

COMPLAINT AND MEMORANDUM

TO: William B. Gorman, Esquire

FROM: National Legal Research Group, Inc.
Douglas R. McKusick, Senior Attorney

RE: NC-Federal/Civil Rights/Free Speech/Adult Use Ordinance—Total
Exclusion Of Uses From Town

FILE: 12-27861-254 February 4, 1999

YOUR
FILE: Jesse Burns v. City of Murfreesboro

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION**

JESSE BURNS, d/b/a F&M NEWSTAND,)	
)	
Plaintiff,)	
)	
v.)	Case No.
)	
)	
CITY OF MURFREESBORO, a North)	
Carolina Municipal Corporation, and RAY)	
CLAIRE, Mayor of the City of Murfreesboro,)	
and KENNETH B. GEATHERS, Mayor)	
pro tem of the City of Murfreesboro, and)	
JACK M. GOODNIGHT, ROGER D. HAAS,)	
JENNIE C. WYRICK, ROBERT S.)	
MISENHEIMER, and PHIL MEACHAM,)	
Council Members of the City of Murfreesboro,)	
and BARRY MOSLEY, Zoning Services)	
Manager for the City of Murfreesboro,)	
)	
Defendants.)	
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COMPLAINT

The Plaintiff, Jesse Burns, d/b/a F&M Newstand, files the following complaint against the Defendants.

Parties

1. Plaintiff, Jesse Burns, (hereafter “Burns”) is a resident of China Grove, North Carolina. Burns is the owner and operates as a sole proprietorship F&M Newstand located at 1201 North Cannon Boulevard in the City of Murfreesboro, North Carolina.

2. Defendant City of Murfreesboro (hereafter “the City”) is a municipal corporation organized and operating under the laws of the State of North Carolina and exercising powers delegated to it by the State of North Carolina.

3. Defendant Ray Claire is the Mayor of the City and charged with the enforcement of all laws, ordinances, and regulations enacted by the City. Claire is made a Defendant in this action in his official capacity as Mayor of the City.

4. Defendants Kenneth B. Geathers, Jack M. Goodnight, Roger D. Haas, Jennie C. Wyrick, Robert S. Misenheimer, and Phil Meacham are Members of the Murfreesboro City Council, each of whom is made a Defendant in his or her official capacity as a City Council Member.

5. Defendant Barry Mosley, Zoning Services Manager for the City, is charged with the enforcement of zoning ordinances and laws within the City and is made a Defendant in his official capacity.

Jurisdiction and Venue

6. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 as it is founded on a claim arising under the laws of the United States and seeks relief under an Act of Congress for the protection of Civil Rights.

7. Venue is proper in this District under 28 U.S.C. § 1391(b) as all the Defendants reside within this District and are residents of the State of North Carolina.

Facts

8. In 1971, Burns established F&M Newstand at its present location. At that time, the location was within an unincorporated portion of Rowan County, North Carolina. From its establishment, F&M Newstand sold adult-oriented books and magazines. Since that time, F&M Newstand has added to its inventory adult-oriented videos for sale, rental, and for on-site viewing.

9. In 1984, the City was chartered under the laws of the State of North Carolina. The City's territory and limits include the property located at 1201 North Cannon Boulevard, where F&M Newstand was and is located.

10. On February 28, 1994, the City adopted Ordinance 150-40 concerning sexually oriented businesses. The Ordinance is codified in various sections of the City Zoning Ordinance.

11. Section 4:5 of the City Zoning Ordinance defines an "adult oriented business" as including an adult arcade, adult bookstore, or adult video store. F&M Newstand is an adult bookstore or adult video store under § 4:5 of the City Zoning Ordinance because one of its principal business purposes is the sale or rental of books, magazines, and video reproductions that depict specified sexual activities or specified anatomical areas, and so is an adult-oriented business under the City Zoning Ordinance.

12. Section 3:3 of the City Zoning Ordinance and the Official Map adopted and in effect under Article 7 of the City Zoning Ordinance establish Adult Oriented Business Overlay District. Section 5:3.15 of the City Zoning Ordinance provides that the purpose of the Overlay District is to provide areas where adult entertainment or sexually oriented

businesses may be established, and that the intent of this Overlay District is to restrict the concentration of these uses and to separate these uses from residential and institutional uses or areas.

