

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WHYNON CORPORATION,	:
Plaintiff	:
	:
vs.	: NO. 05-01, 011
	:
ARMSTRONG TOWNSHIP,	: CIVIL ACTION – LAW
LYCOMING COUNTY,	:
PENNSYLVANIA,	: NON-JURY TRIAL DECISION
Defendant	: AND ORDER

DATE: June 30, 2008

DECISION

This litigation involves the request of Plaintiff, Whynon Corporation (hereafter “Whynon”) for declaratory injunction relief, declaring that the Armstrong Township Zoning Ordinance in existence on June 3, 2005 was unconstitutional on the basis that it deprived Whynon the right to open an adult bookstore, with adult entertainment viewing booths, in Armstrong Township. Whynon also asserts claims for damages and attorney fees. At the same time Defendant, Armstrong Township (hereafter “Township”) seeks a permanent injunction which would prohibit Whynon from opening its retail establishment until such time as it applies for an appropriate zoning permit and license to operate under the provisions of its applicable zoning ordinance. Following this court’s denial of cross-motions for summary judgments by an Opinion and Order of December 31, 2007, this case was tried in a non-jury proceeding before the court on March 28, 2008. At the conclusion of the testimony, the parties’ respective counsel requested the opportunity to file briefs and to appear for oral argument. This court held oral argument on May 6, 2008. Based upon the facts found by the court as stated below and the application of the law we will enter an order in favor of Defendant Armstrong Township.

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. 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.

On June 6, 2005, upon learning of the opening of the “Adult Outlet,” a zoning officer issued a zoning violation notice which directed Whynon to cease all operations of “Adult Outlet.” The notice alleged that Whynon had commenced business as an adult entertainment establishment without applying for a special exception or obtaining a zoning occupancy permit in violation of sections 307 and 440. Section 307 permits “public entertainment establishments” except the sale of pornographic materials. Section 440 defines “adult entertainment establishments” and permits them as special exceptions. The notice directed Whynon to cease all operations immediately and to remove any signs that had been erected.

On June 7, 2005 Township filed a response to Whynon’s complaint and a cross-motion for an injunction to prohibit Whynon from operating until such time as it complied with the zoning ordinance requirements. Following a hearing, on June 30, 2005, the Honorable Richard A. Gray issued an opinion and order which granted the Township’s request for a preliminary injunction and denied Whynon’s request for a preliminary injunction.

Cross motions for Summary Judgment were filed after completing discovery in this matter; the motions were filed on July 2, 2007 by the Township and on July 6, 2007 by Whynon.

By our Opinion of December 31, 2007 we found that neither of the summary judgment motions could be granted as the court was unable to make a determination based upon the facts that were not in dispute as to whether or not there were any lots in the Township that were able to be developed as an adult entertainment establishment or if there were sufficient alternative avenues of communication consisting of locations either within Armstrong Township, given its size and population and other unique characteristics or alternative locations in nearby neighboring municipalities which provided adequate alternative locations for retail establishments.

Our summary judgment decision did recognize that the burden is on the Township to prove its zoning ordinance is constitutional when applied as a prescriptive restriction upon Whynon's First Amendment Rights of freedom of expression through its adult bookstore business. We also recognized the determination as to the validity of the ordinance was governed by several well established principles, specifically:

- 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.*

Although we denied the cross-motion for summary judgment we did in our December 31, 2007 Opinion come to several conclusions, specifically the following:

1. The zoning code restrictions on Whynon's operation as a special exception in the HC zoning district are valid (12/31/07 Opinion, page 6).

2. Whynon’s failure to apply for a special exception under the zoning ordinance but instead instituting this suit did not stop Whynon from pursuing this action nor is it an automatic bar to Whynon’s conducting business. *Id.* at p. 8.

3. The licensing and special exception procedures under the zoning ordinance sections 307 and 440 are valid. *Id.* at p. 9.

