

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
Civil Action No. 08-00223

CAPITAL VIDEO CORPORATION,
Plaintiff

HAMPDEN COUNTY
SUPERIOR COURT
FILED

vs.

AUG 21 2008

CITY OF SPRINGFIELD,
Defendant

Brian P. Lee
CLERK-MAGISTRATE

MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The plaintiff, Capital Video Corporation, d/b/a "Amazing.Net" ("Capital Video"), brought the action, in the nature of a writ of certiorari, against the City of Springfield to contest the City's denial of Capital Video's 2008 entertainment license. The City denied Capital Video a license to offer adult videos in private viewing booths. Capital Video now moves for preliminary injunction to enjoin the City from preventing Capital Video from re-opening its private viewing booths during the pendency of this action. For the reasons discussed below, the Capital Video's motion for preliminary injunction is ALLOWED.

BACKGROUND

Capital Video has operated an adult store in the City of Springfield since 1993. It also provided licensed adult videos to its patrons through private coin-operated viewing booths. The viewing booths have been licensed annually by the licensing authority, the Mayor of the City of Springfield.

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In November of 2007, the Mayor revoked Capital Video's entertainment license for the viewing booths. The revocation decision was based on Mayor's findings that in November of 2006 the conditions at the store lead to increased incidents of disruptive behavior in the area. The Mayor found that patrons engaged in lewd behavior in the viewing booths and other patrons observed such behavior through holes they made in the walls between the adjoining booths. The Mayor further found that these conditions lead to two incidents of sexual assault of patrons at the store.

In December of 2007, Capital Video applied for a 2008 license. At a hearing, it presented evidence that the conditions cited in the Mayor's revocation decision have been corrected. Capital Video presented testimony that it installed surveillance cameras in the viewing booths and covered holes in the walls with metal plates. The testimony also established that despite the November 2007 revocation order, Capital Video continued to operate the video booths without a license between November of 2007 and January 3, 2008. In addition to the witness' testimony, the Mayor admitted into evidence, over Capital Video's objection, his own revocation decision from November of 2007. Based on all the evidence, the Mayor denied Capital Video's application for 2008 entertainment license. Capital Video then filed this action in the nature of certiorari and moved for preliminary injunction.

DISCUSSION

To determine whether to grant a preliminary injunction, this Court must consider the balancing test set forth in Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980). See also Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 710 (1990). The moving party must show, on the basis of an "abbreviated presentation of the facts and law," a likelihood of success on the merits of its claim and that

absent a preliminary injunction, the moving party will suffer irreparable harm. Packaging Industries Group, Inc. v. Cheney, 380 Mass., 609, 617; GTE Products Corp. v. Steward, 414 Mass. 721, 722 (1993). The court must then balance the risk of irreparable harm to the moving party against any similar risk of irreparable harm which granting the injunction would create for the opposing party. Packaging Industries Group, Inc. v. Cheney, 380 Mass. 616, 617. "In the context of a preliminary injunction, the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity." Id. at 617 n.11.

I. Likelihood of Success on the Merits

Since the statute governing the regulation and licensing of public entertainment, Gen. Laws c. 140, § 181, does not provide for judicial review of adverse licensing decisions, and the Mayor of Springfield is not a State "agency" within the meaning of the State Administrative procedure Act, G.L. c. 30A, § 1(2), judicial review is only available by a civil action for relief in the nature of certiorari under G.L. c. 249, § 4. The Black Rose, Inc. v. City of Boston, 433 Mass. 501, 503 (2001). "The standard of review for an action in the nature of certiorari depends on the nature of the action sought to be reviewed." Id.

The purpose of an action in the nature of certiorari is "to correct substantial errors of law apparent on the record." Commissioners of Civil Serv. v. Municipal Court of Boston, 369 Mass. 84, 90 (1975). Where First Amendment rights are involved, "the standard of review should be higher than abuse of discretion or error of law standard, and the licensing authority should carry the burden of proving that the denial of the license application is justified." Caswell v. Licensing Comm'n for Brockton, 387 Mass. 864, 878 n.9 (1983).