13. Section 5:3.15.2 of the City Zoning Ordinance provides that, in addition to complying with all general regulations for the underlying zoning district in which they are located, adult-oriented businesses within the Adult Oriented Business Overlay District must comply with, inter alia, the following standard and requirements:

1. No such business shall locate within 2,000 feet of any other Adult Oriented Business, as measured in a straight line from property line to property line;
2. No Adult Oriented Business shall be located within 2,000 feet of a church, public or private elementary or secondary school, child day care or nursery school, public park, residentially zoned or residentially used property, or any establishment with an on-premise ABC license, as measured in a straight line from property line to property line.

14. Section 9:3(1) of the City Zoning Ordinance provides that any lawfully operating adult-oriented business which does not comply with the locational requirements of the ordinance on the effective date of the ordinance is deemed a nonconforming use. Under § 9:3(3) of the City Zoning Ordinance, any such nonconforming adult-oriented business shall either cease to operate or meet all of the requirements of City Zoning Ordinance for such businesses no later than 60 months from the date the business becomes a nonconforming use.

15. Because of the location restrictions contained in § 5:3.15.2 of the City Zoning Ordinance, F&M Newstand became a nonconforming use on the effective date of the Adult Oriented Business Ordinance.

16. In a letter dated March 9, 1994, the City informed Burns of the adoption of the Adult Oriented Business Ordinance and the establishment of the Overlay District. The letter informed Burns that F&M Newstand had been determined to be a nonconforming use because it is not located in an Adult Oriented Business Overlay District, and that Burns had 60 months from February 28, 1994 to either cease to operate or meet all the requirements of the zoning ordinance.

17. The Defendants, in enacting and enforcing the City zoning ordinances and the Adult Oriented Business Overlay District ordinance, acted and continue to act under color of state law.

18. The Adult Oriented Business Overlay District ordinance and its enforcement by the Defendants violates the rights of Burns to freedom of expression and freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution in that the effect of the Overlay District and the distance requirements set forth in City Zoning Ordinance § 5:3.15.2 is to totally exclude and preclude the location or operation of Burns's or any other adult-oriented business within the City.

19. For this deprivation of federally guaranteed constitutional rights under color of state law, Burns is entitled to relief under 42 U.S.C. § 1983.

WHEREFORE, Burns requests that judgment be entered in his favor granting the following relief:

a) that a preliminary injunction be issued forbidding the Defendants from enforcing the City's Adult Oriented Business Overlay District ordinance against Burns or

otherwise taking any action requiring Burns to cease or move his operation of F&M Newstand;

b) that a final judgment be entered finding that the provisions of the City's Adult Oriented Business Overlay District ordinance violate the First and Fourteenth Amendments to the United States Constitution and that the Defendants be permanently enjoined from enforcing that ordinance; and

c) that judgment be entered in favor of Burns under 42 U.S.C. § 1988 for the amount of attorney's fees and other costs incurred in bringing and prosecuting this action.

DATED: February __, 1999

By: _____
William B. Gorman
N.C. Bar No. _____
POPE, GORMAN, KUTTEH,
SIMON & BAKER, P.A.
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113 North Center Street
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Council Members of the City of Murfreesboro,)	
and BARRY MOSLEY, Zoning Services)	
Manager for the City of Murfreesboro,)	
)	
Defendants.)	
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MOTION FOR PRELIMINARY INJUNCTION

COMES NOW the Plaintiff, Jesse Burns, d/b/a F&M Newstand, and moves pursuant to Fed. R. Civ. P. 65(a) for the entry of a preliminary injunction forbidding the Defendants from enforcing the City's Adult Oriented Business Overlay District ordinance against the Plaintiff or otherwise taking any action requiring the Plaintiff to cease or move his operation of F&M Newstand under § 5:3.15 of the City of Murfreesboro Zoning Ordinance. In support of this motion, the Plaintiff incorporates by reference as if fully set out herein the allegations

contained in the Complaint filed in the above-titled action and also submits the attached affidavits.

