WHYNON CORPORATION,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 05-01,011
	:	
ARMSTRONG TOWNSHIP,	:	
LYCOMING COUNTY,	:	
PENNSYLVANIA,	:	
Defendant	:	
	:	

Date: October 23, 2008

OPINION IN SUPPORT OF THE ORDER OFJUNE 30, 2008 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This Opinion is entered in support of the Court's Order of June 30, 2008, wherein we found in favor of Armstrong Township, Lycoming County, the Defendant, and dismissed all claims of Whynon Corporation, the Plaintiff. The order of June 30, 2008, enjoined Plaintiff, Whynon Corporation, from operating its retail store "Adult Outlet" (an adult bookstore) or any other adult entertainment establishment unless and until it would submit an appropriate zoning application to Armstrong Township, Lycoming County for such use. Plaintiff, Whynon Corporation had sought affirmative injunction relief from this Court on June 3, 2005 under the premise the zoning ordinance that Armstrong Township, Lycoming County had adopted in 1994, was on its face unconstitutional as a prescriptive violation of its First Amendment rights. Whynon Corporation, however, never applied for a license to operate its retail business "Adult Outlet" under the prior zoning ordinance and did not acquire any vested rights under its assertedly invalid provisions. The Armstrong Township Zoning Ordinance was amended in 2006 and was admittedly rendered constitutional by the amendment. Without vested rights

under the prior zoning ordinance Whynon Corporation must now seek a valid zoning permit under the new ordinance before it can open "Adult Outlet".

THE ISSUES

WHYNON'S NOTICE OF MATTERS COMPLAINED OF ON APPEAL

On appeal Whynon Corporation argues that this court made twenty four errors, 1a-1k and 2-14, as follows:

> 1. The court erred in denying plaintiff's motion for preliminary injunction; in granting defendant's motion for preliminary injunction; in denying plaintiff's motion for summary judgment on its claims for declaratory judgment and injunctive relief liability and on liability; in accepting certain of the arguments made by defendant in its motion for summary judgment; in entering judgment for defendant after trial and not entering judgment for plaintiff on its claims for declaratory and injunctive relief and setting the matter down for trial on the plaintiff's claim for damages. The grounds upon which plaintiff claims these constituted errors are that the ordinances at issue in this case (Armstrong Township Zoning Ordinance) are unconstitutional on their face and as applied under the First and Fourteenth Amendments to the United States Constitution and Art. 1 § 7 of the Pennsylvania Constitution for each of the following reasons, each of constitutes a separate statement of the matters complained on appeal:
>
> a. Section 401 and 300 operate to prohibit adult uses entirely since such uses are not expressly permitted in any district l thus there is a complete zone out of adult uses.
>
> b. Section 307 does not permit adult uses either as a permitted use or a special exception in the HC District; thus there is a complete zone out of adult uses.
>
> c. Section 307 specifically prohibits the sale of pornographic materials; thus there is a complete zone out of retail adult uses.
>
> d. Section 440 states that adult uses may only be permitted as a Special Exception "in those districts specified in Article 3." There are, however, no districts specified in Article 3 where adult uses are permitted even as Special Exceptions. Thus there is a complete zone out of adult uses.
>
> e. Even if there were a specified district for adult uses, they

are not permitted as of right, but only as Special Exceptions, rendering the entire ordinance unconstitutional for failing to provide any sites where adult uses may be located as a matter of right.

f. The special exception provisions confer impermissible discretion on township officials to grant or deny a special exception.

g. The zoning ordinance is unconstitutionally vague and overbroad.

h. The zoning ordinance fails to require the Township to make a final decision to grant or deny a special exception within a short, specified period of time, as constitutionally required.

i. The licensing requirements of Section 440 confer impermissible discretion on the Township to grant or deny a license.

j. The zoning ordinance does not require the Township to make a final decision to grant or deny a Section 440 license within a short, specified period of time, as constitutionally required.

k. There is a complete zone out of adult uses because there is no land within the Township that satisfies the separation requirements of Section 440.