4. We further found the time limits of the ordinance to be constitutionally adequate. *Id.* at 13-16.

5. The ordinance was not impermissibly vague or over broad in its terminology.

We did, however, rule unconstitutional as applied to Whynon the Township’s zoning ordinance requirements for issuance of a special exception as set forth in the Article 10, Standards Applicable to the Issuance of a Special Exception. Under Article 10, in issuing special exceptions the Zoning Hearing Board is mandated to consider requirements under section D(1), as follows:

- “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 egress is designed to cause minimum interference with traffic on abutting streets...

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 requirements are too broad to be constitutionally applied to Whynon. We held these provisions could 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. It is our holding those requirements need not be met by Whynon and if Whynon met the specific requirements of Section 440, it would have qualified as a suitable special exceptions use under the provisions of Article 10.

This ruling then set the stage for the evidentiary hearing that was held on May 12, 2008.

The record upon which we are deciding this case consists of the depositions, affidavits, exhibits, other matters filed of record, and considered at the time of the summary judgment stage as supplemented by the testimony at the evidentiary hearing. Armstrong Township is a second class township municipality of 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.

Section 440 of the 1994 Armstrong Township Zoning Ordinance states, in relevant part, as follows:

440 ADULT ENTERTAINMENT ESTABLISHMENTS

....

A. For purposes of this Ordinance, Adult Entertainment Establishments include but are not limited to:

1. ADULT BOOKSTORE...
2. ADULT CABARET...
3. ADULT DRIVE-IN PICTURE THEATER...
4. ADULT MINI MOTION PICTURE THEATER...
5. ADULT MOTION PICTURE THEATER...
6. ADULT WALK-IN PICTURE THEATER...
7. AMUSEMENT ARCADE...
8. MASSAGE PARLOR...

B. For purposes of this Ordinance explicit and specified sexual activities include:

1. SPECIFIED ANATOMICAL AREAS:

....

2. SPECIFIED SEXUAL ACTIVITIES:

....

C. To further the promotion and protection of the public health, safety, morals and general welfare of the Township...Adult entertainment facilities shall not be located within:

1. 500 feet of any Residential District, residential structure, or rooming unit;
2. 1,000 feet of any church, school, theater, park, playground; public pool, billiard hall, amusement arcade, club or lodge; or other area where minors congregate;
3. 1,000 feet of any establishment licensed by the PA Liquor Control Board to dispense alcoholic beverages;
4. 1,000 feet of any restaurant, eating establishment or grocery store; nor within
5. 1,000 feet of any other adult entertainment establishment;
6. For the purposes of this Section, spacing distances shall be measured from all property lines of any of the uses specified or mentioned in Subsection B above.

(Hearing Exh. D-2).

At the hearing, the Township presented testimony from their former solicitor, Richard A. Gahr. Former solicitor Gahr's testimony described the procedures and a chronology of the events which surrounded the initiation of the litigation and general advises he had given to the zoning officer. Overall, this testimony was of little value to the Court and for the most part was not relevant to the factual determinations we are required to make and the conclusions stated by Mr. Gahr have no bearing upon our decision. What was significant from Mr. Gahr's testimony was that Whynon had failed to apply for a license, building permit, zoning permit, or special exception prior to opening the "Adult Outlet". Following the Township's adoption of the 2006 zoning ordinance Whynon submitted a partial incomplete application for a zoning permit which was returned to Whynon with the request that further information be provided. The application was not resubmitted. Former solicitor Gahr's testimony also verified that the 2006 ordinance

was adopted on November 30, of that year (hearing exhibit D-10) for the purpose of amending section 440 as to proximity limitations in the manner of making measurement between an adult entertainment facility and limiting uses. The 2006 zoning ordinance change has also reduced the buffer zone between an adult entertainment establishment and a residential district to 300 feet from 500 feet. The measurement change provides that measurements are to be from building point to building point. From this testimony, the Court concludes that the Township acknowledges that in its view its prior ordinance was inappropriate or vague.

The second and final witness called on behalf of the Township was Clifford A. Kanz, the Development Services Supervisor of Lycoming County, Department of Planning Community Development. Mr. Kanz is a certified planner by the American Institute of Certified Planners and has been such since 1993. Mr. Kanz, at the request of the Armstrong Township zoning officer and former solicitor Gahr, provided services and advice to Armstrong Township in connection with Whyton's opening of the "Adult Outlet" as well as services in connection with their 2006 ordinance. He also familiarized himself, to the extent that he did not already have that familiarity in his work with the County Planning Commission, with the demographics and geography of Armstrong Township.