The Plaintiff would further allege that he will suffer irreparable harm if the preliminary injunction is not granted in that enforcement of the City Ordinance will deprive him of rights guaranteed under the First and Fourteenth Amendments to the United States Constitution, as well as the loss of business, while no significant harm to the Defendants or the public interest will be caused by a grant of a preliminary injunction. Furthermore, for the reasons set forth in the Brief in Support of this motion, the Plaintiff is likely to succeed in this action.

WHEREFORE, the Plaintiff respectfully requests that this Court, after notice and hearing to the Defendants, order that enforcement of the City's Adult Oriented Business Overlay District ordinance be preliminarily enjoined pending final resolution of this action. The Plaintiff also requests leave to present oral argument on this motion.

DATED: February ____, 1999

By: _____
William B. Gorman
N.C. Bar No. _____
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Manager for the City of Murfreesboro,)	
)	
Defendants.)	
_____)	

**PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

This action is one brought by the Plaintiff, Jesse Burns (hereafter "Burns"), d/b/a F&M Newstand, pursuant to 42 U.S.C. § 1983 to enjoin the enforcement of ordinances of the Defendant City of Murfreesboro (hereafter "the City") which restrict the location and operation of adult-oriented businesses within the City. In addition to seeking a permanent injunction forbidding enforcement of these ordinances by the Defendants, Burns also has requested and moved pursuant to Fed. R. Civ. P. 65(a) for a preliminary injunction

forbidding enforcement of the ordinances. For the reasons set forth below, Burns respectfully requests that the motion for a preliminary injunction be granted.

STATEMENT OF FACTS

Burns operates F&M Newstand at 1201 North Oak Street within the City, which is a North Carolina municipal corporation exercising the state powers under the general and special laws of North Carolina. Burns has operated F&M Newstand at this location since 1991, even prior to the incorporation of the City in 1984. Part of the business of F&M Newstand includes that sale of adult-oriented books and magazines and the sale, rental, and on-premises viewing of adult-oriented videotapes.

On February 28, 1994, the City adopted Ordinance 150-40 as an amendment to its Zoning Ordinance. Ordinance 150-40 established an Adult Oriented Overlay District (AOB) for certain zoning districts within the City. The AOB Ordinance applies to adult-oriented businesses as defined in § 4.5 of the City's Zoning Ordinance. F&M Newstand falls within the definition of an adult bookstore or adult video store under § 4.5, and so is an adult-oriented business covered by the AOB Ordinance. Section 5:3.15 of the City Zoning Ordinance states that the purpose of the AOB "is to provide areas in which adult entertainment or sexually oriented business [sic] may be established. . . . It is the intent of this Overlay District to restrict the concentration of these uses and to separate these uses from residential and institutional uses."

Section 5:3.15.2 of the City Zoning Ordinance goes on to set forth requirements for adult-oriented businesses as follows:

In addition to the General Regulations and Requirements of this Ordinance for the underlying Primary Zoning District, Adult Oriented Businesses located in an Adult Oriented Business Overlay District shall comply with the following standards and requirements:

1. No such business shall locate within 2,000 feet of any other Adult Oriented Business, as measure in a straight line from property line to property line;
2. No Adult Oriented Business shall be located within 2,000 feet of a church, public or private elementary or secondary school, child day care or nursery school, public park, residentially zoned or residentially used property, or any establishment with an on-premise ABC license, as measured in a straight line from property line to property line[.]

Section 9:3 of the City Zoning Ordinance provides that any adult-oriented business which was lawfully operating on the date the AOB ordinance was adopted but does not comply with the AOB ordinance shall be deemed a nonconforming use and shall either cease to operate or meet all the requirements of the AOB ordinance no later than 60 months after the business becomes a nonconforming use.

F&M Newstand is not located within an AOB Overlay District, and on March 9, 1994, Burns received a letter from the City informing him that F&M Newstand was determined to be a nonconforming use under the AOB ordinance. "Consequently," the letter reads, "your adult oriented business will have 60 months from February 28, 1994 to either cease to operate or meet all the requirements of the Zoning Ordinance."

Subsequently, Burns began to look for a place within the City to move the business. However, as set forth in the attached affidavits, the location and distance restrictions set forth in § 5:3.15.2 make it impossible for any adult-oriented business to locate within the City and comply with the AOB ordinance. According to the zoning maps of the City, there is no real

estate parcel located more than 2,000 feet from residentially zoned land, churches, schools, parks, or business establishments with ABC on-premises licenses. This fact is established by drawing a 2,000-foot radius around all areas so zoned or all churches, schools, or parks. The AOB ordinance has thus resulted in the total exclusion of adult-oriented businesses from the City.