2. The court erred in concluding that Section 440, and particularly 440(c)(6), did not require spacing distances to be measured property line to property line.
3. The court erred in striking only 440(c)(6) due to vagueness rather than striking 440(c) in its entirety.
4. The court erred in concluding that portions of lots 113 and 113A were available for adult uses.
5. Assuming arguendo the court correctly concluded portions of lots 113 and 113A were available for such uses, the court erred in concluding that the availability of such portions constituted sufficient alternative avenues of communication.
6. The court erred in accepting lots 113 and 113A as available for adult uses, when other provision of the zoning ordinance, including the minimum lot requirements, depth and width requirements and set back requirements of Section 307 and Section 506 and the parking requirements of Section 800 rendered those lots unavailable for plaintiff's proposed adult use.
7. The court erred in considering and counting, as alternative avenues of communication, an adult bookstore and adult nightclub located outside of Armstrong Township.
8. The court erred in considering and counting, as alternative avenues of communication, land supposedly available for adult uses in other cities and townships.

9. The court erred in concluding that there was land available for adult uses in other cities and townships based on the testimony of Clifford Kanz, who did not know how adult uses were defined in those jurisdictions, did not know what zoning districts permitted them, did not know whether such uses were merely discretionary and did not know whether there were any time limits within which any needed permits had to be issued.
10. The court erred in admitting the testimony of Clifford Kanz, as to the availability of land for adult uses under zoning codes and maps of other cities and townships, when that testimony was hearsay and violated the best evidence rule.
11. The court erred in not recognizing and holding that pursuant to Section 1201(G), plaintiff had a valid certificate of occupancy and was not required to obtain a new one and, given the unconstitutionality of the zoning ordinance pertaining to adult uses, had all the permits required to lawfully operate its business.
12. The court erred in holding that Whynon's business and other adult uses constituted "public entertainment establishments" as that term is employed in Armstrong Township's zoning code.
13. The court erred in denying Whynon the injunctive relief sought after holding that several of the requirements for a special exception under the zoning code were unconstitutional.
14. The court erred in holding that Whynon was required to apply to operate an adult use under an unconstitutional licensing scheme in order for its right to operate at its location to vest.

FACTS & PROCEDURAL HISTORY

On June 3, 2005, Plaintiff, Whynon Corporation (hereinafter "Whynon"), opened a retail store named "Adult Outlet" at 960 Route 15 Highway, South Williamsport, which was located within Armstrong Township, Lycoming County, Pennsylvania (hereinafter "Township" or "Armstrong Township"). Beginning on June 3, 2008, Adult Outlet engaged in the business of selling pornographic materials and also offered the use of viewing booths.

Upon opening its business, Whynon instituted legal action the same day by filing the Complaint in this action seeking declaratory injunctive relief, attorney's fees, and costs asserting that the Armstrong Township Zoning Ordinance was unconstitutional and deprived

Whynon 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. Armstrong Township is a second class township municipality of the Commonwealth of Pennsylvania. The Township had adopted the zoning ordinance provisions which applied in 2005 in 1994. The area in which the Whynon retail store lot was located is in a HC (Highway-Commercial) zoning district.

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 as a specific violation 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 of the zoning ordinance. The notice directed Whynon to cease all operations immediately and to remove any signs that had been erected.

The 1994 Armstrong Township Zoning Ordinance (hereafter "ordinance" or "zoning ordinance") in its entirety appears as Exhibit A of the Defendant's Appendix of Exhibits in support of Motion for Summary Judgment filed July 2, 2007. The sections of the zoning ordinance relevant to the appeal are: Section 307, a table uses and structures authorized as permitted, accessory, or by special exception in the Townships HC zoning district (p.11); Section 440, as extensive statement of supplementary regulations which apply to "Adult Entertainment Establishments" (pp. 47-50); Section 1001, D. and 1002, Zoning Hearing Board and Zoning Officer procedures to be applied in ruling upon applications for special exceptions (pp. 80-81) in section 307 authorizes stores and "any retail business except the sale of

pornographic materials" in an HC district as a permitted use and "public entertainment facilities" as a special exception.

Section 440 defines "adult entertainment establishments" and permits them as special exceptions. Section 440 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 Exhibit D-2, Plaintiff's Exhibit No.7)

On June 7, 2005, the 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 Armstrong Township Zoning Ordinance requirements.

On June 30, 2005, after a hearing, the Honorable Richard A. Gray, entered an Opinion and Order which granted the Township's request for a preliminary injunction and denied Whynon's request for a preliminary injunction. Judge Gray determined that the business operated by Whynon Corporation was deemed an "adult entertainment establishment" under the zoning code and a "public entertainment establishment" under the zoning ordinance. Judge Gray aptly concluded 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. Judge Gray determined that the retail store operated by Whynon Corporation would be permitted as a "public entertainment establishment," a special exception in a highway commercial district under section 307 of the zoning ordinance.