From Mr. Kanz's testimony, the Court finds that Armstrong Township is composed of 17,540 acres of land, 7,624 of which are not controlled by a government entity. Much of the Township is forested and watershed with major holdings being held by the Williamsport Water and Sanitary Authority, Pennsylvania Department of Forestry, Pennsylvania Game Commission and other government entities. The highly commercial zoned Township consists of 70 acres exclusive of roads. The Township population as of the 2000 census was 717 people. Mr. Kanz testified as to the very limited commercial development in the Township, most of which was

situated along the one major highway, U.S. Traffic Route 15, which crosses a Township eastern section in a generally East/West alignment (although the traffic routing is North/South). This commercial development included one gas station, a tennis club, and a construction business. There are no grocery stores, banks, theaters, or bowling alleys within the Township. Kanz further testified that under the 2006 ordinance, a total of 21 acres of land exists in the HC area.

Clinton Township borders Armstrong Township on its Southeast side, with U.S. 15 intersecting the boundary lines of the two Townships approximately one and a half miles East (South on U.S. 15) of the Whynon lot. Immediately adjacent to that boundary line of Armstrong and Clinton Township another adult entertainment facility exists in Clinton Township, although it was noted that part of that property may in fact be in Armstrong Township.

Mr. Kanz also testified as to his manner of applying the buffer zones of the 1994 zoning ordinance to “Adult Outlet”.

At issue in this testimony was the correct interpretation of Section 440.C., 6.

“6. For the purposes of this Section, spacing distances shall be measured from all property lines of any of the uses specified or mentioned in Subsection B above.

Id.”

It is apparent on its face that subparagraph 6 above of subsection C is vague and incapable of interpretation in as much as there are no uses specified or mentioned in “subsection B above.”. Section 440 B describes specified sexual activities.

Mr. Kanz conceded that if one measured the spacing distance imposed by Section 440.C from the property line of Whynon to the property line of the disqualifying use, there was no land in Armstrong Township that met the separation requirements. This was particularly true since Whynon’s lot was adjacent to a tennis club which is a buffering disqualifying use. Similarly, he testified that if one measured the spacing distance from the property line of the adult use directly

to the disqualifying use there were no parcels of land that satisfied the zoning code's restrictions.

Mr. Kanz also testified that he examined the separation requirements set out in the Code and drew circles of either 500 or 1,000 feet from the property lines of the disqualifying uses. Land falling within the circles, he testified, was disqualified for an adult use, while the land outside the circles was potentially available for an adult use. He testified that under this method, portions of two parcels, parcels 113 and 113A, were available for development as an adult bookstore.

The Township contends that this later method is the correct way to interpret subparagraph 6 of section C because doing so interprets the vague paragraph in a way most favorable to Whynon. Whynon asserts that paragraph 6 should be interpreted strictly to refer to property lines regardless of the reference to either prohibited adult entertainment uses or prohibited disqualifying buffer uses. Regardless, this court believes that both parties have misapprehended how to deal with the vagueness of subparagraph 6. Because of its vagueness and impossibility of determining the Scribner's intent this paragraph should be completely disregarded and deemed to be stricken from the ordinance. That leaves the ordinance with the provisions of subparagraph C, paragraph 1-5, which provide that adult entertainment facilities shall not be located within specific distances of specific other district structures or other facilities. The clear reference to facilities and specific buildings then means that the distance that can be applied under the ordinance is from a particular building or structure or other facility or a specific line of a residential district. It can not be a distance that applies to open space or parking lot or property lines. This interpretation would create even more area for use as an adult entertainment facility than that contended by the Township through the testimony of Mr. Kanz.

Nevertheless, from the testimony of Mr. Kanz the court finds that at minimum an adult

entertainment facility could have been constructed on lots 113 and 113A under the 1994 Armstrong Township zoning ordinance without violation of the buffer distance requirements applied to such a use.

