IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Jackson Township, a Second-Class Township of the Commonwealth of Pennsylvania | : | |
| v. | : | No. 2594 C.D. 2010 |
| | : | Submitted: October 14, 2011 |
| Dizzy Dottie, LLC, a Pennsylvania Limited Liability Company, Appellant | : | |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: December 2, 2011

Dizzy Dottie, LLC, a Pennsylvania Limited Liability Company (Property Owner), appeals from the November 5, 2010, order of the Court of Common Pleas of Monroe County, Forty-Third Judicial District (trial court), which: (1) permanently enjoined Property Owner from using its commercially-zoned property in Jackson Township, a Second-Class Township of the Commonwealth of Pennsylvania (Township), as an adult cabaret, a use permitted only in the industrial zoning district; and (2) enjoined Property Owner from violating sections 5503(b) and (d) of the Act known as Act 120 of 1996 (Act), which sets forth certain illumination and visibility requirements for adult establishments.[1] We affirm.

[1] 68 Pa. C.S. §§5503(b) & (d). Sections 5503(b) and (d) of the Act provide as follows:

> (b) Interior plan. – Every adult-oriented establishment doing business in this Commonwealth shall be well lighted at all times and be

**(Footnote continued on next page…)**

Property Owner opened a business known as Thrills at the corner of Route 715 and Doll Road in the Township's commercial zoning district. The Township's zoning ordinance permits adult cabarets only in the industrial zoning district. When Property Owner began advertising for bikini dancers, the Township suspected that Property Owner might be planning to operate an adult cabaret in violation of the zoning ordinance. Thus, the Township hired Glen Miller, a private investigator, to visit Thrills.

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**(continued…)**

> physically arranged in such a manner that the entire interior portion of the booths, cubicles, rooms or stalls where adult entertainment is provided shall be clearly visible from the common areas of the premises. Visibility into such booths, cubicles, rooms or stalls shall not be blocked or obscured by doors, curtains, partitions, drapes or any other obstruction whatsoever. It shall be unlawful to install enclosed booths, cubicles, rooms or stalls within adult-oriented establishments for whatever purpose, but especially for the purpose of providing for the secluded viewing of adult-oriented motion pictures or other types of adult-oriented entertainment.
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> . . . .
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> (d) Illumination and visibility. – The operator of each adult-oriented establishment shall be responsible for and shall provide that any room or other area used for the purpose of viewing adult-oriented motion pictures or other types of live adult entertainment shall be well lighted and readily accessible at all times and shall be continuously open to view in its entirety. The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one footcandle as measured at the floor level. It shall be the duty of the operator and the operator's agents to ensure that the illumination required by this subsection is maintained at all times that a patron is present in the premises.

Based on Miller's investigation, the Township filed with the trial court a petition for a preliminary and permanent injunction, arguing that Property Owner was operating an adult cabaret in a commercial zoning district in violation of the Township's zoning ordinance. At the preliminary injunction hearing, the Township presented a video recording made by Miller during his visit to Thrills. Miller also testified that he spoke with a dancer named Autumn, who invited Miller to purchase a lap dance in the VIP room, a private room in the upstairs section of the premises. Miller paid $20 "to the house" and $40 to Autumn for two fifteen-minute lap dances.

In the VIP room, Autumn removed her bra and the bottom of her costume, leaving only a g-string covering the vaginal and anal areas of her body. Autumn informed Miller that he could touch everything except the "cookies," by which she meant her vagina. During the dance, Autumn put her nude breasts in Miller's mouth. She also allowed Miller to suck, lick and caress her breasts and to squeeze and caress her bare buttocks while she gyrated and thrust her covered vagina against his groin area.

After considering the video recording and Miller's testimony, the trial court concluded that Property Owner was operating an adult cabaret in a commercial zoning district in violation of the Township's zoning ordinance.[2] Accordingly, on June 16, 2010, the trial court granted the Township's petition for a preliminary

[2] The zoning ordinance defines the term "adult cabaret" as "an establishment . . . which features live entertainment distinguished or characterized by emphasis on sexual conduct, sexually explicit nudity and/or activities such as mud wrestling and dancing." (R.R. at 22a.) The trial court concluded that, although Thrills does not feature live entertainment emphasizing "sexually explicit nudity," Thrills features live entertainment emphasizing "sexual conduct" in the VIP room. (Trial Ct. Op., 6/16/10, at 13-18.)

injunction. Property Owner has appealed the order to this court at 1941 C.D. 2010. By order dated June 30, 2010, the trial court continued the preliminary injunction. Property owner has appealed that order to this court at 1942 C.D. 2010.