After completing discovery in this matter, the Township filed a motion for summary judgment on July 2, 2007 and Whynon filed a cross-motion for summary judgment on July 6, 2007. On December 31, 2007, after hearing arguments on Cross-Motions for Summary Judgment, we issued an Opinion in which we found that neither Summary Judgment Motion could be granted in its entirety so as to constitute a final determination of the case. Although our order did resolve some issues based upon the facts that were not in dispute, this Court found a factual dispute did exist as 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 such retail establishments.

Following the court's ruling on the cross-motions for summary judgment, 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. We complied and subsequently held oral argument on May 6, 2008.

On June 30, 2008, based upon the facts found by the court and the application of the law, this Court determined that sufficient alternative avenues of communication consisting of lots upon which businesses such as "Adult Outlet" could be operated did exist both within and without Armstrong Township. The sufficient alternative locations for such adult entertainment establishments consisted of two available lots in Armstrong Township and sufficiently nearby locations outside of Armstrong Township in adjoining municipalities that were able to be so developed. We also denied Whynon's contentions the zoning ordinance was unconstitutional on the basis that there were insufficient alternate available means for the Township's populace to acquire pornographic books or view pornographic films. We further held that even if the zoning ordinance were unconstitutional, because Whynon had not ever applied for a zoning permit under the 1994 zoning ordinance, it could not avail itself of vested rights under that ordinance. We also held Whynon was now governed by an admittedly constitutionally valid amendments to the zoning ordinance enacted in 2006.

Accordingly, our order of June 30, 2008 entered a finding in favor of Armstrong Township and enjoining Whynon Corporation from operating its retail store "Adult Outlet" or any other adult entertainment establishment unless and until it submits an appropriate application to Armstrong Township and obtains a zoning permit and we also dismissed all claims of Whynon Corporation, the Plaintiff, and directed each party to pay its own costs.

The material submitted in support of the cross-motions for summary judgment and the testimony at the trial of March 28, 2008 also allowed us to find the following facts during the course of these proceedings.

Whynon had failed to apply to the Township for any type of license, building permit, zoning permit, or special exception prior to opening "Adult Outlet." A revised zoning ordinance was adopted on November 30, 2006 (hearing exhibit D-10), which amended section 440 of the prior ordinance. This change lessened the restrictions on the required distance between an adult entertainment facility, such as Adult Outlet, and a prohibiting use, and if reduced the buffer zone distance between an adult entertainment establishment and a residential district to 300 feet from 500 feet. The 2006 amendments also made it clear that measurements under the zoning ordinance are to be made from building point to building point. 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.

Armstrong Township has a population as of the 2000 census of 717 people. It contains 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 land holdings being held by the Williamsport

Water and Sanitary Authority, Pennsylvania Department of Forestry, Pennsylvania Game Commission and other government entities. Commercial development under the 1994 zoning ordinance (as well as after the 2006 amendments) is allowed only in the HC (highway commercial) zoned area of the Township, which consists of 70 acres exclusive of roads. Commercial Development in the Township is very limited, most of which was situated along the one major highway, U.S. Traffic Route 15, which crosses the Township's eastern section in a generally East/West alignment (although the traffic routing is North(west)/South(east). The HC zoning area of the Township is along this highway corridor. This commercial development includes one gas station, a tennis club, and a construction business. There are no grocery stores, banks, theaters, or bowling alleys within the Township. A total of 21 acres of land exists in the HC area. There are at least two parcels, referenced as Numbers 113 and 113A, having a total of .4342 acres, on which a business such as Adult Outlet could be operated applying the 1994 zoning ordinance distance of measuring from the boundary of the limiting use to the adult entertainment structure. The correct way of measuring the buffering distances under the 1994 zoning ordinance is to measure from the limiting use facility, rather than the boundary line of the property on which the use is located to the adult entertainment business structure. Applying such a measuring method results in several more parcels becoming available for adult entertainment uses such as "Adult Outlet."

There are suitable alternative sites for adult entertainment establishments in the municipalities surrounding Armstrong Township. Such a use is located in Clinton Township. A second is located in Loyalsock Township. Both are 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 Whynon's lot. 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.

