of Fermanagh Twsh.***, 611 a.2D 809 (Pa. Commw. 1992). The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." ***Cochatta Inc. V. Miller***, 458 F.3d 258 (3rd Cir. 2006).

Whynon asserts certain undefined terms of the zoning ordinance are too broad or vague to be enforced. These terms specifically are, "Public clubs or lodges", "Pornographic material", "Other places where minors congregate". Despite the Township Zoning Officer, Mr. Eck, hesitating to define these terms further in his deposition (see p. 61) we find these terms clear and factually ascertainable.

ORDER

Trial on the remaining issues as referenced in the foregoing opinion will be held on January 25, 2008 in Courtroom 5, Lycoming County Courthouse, 48 West Third Street, Williamsport, Pennsylvania beginning at 9:00 a.m. Counsel are hereby attached.

BY THE COURT,

William S. Kieser, Judge

cc: J. Michael Murray, Esquire-55 Public Square, Suite 2121, Cleveland, OH 44113-1949
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