Mr. Kanz's testimony did not apply the 1994 zoning ordinance in such a way as to determine the existing uses when the 1994 ordinance was adopted of the available properties for establishing an adult entertainment establishment existing at that time. Kanz did testify that a substantial quantity of land could be available under the 1994 ordinance in the HC district if the tennis club, parcel number 123, would be eliminated. There was no testimony as to when the tennis club was erected. This court therefore can not make a determination as to whether or not when the 1994 ordinance was adopted the ordinance would have permitted adult entertainment establishments on a substantial quantity of land, if so this court would have deemed that there was available sites and the mere fact that some other use was established prior to the time that Whynon or other entity sought to establish an adult entertainment facility would not render the ordinance invalid. Without that testimony, we must determine whether or not the existence of the two lots, 113 and 113A, are sufficient alternative available sites for use as an adult entertainment facility.

Given the very limited commercial nature of Armstrong Township, its overall rural characteristics and large quantity of land held by government entities, its small population, 771, we believe that these two commercial parcels do provide alternate suitable locations and the fact that only these two lots exist under the 1994 ordinance does not render it unconstitutional.

In addition, we find, as testified by Mr. Kanz, that there are suitable alternative sites for adult entertainment establishments in the municipalities surrounding Armstrong Township, specifically one is located in Clinton Township and one is located in Loyalsock Township, both

short driving distances from Armstrong Township. In fact, the Clinton Township site is immediately adjacent to the municipal boundary of Armstrong Township. It is a driving distance of 2.7 miles from Whynon's lot. The Loyalsock Township facility is 5.6 driving distance miles from the adult entertainment site. Between the Loyalsock Township facility and Armstrong Township there are many potential locations for adult entertainment facilities in the Borough of South Williamsport, the City of Williamsport, and Loyalsock Township. Specifically, there would be 160 acres available in the City of Williamsport MH district, 9 acres available in the South Williamsport B-2 district, and 437 acres within the I District of Loyalsock Township. Despite Whynon's objections to Kanz's methodology we find that he has applied the usual and appropriate methodology used by planners to ascertain this information and find his evidence credible and persuasive, particularly in view of lack of any evidence to the contrary.

We find that .4342 acres of land situated within Armstrong Township's HC zoning district is potentially available for the operation of an adult entertainment facility such as Whynon's "Adult Outlet" is adequate particularly when coupled with the two similar existing establishments available in the relevant market area and the additional land potentially available in the adjacent municipalities.

Armstrong Township amended its 1994 ordinance in 2006, specifically incorporating changes as would be applicable to adult entertainment establishments such as Whynon's Bookstore, the "Adult Outlet". Whynon acknowledges that these changes satisfy on their face the constitutional requirements which Whynon asserts were not met under the 1994 ordinance. Whynon has not yet filed for an application to operate "Adult Outlet" under the provisions of the 2006 ordinance.

“Adult Outlet” opened at a time when building and business operations were bound by the 1994 zoning ordinance. Whether the 1994 zoning ordinance is unconstitutional as applied to Whynon is not per se directly rendered moot by the 2006 amendment to the code. The question of whether or not the 1994 zoning ordinance is constitutional is, rather, incidentally rendered moot by the amendment to the code. Whynon is accountable to the amended, constitutional zoning ordinance because, having not appropriately applied for license to operate under the 1994 ordinance, Whynon does not have any vested rights for operation under the 1994 zoning ordinances. Without any vested rights for operation, Whynon now finds itself instead accountable to the amended, current zoning ordinance.

In addressing Whynon’s argument to the contrary, it is helpful to recount Whynon’s specific failings to act in accordance with the procedural rules within the zoning code itself that are precursory to all business operations. Whynon created an insurmountable obstacle for itself by seeking a preliminary injunction to prohibit enforcement of the Township’s zoning ordinance without ever applying to obtain licensure to legally operate under the applicable zoning ordinances.