DISCUSSION

In its Concise Statement of Matters Complained of on Appeal Whynon essentially raises four issues.

1. Sections 307 and 440 and the Special Exception procedure of Article 10, contained in the 1994 Armstrong Township Zoning Ordinance, operates as a complete zone out of adult entertainment uses and also are vague and overbroad thus rending the ordinance facially invalid as a prescriptive restriction upon Whynon's free expression rights under the First Amendment of the United States Constitution.
2. Due to a lack of land within Armstrong Township that satisfies the Section 440 separation requirements, there is a complete zone out of adult uses such as "Adult Outlet" by the 1994 Armstrong Township Zoning Ordinance.
3. Alternate avenues of communication of adult entertainment do not exist for the inhabitants of Armstrong Township.
4. Whynon Corporation should have been granted affirmative injunctive relief because the 1994 Armstrong Township Zoning Ordinance was unconstitutional, and

Whynon Corporation was not required to apply to operate an adult use under the licensing scheme directed by the zoning ordinance in order for its right to operate at its location to vest.

Our discussion will be divided into four parts addressing our reasoning as to why we have ruled against Whynon on each of these issues.

1. The Constitutionality of the 1994 Zoning Ordinance Provisions

We believe Whynon's first issue to the facial unconstitutionality of the 1994 zoning ordinance has been addressed by the order of Judge Gray of June 30, 2005, which granted the Township's request for a preliminary injunction, and our rulings in the Opinion issued on December 31, 2007 on the parties' cross-motions for summary judgment. Accordingly, we rely upon the findings and rulings set forth in those opinions. We also briefly will summarize and expand upon the reasoning set forth therein.

On June 30, 2005, following a hearing, 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. 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" as set forth under section 307 of the code, but ultimately concluded that Whynon's "Adult Outlet" was a "public entertainment establishment" under the zoning ordinance.

Judge Gray also 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 an adult entertainment use under Section 440. Judge Gray also held that an adult entertainment use as defined by Section 440 would be a "public entertainment establishment" which is authorized as 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.

While we believe Judge Gray's opinion to be well reasoned in and of itself, we also would note it correctly applies applicable case law:

> "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. More over, 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).

In its summary judgment motion Whynon asked this court to declare it had a constitutional right to open an adult bookstore in Armstrong Township and that the zoning ordinance under which the Township seeks to prohibit from opening was unconstitutional. Township's motion, on the other hand, sought a permanent injunction to prohibit Whynon from opening the bookstore until such time as it applied for an appropriate zoning permit and license to operate under the provisions of its zoning ordinance. At argument on the motions held September 11, 2007 the parties agreed the court should consider as evidence in support of the summary judgment motions the depositions, affidavits, exhibits, and other matters filed of record. N.T., 9/11/2007, pp. 4-8.

Many facts relevant to several issues raised in each of the summary judgment motions were undisputed. We found, however, the record to be incomplete as to 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. Therefore, a determination of the entire case on the motions for summary judgment was not appropriate.

Although we denied the parties request that we make a final determinative ruling on the case based upon the cross-motions for summary judgment we did, in issuing our summary judgment decision December 31, 2007 Opinion, make several rulings, 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 and procedures for prompt judicial review to be constitutionally adequate. ***Id***. at 13-16.
5. The ordinance was not impermissibly vague or over broad in its terminology referring to "Public clubs or lodges," "pornographic material," and "other places where minors congregate." ***Id.*** at 16.
6. We ruled unconstitutional as applied to Whynon the Township's zoning ordinance requirements for issuance of a special exception under Sections 1001, D. as these provisions could empower the Zoning Hearing Board to discriminate against adult entertainment establishments. ***Id.*** at 12.

The effect of our summary judgment decisions was to rule that if Whynon met the specific requirements of Section 307 and 440, it would qualify as a suitable special exceptions use, with the provisions of Article 10, being inapplicable. Whynon would be required to comply with the requirements of the zoning ordinance, if the Township ultimately prevailed on its contentions that the zoning ordinance provides sufficient area for adult entertainment establishments in the Township or other reasonable alternative avenues of communication were

available to its residents. ***Id.*** at 2.