QUESTION PRESENTED

Is Burns entitled to an order preliminarily enjoining enforcement of the AOB ordinance on the basis that that ordinance violates the First and Fourteenth Amendments by operating to totally exclude adult-oriented businesses from the City?

ARGUMENT

In a recent decision also involving the validity of municipal regulations upon adult-oriented businesses, the court in *Mom N Pops, Inc. v. City of Charlotte*, 979 F. Supp. 372, 375 (W.D.N.C. 1997), set forth the controlling standards for the grant of a preliminary injunction, noting that a hardship balancing test is to be applied. Quoting from *Manning v. Hunt*, 119 F.3d 254, 263-64 (4th Cir. 1997), the court stated that a court must consider the following four factors:

"(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,

(2) the likelihood of harm to the defendant if the requested relief is granted,

(3) the likelihood that the plaintiff will succeed on the merits, and

(4) the public interest." [*Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1992).]

. . . .

Under this hardship balancing test, the first two factors regarding the likelihood of irreparable harm to the plaintiff if denied and of harm to the defendant if granted are the most important. . . . Thus, the first task of the district court is to determine the harm that will be suffered by the plaintiff if no preliminary injunction is entered. The harm demonstrated by the plaintiff must be "neither remote nor speculative, but actual and imminent". . . . The district court must then balance this harm against the harm which would be suffered by the defendant if the preliminary injunction is granted.

Mom N Pops, 979 F. Supp. at 375.

In the instant case, the harm which will be suffered by Burns if the AOB ordinance is not enjoined is the loss of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, since enforcement of the ordinance will require Burns to close his book and video store. It is beyond question that the First Amendment protects the sale of nonobscene adult materials, and that a person engaged in the business of selling such materials may invoke the First Amendment as against municipal regulations of that business. *1126 Baltimore Boulevard, Inc. v. Prince George's County, Maryland*, 58 F.3d 988, 994 (4th Cir. 1995) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990)).

Furthermore, the threat to Burns's First Amendment rights unquestionably constitutes irreparable injury for the purpose of a request for a preliminary injunction. As stated in *Mom N Pops*, 979 F. Supp. at 384:

Plaintiff alleges loss of First Amendment freedom occasioned by the ordinances and how they are enforced, and thus, irreparable injury or the threat thereof. In this context, the . . . questions of irreparable harm and likelihood of success on the merits are necessarily subsumed into the First Amendment inquiry. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427

U.S. 347, 373-74, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976). If First Amendment rights are being violated or in danger of being violated, Plaintiff is likely to succeed on the merits, and the balance of equities will not aid Defendants.

See also Dia v. City of Toledo, 937 F. Supp. 673, 678 (N.D. Ohio 1996) (violation of the right to free speech always constitutes irreparable harm which justifies a court in invoking its equitable powers and issuing an injunction).

Because First Amendment rights are at stake, the analysis on the instant motion resolves into whether there is a substantial likelihood that Burns will succeed on his claim that the AOB ordinance violates the First Amendment. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986), the Court ruled that municipal zoning regulations aimed at curbing the undesirable secondary effects of businesses which distribute adult or sexually oriented material are consistent with the First Amendment if they meet certain criteria. Such regulations are considered valid content-neutral time, place, and manner regulations of speech "so long as they are designed to serve a substantial governmental interest *and do not unreasonably limit alternative avenues of communication.*" *Id.* at 47 (emphasis added). With respect to the latter requirement, the Court found that the ordinance before it did not unreasonably limit alternative channels of communication because the ordinance, which forbade the location of adult-oriented businesses within 1,000 feet of residential zones, family dwellings, churches, parks, or schools, in actual effect allowed 520 acres of land within the city in which an adult use could locate. But the Court pointed out that it had "cautioned against zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,'" and the First Amendment requires that cities

"refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theatre within the city[.]" *Id.* at 54 (quoting *Young v. American Mini Theatres*, 427 U.S. 50, 71 n.35 (1976)).