We acknowledge that in our summary judgment ruling we determined that Article 10 (d) was unconstitutional as applied to Whynon. This does not, however, make Whynon a beneficiary of a statute unconstitutional at the time of its adoption and free of all of the constitutionally appropriate provisions of that ordinance. An ordinance may be constitutional in many respects and one unconstitutional provision of there does not declare or make the entire ordinance void and inapplicable to a particular party. *Daniel Rothermel v. John Meyerle*, 20 A. 583, 587-588 (1890); *Comm. of PA v. Gomer Robert Williams*, 832 A.2d 962, 986 (2003).

“[U]nless otherwise specified the individual provisions of all statutes are presumptively severable. See 1 Pa.C.S. § 1925.

Severance is precluded only where, after the void provisions are excised, the remainder of the statute is incapable of execution in accordance with legislative intent. See *id.* *Commonwealth v. Williams*, 832 A.2d at 986.

This fact of law is equally applicable to ordinances as it is statutes. *Nationalis Movement v. City of York*, 425 F. Supp. 2d 574 (2006).

Just as the Township has recognized that subparagraph 6 of subsection C of section 440 can not be applied in derogation of Whynon's rights there is no reason to think that the Township would have applied Article 10 in derogation of Whynon's rights if it had made application to the Township for a permit before opening. In view of the specific provisions that do relate in governing an adult entertainment facility under section 440 of the ordinance which Whynon could very correctly assert that if it met those specific provisions that then it automatically was meeting the conditions set forth under Article 10.

Specifically, to ensure the vesting of rights to operate its business under the 1994 zoning ordinance to enable argument that the 1994 zoning ordinance violated Whynon's constitutional right to operate an adult bookstore with viewing booths, Whynon should have applied to operate under section 307 as a public entertainment establishment in conjunction with applying for exception to the prohibition of the sale of pornographic materials contained in section 440 as an adult entertainment exception. Thus, even though the new ordinance has no relevance to our disposition of the 2005 violation because the new ordinance took effect in 2006, after this litigation had commenced, the new ordinance is relevant to dispose of any newly initiated complaint of constitutionality by Whynon. The current ordinance is not unconstitutional, and Whynon has no vested right of operation under the 1994 ordinance.

In Whynon's post-hearing brief, Whynon states that it filed its complaint in response to a cease and desist letter implying that it did not file upon opening "Adult Outlet" instead of attempting to comply with the Township's operation licensing procedures, as was the case:

Whynon opened its retail business in June 2005, after being advised that a new certificate of occupancy was unnecessary, as Whynon and the previous occupant were both retail uses.

But shortly after Whynon opened, the Township issued a cease and desist letter, and Whynon filed this case seeking a declaration that the Township's zoning code was unconstitutional and an injunction against its enforcement. The Township counterclaimed and sought an injunction to enforce the provisions of the 1994 zoning code restricting the location of adult uses at issue here.

... Under these circumstances, the Township's claim that the constitutionality of the 1994 zoning code had been rendered moot by subsequent amendments to the Code lacks merit."

Plaintiff's Post-Hearing Brief at page 7, April 30, 2008. Whynon misconstrues the procedural posture of the case in an attempt to prove that Whynon may have standing to challenge the constitutionality of the 1994 zoning ordinance. Whynon did not file a complaint in response to being deemed in violation of the 1994 zoning ordinance, as Whynon states in its brief. Instead, Whynon began operation of "Adult Outlet" as it commenced litigation against the 1994 zoning ordinance, both occurring on the same day. Whynon never intended to attempt any compliance with the code's licensing procedures. Even if it was exempted from a new certificate of occupancy under section 900 of the zoning code, because the previous occupant was a retail user, a garden center that had gone out of business, Whynon ought to have applied under sections 307 along with a section 440 exception.

Whynon states, unequivocally, that if the 1994 law was unconstitutional, then Whynon has grandfather rights under the 1994 zoning code. Whynon states, and we revere, that "a law repugnant to the constitution is void." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 Led. 60

(1803). The concept is further explained in Whynon's post-hearing brief by quotation to a leading treatise:

A zoning ordinance has only prospective operation and, if the zoning ordinance when acted is invalid, there is no zoning ordinance. A landowner's right to use his property in a particular manner is determined by the legal state of facts which exist at the time a use is commenced. If at that time, by reason of either the nonexistence of a restrictive ordinance or the existence of an ordinance which if inquiry were made would be determined to be invalid, it is found that the landowner had the right to operate the particular use and that the municipality would have no right to stop him from doing so, then the landowner's rights to use his land in the particular manner so initiated are vested.