Our summary judgment ruling required a further evidentiary hearing which was held on May 12, 2008. At the evidentiary hearing, Whynon presented no testimony; 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 advice he had given to the zoning officer. Attorney Gahr's testimony had little bearing upon our ultimate decision, it was significant in confirming that Whynon had not applied for any permit under the 1994 ordinance and the nature of the 2006 amendments which Whynon had started an application but failed to complete the process. From this testimony, this Court also concluded that the Township acknowledged its 1994 ordinance was inappropriately 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 land use planner, credentialed 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 Whynon's opening of the "Adult Outlet" as well as services in connection with their 2006 amendments to the zoning 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.

Kanz's testimony confirmed the demographics of the Township. Kanz confirmed

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. Kanz had also ascertained from his investigation that immediately adjacent to that boundary line of Armstrong and Clinton Township another adult entertainment facility, an adult bookstore with viewing booths exists in Clinton Township, although he noted that part of that property may in fact be in Armstrong Township.

Mr. Kanz's testimony as to the foregoing was not challenged. Mr. Kanz also testified as to his manner of applying the buffer zones of the 1994 zoning ordinance to "Adult Outlet", the manner of which Whynon strongly disputed.

At issue in his testimony was the correct interpretation of the zoning ordinance Section 440.C., 6, which provides,

> "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."

Section 440 B describes specified sexual activities, such as stimulation, masturbation and erotic touching, not property uses. Mr. Kanz testified in subparagraph 6., of subsection C., was subject to various interpretations in its application in as much as there are no uses specified or mentioned in "subsection B above."

Mr. Kanz conceded that if one measured the restrictive spacing distance imposed by Section 440.C from the Whynon property line 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 disqualifying use. Similarly, he testified that if one measured the spacing distance from the Whynon property line

to the disqualifying use structure 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 contended that this later method was 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 asserted to the contrary 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. The Township's contention is correct in that it applies the mandate that any vagueness in the zoning ordinance must be resolved in favor of Whynon. (See citations above). This contention of Kanz, however, did not go far enough in granting Whynon, as landowner, the most beneficial interpretation of the vague measuring provisions.

In our decision issued June 30, 2008, this court found both parties misapprehended how to deal with the vagueness of subparagraph 6. Because of its vagueness and impossibility of determining intent, we decided that this paragraph should be completely disregarded and deemed to be stricken from the ordinance. The ordinance then only contains the provisions of subparagraph C., paragraph 1.-5., which provide that adult entertainment facilities shall not be

located within 500 feet of a Residential District boundary or within 1,000 feet of specifically designated places. The 1000 feet restriction of the zoning ordinance Section 440, C., 2-5, applies to:

> "….any church, school, theater, park, playground; public pool, billiard hall, amusement arcade, club or lodge; or other area where minors congregate….establishment licensed by the PA Liquor Control Board to dispense alcoholic beverages;….restaurant, eating establishment or grocery store; nor within…any other adult entertainment establishment;…."

The ordinance prohibition does not state that it applies to any part of a parcel used for such a prohibited space nor to open space or parking lot or property lines. Therefore, we held the clear reference to specific buildings and facilities Section 440 requires the prohibited distance to be measured from the adult entertainment facility structure to the particular disqualifying building or facility. The ordinance prohibition does not state that it applies to any part of a parcel used for such a prohibited space nor to open space or parking lot or property lines. This interpretation is not only sensible but is statutorily required.

Section 603.1 of the Municipalities Planning Code (53 P.S. § 10603.1), 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.

Further our statutory construction act mandates in 1 Pa.C.S.A. § 1932:

> 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, is possible, so that effect may be given to both.

As noted by Judge Gray in his preliminary injunction order of June 30, 2005 at page 3,

this rule should be applied to ordinances, as well as statutes. Francis v. Corleto, 211 A.2d 503 (Pa. 1965).

Under our interpretation a substantially greater number of lots and areas in the Township's HC area than the two parcels identified by Kanz would be made available for adult entertainment uses, to the great favor of those, such as Whynon, who wish to establish such uses.

Mr. Kanz's testimony, unfortunately, did not provide any evidence from which we could determine the existing uses when the 1994 zoning ordinance was adopted, nor the available properties upon which an adult entertainment establishment could have been operated at that time. Kanz did testify that regardless of the measurement point criteria used, a substantial quantity of land could be available under the 1994 zoning ordinance in the HC district if the tennis club, parcel number 123, would be eliminated. There was no testimony, however, as to when the tennis club was erected. This court therefore could not make a determination as to whether or not when the 1994 zoning ordinance was adopted, the ordinance would have permitted adult entertainment establishments on a substantial quantity of land. If this court could have ascertained that there were numerous available sites developable as an adult entertainment facility when the ordinance was adapted. We believe we would have been constrained to hold that Whynon could not assert the lack of presently available sites because of the post-1994 development of those sites by other legitimate uses would not make the zoning ordinance unconstitutional.