At the July 6, 2010, hearing on the permanent injunction, counsel for Property Owner, who also is a manager at Thrills, testified that Property Owner no longer permits lap dances. (N.T., 7/6/10, at 20, R.R. at 358a.) However, the witness stated that Property Owner now offers topless female dancers and allows the dancers to take patrons upstairs to the former lap dance rooms and dance bottomless; the witness asserted that the preliminary injunction order did not prohibit either of these types of dancing.[3] (*Id.* at 21, 26-27, R.R. at 359a, 364a-65a.)

The Township presented the testimony of Brian Miller, a private investigator who visited Thrills on June 22, 2010. Brian Miller confirmed that the dancers at Thrills were both topless and bottomless at times. (*Id.* at 44, R.R. at 382a.) He also testified that the upstairs room was painted black, with a black curtain in the doorway, and that the entrance was illuminated only by a recessed light. (*Id.* at 43, R.R. at 381a.)

On July 20, 2010, the Township filed a petition to enjoin Property Owner from violating the illumination and visibility requirements set forth in sections 5503(b) and (d) of the Act for adult establishments. By order dated July 28, 2010, the

[3] The witness apparently believed that topless and bottomless dancing does not emphasize "sexual conduct" or "sexually explicit nudity," and, therefore, Thrills was not operating an "adult cabaret" in violation of the preliminary injunction order.

trial court granted the petition, temporarily enjoining Property Owner from having live adult entertainment in booths, cubicles, rooms or stalls that are blocked or obscured by doors, curtains, partitions, drapes or any other obstruction, and from allowing live adult entertainment that is not continuously open to viewing in its entirety from the common areas of the premises. (R.R. at 81a-82a.)

At the remaining permanent injunction hearings, the Township presented additional testimony from private investigators regarding the activities occurring at Thrills. The testimony established that: (1) female dancers expose their buttocks, breasts, vagina and anus to the male patrons; (2) patrons in the VIP rooms kiss, lick and fondle the breasts and buttocks of the female dancers; (3) the female dancers in the VIP rooms rub and gyrate against the male penis, albeit covered by clothing; and (4) the female dancers in the VIP rooms fondle and caress their vaginas, causing patrons to become sexually aroused.

Property Owner presented evidence in support of its contention that the Township's restrictions on adult facilities violated the constitutional right to free expression. In particular, Property Owner attempted to show that it was not possible to develop a site within the industrial zoning district as an adult cabaret. Thus, Property Owner complained that the Township effectively banned all adult cabarets.

After the trial court concluded its hearings, the trial court issued an order on October 19, 2010, permanently enjoining Property Owner from operating an adult cabaret in the commercial zoning district and permanently enjoining Property Owner from violating the illumination and visibility requirements in sections 5503(b) and (d)

of the Act. Although Property Owner had argued that the Township's zoning ordinance violated the right to free expression, the trial court rejected the argument, explaining that: (1) the zoning ordinance is a content-neutral, time, place and manner regulation of adult cabarets, motivated by concerns for the public health, safety and welfare; and (2) there are at least seventeen lots in the industrial zoning district available for the development of an adult cabaret. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (stating that content-neutral time, place and manner regulations are acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication).

Property Owner filed a motion for post-trial relief, which, by order dated November 5, 2010, the trial court denied. In its opinion, the trial court rejected the argument of Property Owner that the definition of "adult cabaret" in the Township's zoning ordinance was unconstitutionally vague. Property Owner now appeals to this court.[4]

**Definition of "Adult Cabaret"**

Property Owner first argues that the trial court erred in concluding that Thrills is an "adult cabaret" as that term is defined in the Township's zoning ordinance. We disagree.

[4] The standard of review for the grant of a permanent injunction that turned on whether the trial court properly determined that the party seeking the injunction established a clear right to relief as a matter of law is *de novo*, and the scope of review is plenary. *Big Bass Lake Community Association v. Warren*, 23 A.3d 619, 624 n.5 (Pa. Cmwlth. 2011). However, this court is bound by the trial court's findings of fact unless there is not competent evidence in the record to justify the findings. *Id.* Likewise, we are bound by the trial court's credibility determinations. *Id.* at 625.

Section 1(J)(3) of Ordinance 97-100 provides the following definition of "adult cabaret":

> Adult Cabaret – an establishment, club, tavern, restaurant, theatre hall or room which features live entertainment distinguished or characterized by emphasis on sexual conduct, sexually explicit nudity and/or activities such as mud wrestling and dancing.

(R.R. at 22a.) There is no question that Thrills is an establishment that features live entertainment. However, Property Owner contends that, if the trial court had applied the proper rules of construction,[5] the trial court would have concluded that Thrills does not "feature" live entertainment that emphasizes "sexual conduct" or "sexually explicit nudity," terms not defined in the ordinance.