The City argues that, in this case, no First Amendment rights are implicated because public sex acts, sexual assaults, violations of license conditions, and operation of an entertainment

establishment without a license do not amount to a constitutionally protected expressive conduct. However, such unlawful acts are not the conduct at issue in this case. Capital Video applied for a license to provide its patrons with adult videos via coin-operated viewing booths. That is the activity regulated by the licensing scheme, and such activity falls within the First Amendment protection. See Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115, 1120 n.5 (1st Cir. 1981).

The Court "will uphold a decision of a licensing authority as long as the findings by the authority are supported by substantial evidence in the record considered as a whole." 1001 Plays, Inc. v. Mayor of Boston, 387 Mass. 879, 885 (1983). "Substantial evidence" means such evidence as a reasonable mind might accept as sufficient to support a conclusion. Id.

Thus, under G.L. c. 140, § 181, the City could deny the Capital Video a license to operate its video booths only if the record contained evidence sufficient to support a conclusion that issuance of such a license would

- (a) unreasonably increase pedestrian traffic in the area; or
- (b) increase the incidence of disruptive conduct; or
- (c) unreasonably increase the level of noise in the area.

The record before this Court is devoid of such evidence. The only evidence in the record that tends to link the video booths to disruptive conduct is the Mayor's decision to revoke the Capital Video's 2007 license. The decision was based on some evidence that in November of 2006, the conditions existed at Capital Video's premises that allowed some patrons to engage in public sexual acts and contributed to two incidents of sexual assault.

Nothing in the record supports a conclusion that such conditions continued to exist at the time of Capital Video's application for a 2008 license. Further, all witnesses, including those

called by the City, testified at January 3, 2008, hearing that they were not aware of any incidents of disruptive conduct at the Capital Video store between May of 2007 and January 2008, or that the store was linked to increased noise or pedestrian traffic in the area.

Therefore, the City's decision to deny Capital Video a license to offer coin-operated adult video booths to its patrons was not supported by substantial evidence. The evidence presented at the hearing established that Capital Video continued to operate its video booths after its 2007 license was revoked. However, G.L. c. 140, § 182 clearly describes the only remedies available to the City in such a case. The statute provides for progressively increasing fines for operation without a license and does not provide for subsequent denial of a license in the future.

Thus, the City did not meet its burden to show that the denial of 2008 license to Capital Video was justified. Accordingly, Capital Video has established the likelihood of success on the merits.

2. Irreparable harm to Capital Video

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). As stated above, sale of adult videos through coin-operated video booths constitutes expressive conduct protected by the First Amendment. Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115, 1120 n.5 (1st Cir. 1981). In view of the Court's finding that Capital Video has established the likelihood of success on the merits, the denial of a license to engage in such protected activity infringes on Capital Video's First Amendment rights and, therefore, amounts to irreparable harm.

3. Harm to the City and Adverse Affect on the Public Interest

The City does not argue that it would be irreparably harmed by the preliminary injunction; rather, it argues that the public interest would be adversely affected. The City argues that the

conditions at the Capital Video store contribute to transmission of HIV infection. To support its argument, the City relies on Massachusetts Superior Court case Commonwealth v. Can-Port Amusement Corp., Civil No. 2005-0295 (Worcester Super. Ct. March 31, 2005) (Agnes, J.). That case, however, is clearly distinguishable. In Can-Port, the Court found that patrons of an adult movie theater engaged in sexual intercourse with each other, which could lead to transmission of HIV infection. In the case at bar, there is no evidence that patrons of Capital Video store have any physical contact with each other. At most, they are able to observe each other, with mutual consent, through a glass window. There is simply no basis in the record to conclude that in January of 2008 the video booths in question presented a health hazard or adversely affected the public interest in any way.

Accordingly, the Capital Video's motion for preliminary injunction must be

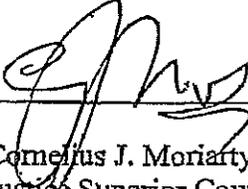
ALLOWED.

ORDER

For the foregoing reasons, the Capital Video's motion for preliminary injunction is

ALLOWED.

8/19/08
DATE


Cornelius J. Moriarty
Justice Superior Court