Nevertheless, from the testimony of Mr. Kanz, the court found that at minimum an adult entertainment facility could have been constructed on lots 113 and 113A under the 1994 zoning

ordinance without violation of the buffer distance requirements applied to such a use. We did determine nevertheless that given the facts as applied to Armstrong Township the existence of the two lots, 113 and 113A, were sufficient alternative available sites for use as an adult entertainment facility, and therefore upheld the constitutionality of the zoning ordinance.

The two available lots provide .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" Armstrong Township, overall is rural in character. A large quantity of land is held by government entities. Its 771 inhabitants need very limited commercial development. It has only one significant highway and it is along that corridor that commercial development is allowed. The Township's mountainous terrain would provide very little other areas viable for commercial development. The Whynon lot in fact is bordered by the highway on the North and a mountain on the South. In considering the small population of the Township, the limited amount of land suitable for commercial development in the Township, the two available lots are sufficient.

> " 'The Supreme Court has suggested that, at least in the case of small municipalities, opportunities to engage in the restricted speech in neighboring communities may be relevant to a determination of the adequate alternative channels. ***Phillips v. Borough of Keyport***, 107 F. 3d 164, 176, n. 4 (1997), citing ***Schad v. Borough of Mount Ephraim***, 452 U.S. 61, 76-77 (1981). In ***Schad***, Mount Ephraim, another New Jersey borough, attempted to ban 'live entertainment' including nude dancing, within the Borough's boundaries. Mount Ephraim asserted that nude dancing was "amply available in close-by areas" within the county. ***Id.*** at 76. Nevertheless, the Court concluded that Mount Ephraim could not avail itself of such an argument as there was no county-wide zoning nor any evidence of the availability of nude dancing in 'reasonably nearby area.' ***Id.***

In our present case, however, there are two other adult establishments available in the

relevant market area. The 11th Circuit has also considered population size as a factor for determining alternative avenues, stating

> In ***David Vincent, Inc. v. Broward County***, 200 F.3d 1325 (11th Cir. 2000): "In ***Boss Capital Inc. v. City of Casselbury***, 187 F.3d 1251, 1254 (11th Cir. 1999), we specifically suggested considering the community's population and size, the acreage available to adult businesses as a percentage of the overall size, the location of available sites, the number of adult businesses already in existence, and the number of adult businesses wanting to operate in the community in the future. ***See id.***
> In another decision, we suggested considering the 'community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plan works toward.' ***International Food & Beverage Systems v. City of Fort Lauderdale***, 794 F.2d 1520, 1526 (11th Cir. 1986).

Kanz also used the information he had as a Lycoming County planner to identify a large amount of available sites in nearby/adjacent municipalities for which Armstrong Township residents and/or those travelling through the Township on U.S. 15 regularly frequent. Despite Whynon's objections to Kanz's methology we found that he applied the usual and appropriate methology used by planners to ascertain this information and found his evidence credible and persuasive, particularly in view of lack of any evidence to the contrary.

The two available commercial parcels especially when coupled with a virtually unlimited number of sites in other surrounding municipalities do provide sufficient alternate suitable locations for adult entertainment use. The fact that only two lots currently exist as usable for such under the 1994 ordinance does not render it unconstitutional.

Finally, we concluded in our denial of Whynon's request for an injunction that Whynon had not obtained any vested or "grandfather rights" which would allow it to open its Adult Outlet under the 1994 zoning ordinance provisions, even if the ordinance had been held

unconstitutional as to Whynon. 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 acknowledged at the evidentiary hearing that these changes satisfy on their face the constitutional requirements which Whynon asserts were not met under the 1994 ordinance. Whynon has not yet followed through on filing 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. As we noted in our summary judgment ruling, whether the 1994 zoning ordinance is unconstitutional as applied to Whynon is not per se rendered moot by the 2006 amendment to the code. We determined however Whynon's request in this litigation for injunctive relief under the premise of the 1994 zoning ordinance is unconstitutional is incidentally rendered moot by the 2006 amendment to the code, Whynon has no claim that its rights to open "Adult Outlet" at its present location are "grandfathered under the 1994 zoning ordinance" since it never sought to obtain the right to open under that ordinance.