The *City of Renton* case makes clear that location and zoning restrictions on adult or sexually oriented business which may otherwise be valid as aimed at the secondary effects of such businesses are violative of the First Amendment if the regulations wholly forbid or deny such businesses a reasonable opportunity to locate within the city. Illustrative of that point is the decision in *Wolfe v. Village of Brice, Ohio*, 997 F. Supp. 939 (S.D. Ohio 1998), in which the court granted the owner of an adult bookstore summary judgment on his claim that the village's zoning ordinance requiring adult-oriented businesses be located more than 1,000 feet from schools and churches and 300 feet from residences, violated the First Amendment. Affidavits presented by the plaintiff showed that the distance restrictions effectively prevented him from locating an adult bookstore anywhere within the village because there was no available place outside of the distance restrictions. *Id.* at 943-44. Relying upon the holding in *City of Renton* that a city must refrain from effectively denying citizens a reasonable opportunity to open and operate adult-oriented businesses within the city, the court held that the total exclusion effected by the village's ordinance rendered it unconstitutional. *Wolfe*, 997 F. Supp. at 945. Similarly, in *Ebel v. City of Corona*, 767 F.2d 635, 639 (9th Cir. 1985), the court affirmed an order permanently enjoining a city from enforcing an ordinance imposing distance restrictions upon adult-oriented businesses because the effect of the ordinance was to preclude the plaintiff from locating within the city.

Indeed, courts have struck down adult-use ordinances as violative of the First Amendment even where there was not a total exclusion effected by the ordinance. In *Walnut Properties v. City of Whittier*, 861 F.2d 1102, 1107 (9th Cir. 1988), the court stressed that under *City of Renton*, an adult-use ordinance is unconstitutional if it does not afford business owners a "reasonable opportunity to open and operate" within the city. It then examined the city's official zoning map, which revealed that, given the 1,000-foot distance requirements mandated by the ordinance, only a small handful of adult-oriented businesses could operate within the city. *Walnut Properties*, 861 F.2d at 1108. The court ruled that this did not satisfy the First Amendment because the paucity of available sites was glaring and did not provide a reasonable opportunity for the operation of adult-oriented businesses. *Id.* at 1109. In *Young v. City of Simi Valley*, 977 F. Supp. 1017, 1021 (C.D. Cal. 1997), the court held that an ordinance which imposed a 1,000-foot distance restriction on adult uses was unconstitutional where it allowed for, at most, four sites within the city where adult uses could be located. *See also Dia*, 937 F. Supp. at 678 (courts generally find the available sites for adult-oriented businesses inadequate if there are fewer than 12 sites or less than 1% of city land available; where the parties agreed that the number of sites available was small, there was a likelihood that the plaintiff would succeed on a claim that a city ordinance violated the First Amendment and was entitled to a preliminary injunction against its enforcement).

The City's AOB ordinance suffers from the same constitutional defect identified in these cases. As indicated in the affidavits accompanying the instant motion, the AOB ordinance does not merely limit the number of places available to an adult-oriented business,

but has the effect of totally excluding such businesses from the City. This plainly violates the principle announced in *City of Renton*, 475 U.S. at 54, that an adult-use ordinance must leave open alternative channels of communication and "refrain from effectively denying [plaintiffs] a reasonable opportunity to open and operate an adult theatre within the city."

In light of this law and the facts of this case, there is surely a strong likelihood that Burns will prevail on his First Amendment claim. Given that it is First Amendment rights which stand to be harmed if the preliminary injunction is not granted, "the balance of equities will not aid Defendants." *Mom N Pops*, 979 F. Supp. at 384. Furthermore, "[t]he public's interest will be served by issuing the preliminary injunction in that the public is served when constitutional rights, especially the right to free speech, are vindicated." *Dia*, 937 F. Supp. at 679 (citing *Christy v. Ann Arbor*, 824 F.2d 489 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988)). Thus, all the criteria for the issuance of a preliminary injunction exist in this case, and such an injunction should issue to prevent enforcement by the Defendants of the City's AOB ordinance.

CONCLUSION

Wherefore, the Plaintiff, Jesse Burns, requests that his motion for a preliminary injunction forbidding enforcement of the City's AOB ordinance be granted pending the final disposition of this action.

Respectfully submitted,

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N.C. Bar No. _____
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