Property Owner asserts that the term "sexual conduct" can only refer to the performance of actual sex acts and cannot refer to the mere touching that occurs during the creation of a "sexual 'fantasy'" in a VIP room.[6] (Property Owner's Brief at 50.) The argument suggests that, because the behavior involves a "fantasy," i.e.,

[5] Zoning ordinances are to be construed in accordance with the plain and ordinary meaning of their words. *Phillips v. Zoning Hearing Board*, 776 A.2d 341, 343 (Pa. Cmwlth. 2001). Moreover, zoning ordinances are to be construed liberally to allow the broadest possible use of land; it is an abuse of discretion to narrow the terms of an ordinance and further restrict the use of property. *Id.*

[6] In acknowledging that VIP room behavior is a "*sexual* fantasy," Property Owner concedes that the behavior is sexual in nature. The word "sexual" refers to the sphere of behavior associated with libidinal gratification. *See* Webster's Third New International Dictionary 1304, 2082 (2002) (defining "sexual," "libidinal" and "libido"). The word does not only refer to sex acts.

something in one's imagination,[7] the behavior is not actually "conduct." However, "conduct" is any behavior in a particular situation,[8] including the behavior that occurs in a VIP room when a male customer acts out a sexual fantasy. The touching that occurs is not in anyone's imagination; it is real.

Moreover, if we were to accept Property Owner's argument that the term "sexual conduct" can only refer to the performance of actual sex acts, then we would have to conclude that the Township's zoning ordinance permits houses of prostitution and the crime of prostitution in its industrial zoning district. *See* section 5902 of the Crimes Code, 18 Pa. C.S. §5902 (defining "prostitution" as engaging in sexual activity as a business and defining "house of prostitution" as any place where prostitution or the promotion of prostitution is regularly carried on by a person under the control, management or supervision of another). Clearly, the Township did not intend the definition of an "adult cabaret" to include such criminal conduct.

Property Owner also asserts that the word "nudity" in the term "sexually explicit nudity" can only refer to a completely naked state, not merely a topless state of undress. Thus, Property Owner contends that "sexually explicit nudity" can only refer to the performance of sex acts in the nude.[9] (Property Owner's Brief at 50.)

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[7] *See* Webster's Third New International Dictionary 823 (2002) (indicating that "fantasy" relates to one's imagination).

[8] Webster's Third New International Dictionary 474 (2002).

[9] Again, to accept such an interpretation of "sexually explicit nudity" would mean that the Township permits houses of prostitution in the industrial zoning district.

Property Owner is correct that the word "nudity" refers to the state of being nude, i.e., devoid of clothing,[10] and "sexually explicit" nudity is nudity associated with genital union.[11] However, we point out that, before Thrills began to feature full nudity, the trial court had held that Thrills did *not* feature "sexually explicit nudity." It was only when Thrills began to feature full nudity, including exposure of the breasts, buttocks, vagina and anus of the female dancers, that Thrills became an "adult cabaret" based on "sexually explicit nudity."

Finally, Property Owner asserts that Thrills does not "feature" the VIP room activities. Rather, these are ancillary to the primary attraction, i.e., eating and drinking with live entertainment. However, to "feature" something is to give special prominence to it; moreover, a "feature" is something offered to the public or to a clientele that is exhibited or advertised as particularly attractive.[12] Thus, by calling the room a "VIP" room, i.e., a room for "very important persons," Thrills gives special prominence to the activities that occur there, making it particularly attractive.

Accordingly, the trial court did not err in concluding that Thrills is an "adult cabaret" as that term is defined in the Township's zoning ordinance.

**Section 5503 of the Act**

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[10] *See* Webster's Third New International Dictionary 1548 (2002) (defining "nudity" and "nude").

[11] *See* Webster's Third New International Dictionary 2081, 2082 (2002) (defining "sex" and "sexually").

[12] *See* Webster's Third New International Dictionary 832 (2002) (defining "feature").

Property Owner next argues that the trial court erred in concluding that Property Owner violated the illumination and visibility requirements set forth in sections 5503(b) and (d) of the Act for adult establishments. We disagree.

Section 5503(b) of the Act requires that an adult establishment be physically arranged in such a manner that the entire interior portion of the rooms where adult entertainment is provided shall be clearly visible from the common areas of the premises; visibility into such rooms shall not be blocked or obscured by any obstruction whatsoever. Section 5503(d) of the Act requires that any room used for viewing live adult entertainment shall be well lighted, readily accessible at all times and continuously open to view in its entirety.

The trial court concluded that Property Owner violated these provisions, explaining as follows:

> Although evidence was presented that the curtains on the doorways to the VIP rooms have been removed, evidence presented in the form of testimony from the private investigators indicates that even without the curtains, the interior of the VIP rooms still are not visible from the common areas of the establishment. Even the photographs presented by [Property Owner] are inconclusive. Those photographs taken from a distance do not show the interior of the rooms and the remaining pictures were obviously taken from the doorway to the rooms.