Plaintiff's Post-Hearing Brief, April 30, 2008, at 7 (quoting, 4 Rathkoph, The Law of Zoning and Planning §72:18 (4th ed.)).

The issue that we must decide as a precursor to Whynon's claim of grandfathered rights under the doctrine of void *ab initio*, that is the issue of the vesting of property rights in regards to zoning ordinances when there has been no application for licensure to operate under the applicable zoning procedures. Whynon does not address this issue. Whynon points to no case where a zoning ordinance was declared void *ab initio* when the vesting of operational rights is questioned because there was no thread of attempt to comply with the proper licensing procedures in the first place. Instead, Whynon attempts to convince the court that operation of "Adult Outlet" must be allowed by distracting the court with cases that do not speak to the true issue that is being decided in the case currently at hand.

One Pennsylvania case that Whynon cites in its Post-Hearing Brief, *Glen-Gery Corporation v. Zoning Hearing Board of Dover Township*, 589 Pa. 133, 907 A.2d 1033 (2006), pertains to procedural due process rights and has a holding that is more narrow than can be applied to the case at hand. That case concerned a zoning ordinance passed without reverence to procedural due process concerns. *Glen-Gery Corp v. Zoning Hearing Bd. Of Dover Tp.*, 907

A.2d at 1035. The zoning ordinance had a time-limit restriction on all challenges to the ordinances. *Id.* Plaintiff made a *prima facie* case that there was a lack of hearings on the ordinance that rendered the ordinance in violation of Plaintiff's procedural due process rights. *Id.* Thus, the time limitations on all challenges to the ordinance were suspended in order for Plaintiff to bring a claim that Plaintiff's procedural due process was violated because the zoning ordinance was passed without proper hearings. *Id.*

This reasoning, however, is of little or no guidance to the court regarding the case currently in front of us. Whynon has not made a valid challenge to the application procedure contained in the township zoning ordinance. Whynon has challenged the substance of an expired township zoning ordinance without ever complying procedurally with the ordinance. Applying to operate under the expired township ordinance may have preserved any vested right to operation in which to base a challenge to the expired township ordinance on. We are not convinced, as Whynon argues, that the reasoning in *Glen-Gery Corp.* creates grandfather rights in Whynon's desired use of the land at issue.

The Township cannot counter Whynon's argument with any precedential cases of its own. The Township does use persuasive authority that is at least on-point as to the threshold issue in the case at hand, the issue being the vesting of property rights in regards to zoning ordinances when there has been no application for licensure to operate under the applicable zoning procedures counters. For instance, in 2004 the 6th Circuit held a complaint to be moot when the plaintiff had not followed proper procedures for relief through the zoning appeal process, electing instead to file suit, and while the suit was pending the ordinance was amended to avoid any potential violation of the constitution. *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830 (6th Cir. 2004). The plaintiff in that case submitted an application for a business license

in which he made representations that no adult materials would be disseminated. *Id.* Upon receipt of a license, however, the plaintiff commenced selling sexually explicit materials. *Id.* Selling sexually explicit materials was not permitted in the applicable zoning district. *Id.* The plaintiff's business license was revoked and the plaintiff's store ordered to close. *Id.* The plaintiff decided to file suit rather than to comply with the zoning appeal process. *Id.* While the suit was pending, the applicable zoning ordinance was amended to permit adult bookstores as a principle, rather than conditional, use. *Id.* The case was declared moot: "We can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect." *Id.* at 836. This plaintiff never had properly applied under the expired ordinance and so was not entitled to any damages or validity as to their challenge of unconstitutionality.