The concept of having "grandfathered rights" under the 1994 zoning ordinance was further explained in Whynon's post-hearing brief by quotation to a leading treaties:

> 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 of the existence of an ordinance which if inquiry were made would be determined to be invalid, it is found that the municipality would have no right to stop him from doing so, then the landowners 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.)).

We determined however that Whynon's claim of grandfathered rights under the doctrine of *void ab initio* can not be asserted when there has been no application for licensure to operate under the applicable zoning procedures.

Whynon's "grandfathered rights" assertion is in effect a claim that there was no effective zoning ordinance in existence at the time that Whynon opened its "Adult Outlet" and it has a vested right in the fact that there were no restrictions upon its operation. 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).

The vested rights doctrine is now well established in Pennsylvania Law. The criteria for its application may have been first recognized by the Commonwealth Court in ***Department of Environmental Resources v. Flynn***, 344 A.2d 720 (Commw. Ct. 1975), in which the Commonwealth Court articulated a five factor approach to determine whether an owner acquired vested rights to use his property contrary to land use laws in effect, specifically providing that test to include the following:

1) the owner's due diligence in attempting to comply with the law;
2) his good faith throughout the proceedings;
3) the expenditure of substantial unrecoverable funds;

4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;
5) the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permits.

Id. at 725. That principle has been recognized and approved by the Pennsylvania Supreme Court in ***Petrosky v. Zoning Hearing Board of the Township of Upper Chichester***, 402 A.2d 1385 (1979) and subsequent cases, such as, ***Highland Park Community Club of Pittsburgh v. Zoning Board of Adjustment of Pittsburgh***, 506 A.2d 887 (1986).

Whynon can not avail itself of these protections because it did not use due diligence in attempting to comply with the law, exhibited no good faith attempt to comply with zoning and building requirements, and in fact misled the Zoning Officer initially to believe it was opening a simple retail establishment instead of disclosing the true nature of its business. Whynon has not demonstrated the expenditure of any substantial unrecoverable funds in the opening and operation of its business. The failure of Whynon to comply with the first prongs does not warrant a further discussion of the final two prongs of the standard.

Whynon did offer evidence in the summary judgment filings to the effect that just prior to opening, it contacted the Township Zoning Officer to request an occupancy permit for a "retail business." Without being advised by the inquirer as to the true pornographic nature of the business, the Zoning Officer stated a new occupancy permit was not needed as the prior use had been a garden center retail business. Whynon acted without good faith in making this inquiry. At the time of opening it obviously knew of the "except the sale of pornographic materials" limitation on retail users under Section 307 of the ordinance. This knowledge is verified by the fact that on the same day it opened it, filed the detailed complaint in this

litigation seeking an injunction against that provision and the other limiting sections of the zoning ordinance. Further, Whynon can not rely upon the statement of the Zoning Officer that an occupancy permit was not needed and specific calls does not gain any vested rights by reliance on that statement. ***See, Ferguson Township v. The Zoning Hearing Board of Ferguson Township et al. Donald A. Dreibelbis,*** 475 A.2d 910 (Pa. Commw. Ct. 1984).

This Court cannot enjoin ordinances that are no longer in effect since where proper zoning procedures are not followed and questionable unconstitutional zoning ordinances are amended, the constitutional challenge has become moot. See ***Diffenderfer v. Central Baptist Church, Inc.,*** 404 U.S. 412, 414, 92 S. Ct. 574, 30 L. Ed. 2d 567 (1972); ***Bottoms Up Enterprises, Inc. v. Borough of Homestead***, 2007 U.S. Dist. LEXIS 74366, 60-62 (W.D. Pa. Oct. 4, 2007). Whynon has not adequately demonstrated that it attempted to obtain a valid building permit under the expired zoning ordinance.

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. Instead, Whynon began operation of "Adult Outlet" and commenced litigation against the 1994 zoning ordinance, both occurring on the same day. Whynon never intended to and did not attempt to comply with the zoning ordinance's licensing procedures. Whynon now finds itself under an amended and constitutional zoning ordinance under which there is no longer a case for this court to hear.

CONCLUSION

Our decision enjoining Whynon from opening "Adult Outlet" should be affirmed.

BY THE COURT,

William S. Kieser, Judge

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