The Township also cites to a recently decided case from the United States District Court for the Western District of Pennsylvania that discusses and decides an issue very close to the one presented in the case at hand, *Bottoms Up Enterprises, Inc. v. Borough of Homestead*, 2007 U.S. Dist. LEXIS 74366 (W.D. Pa. Oct. 4, 2007). The plaintiff in that case was held to not have standing to make a constitutional challenge to a zoning ordinance that was subsequently amended to be constitutional because the plaintiff did not apply for any building, zoning, or occupancy permits under the ordinances they presumed to be unconstitutional. *Id.* After a presentation regarding a proposed adult business that did not strictly speaking fall within the definition of an "adult live entertainment facility," the borough amended the definition in its ordinance to frustrate the plaintiff's plan by requiring application for a conditional use and an alternative location selected for the proposed business. *Id.* In lieu of so complying, the plaintiff filed suit seeking injunctive and declaratory relief. *Id.* After the suit commenced, the ordinance at issue was amended further; the amendment addressed the contentions in the plaintiff's suit

regarding an alleged lack of alternative means available. *Id.* The court reasoned that because Plaintiff did not have any vested right to use the property as an adult live entertainment facility and, that since the amended ordinance was constitutional, the case was moot:

The general rule under Pennsylvania law is that property owners have no vested right that zoning classifications will remain unchanged, and the fact that an amending ordinance may depreciate the market value of a property does not render it invalid. However, a property owner who is able to demonstrate that he obtained a valid building permit under the old zoning ordinance, that he got it in good faith... acquires a vested right and need not conform with the zoning ordinance as changed. See, e.g., *Gulf Oil Corp. v. Township Board of Supervisors of Fairview*, 438 Pa. 457, 266 A.2d 84 (Pa. 1970)...

In the instant case, the Plaintiffs never applied for and, consequently, were never issued or denied any building, zoning, or occupancy permits,... they never acquired a vested right to use the property as an adult live entertainment facility or for any other use.

This Court cannot enjoin ordinances that are no longer in effect, See *Diffenderfer v. Central Baptist Church, Inc.*, 404 U.S. 412, 414, 92 S. Ct. 574, 30 L. Ed. 2d 567 (1972)... Under the currently existing legislation (Ordinance No. 1196), even more land is available for adult use in the WDD zoning district... Their challenge to Ordinance No. 1184 as not providing adequate alternatives has been rendered moot by the enactment of Ordinance No. 1196.

Bottoms Up Enterprises, 2007 U.S. Dist. LEXIS 74366, 60-62. Defendant's Post Hearing Brief, April 14, 2008, at 15-16. Whynon has not adequately demonstrated that it has obtained a valid building permit under the expired zoning ordinance. Courts have decided, whether a mere presentation was made to a borough or land was bought and operation commenced, in the case where proper zoning procedures are not followed and questionably unconstitutional zoning ordinances are amended, the constitutional challenge has become moot.

Whynon cannot claim grandfather rights under the mere fact that before Whynon purchased the property at issue, a garden center had previously operated and then gone out of business there; such a past use hardly works to grandfather a completely different and not similarly nonconforming use. So, while it is true that "a law repugnant to the constitution is void," a plaintiff still must have standing to bring a suit. In this case, Whynon opened "Adult

Outlet” the same day that Whynon brought suit challenging the constitutionality of the zoning ordinance. Whynon commenced this suit before it applied for licensure to operate under the appropriate zoning code procedure. By opening “Adult Outlet” without first applying to operate a public entertainment establishment nor making application for the sale of pornographic materials as an exempted nonconforming use, Whynon has forfeited the vesting of its rights to operate for such nonconforming use. Whynon, now, finds itself under an amended and constitutional zoning ordinance under which there is no longer a case for this court to hear.

ORDER

This court finds in favor of Armstrong Township, Lycoming County and dismisses all claims of Whynon Corporation, the Plaintiff. Each party to pay its own costs.

The court further directs that the Plaintiff, Whynon Corporation, is enjoined from operating its retail store “Adult Outlet” or any other adult entertainment establishment unless and until it submits an appropriate application to Armstrong Township for such use.

BY THE COURT,

William S. Kieser, Judge

Cc: Frank J. Laverly, Esquire
Jonathan E. Butterfield, Esquire
J. Michael Murray, Esquire
Law Clerk
Gary Weber, Esquire (Lycoming Reporter)