(Trial Ct. Op., 10/19/10, at 19.)

Property Owner contends that, in reaching its conclusion, the trial court relied solely on the testimony of two private investigators who had difficulty seeing

into a VIP room from the doorway. However, the trial court also viewed photographs offered by Property Owner. Moreover, to the extent the record contained conflicting testimony on this issue, the trial court resolved those conflicts in favor of the Township.

**Constitutionality: Strict Scrutiny**

Property Owner argues that the Township failed to prove that it enacted its zoning ordinance based on its concerns for the negative secondary effects of adult cabarets in its non-industrial zones; thus, the Township's zoning ordinance is content-based rather than content-neutral and is subject to strict scrutiny.[13] Property Owner recognizes that the ordinance states that it was intended to protect the public health, safety and welfare, but Property Owner contends that boilerplate language is insufficient to establish that the Township had real concerns about the negative secondary effects of adult cabarets in non-industrial zones. We disagree.

In *City of Renton*, the United States Supreme Court considered whether a zoning ordinance regulating the location of adult theaters in the city was content-based or content-neutral. The Court stated that the zoning ordinance was content-neutral because, *by its terms*, it was designed to prevent crime, protect the city's retail trade, maintain property values and generally protect and preserve the quality of the neighborhoods, commercial districts and urban life. 475 U.S. at 48. The Court

[13] "When the government restricts expression due to the content of the message being conveyed, such restrictions are allowable only if they pass the strict scrutiny test. That test is an onerous one, and demands that the government show that the restrictions are '(1) narrowly tailored to serve (2) a compelling state interest.'" *In re Condemnation by Urban Redevelopment Authority of Pittsburgh*, 590 Pa. 431, 441, 913 A.2d 178, 183 (2006) (quoting *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002)).

rejected a view that would have required the city to conduct its own studies relating to the negative secondary effects of adult theaters in the city. *Id.* at 50. The Court held that the city was entitled to rely on the experiences of other cities to enact a content-neutral ordinance regulating the location of adult theaters. *Id.* at 51-52.

Here, the Township's adult facilities zoning ordinance, by its terms, is designed "to be in the Township's best interest regarding the health, welfare and safety of a citizenry." (R.R. at 21a.) Under *City of Renton*, the Township was not required to study the negative secondary effects of adult cabarets in non-industrial zones of the Township. The Township was entitled to rely on the experiences of others in determining that it was in the best interest of the public health, safety and welfare to restrict adult cabarets to the industrial zoning district.

Accordingly, the trial court did not err in failing to apply the strict scrutiny test to the Township's zoning ordinance.

**Constitutionality: Unfettered Discretion/Vagueness**

Property Owner argues that the Township's zoning ordinance regulating adult facilities is so vague that the Township has unfettered discretion to deprive a business like Thrills of its right to free expression. We disagree.

An ordinance making the peaceful enjoyment of constitutional freedoms contingent upon the uncontrolled will of an official, e.g., an ordinance requiring a permit or license that may be granted or withheld in the discretion of such official, is an unconstitutional censorship or prior restraint upon the enjoyment of those

freedoms.[14] *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). Moreover, an enactment is void for vagueness if its prohibitions are not clearly defined. *Boron v. Pulaski Township Board of Supervisors*, 960 A.2d 880, 886 (Pa. Cmwlth. 2008).

> "Vague laws offend several important values. First, because we assume that [people are] free to steer between lawful and unlawful conduct, we must insist that laws give the persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and indiscriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . . ."[15]

*Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)).

First and foremost, a person of ordinary intelligence would know that the terms "sexual conduct" and "sexually explicit nudity" in the definition of "adult cabaret" could not refer to the performance of actual sex acts because, if they did, the zoning ordinance would permit houses of prostitution in the industrial zoning district. Knowing that the terms cannot refer to actual sex acts, a person of ordinary

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[14] We note that this case does *not* involve a Township official's denial of a permit or license. Thus, there was no censorship or prior restraint on freedom of expression at Thrills based on the unfettered discretion of a Township official. Rather, the Township sought an injunction from the trial court, which meant that Thrills continued to operate until the Township proved to the trial court its entitlement to an injunction.

[15] "'Although at first blush a law may appear vague on its face and those subject to it without fair notice . . . it may withstand a constitutional challenge if it has been narrowed by judicial interpretation, custom and usage.'" *Rising Sun Entertainment, Inc. v. Commonwealth*, 829 A.2d 1214, 1218 (Pa. Cmwlth. 2003) (quoting *Purple Orchid, Inc. v. Pennsylvania State Police, Bureau of Liquor Control Enforcement*, 721 A.2d 84, 86 (Pa. Cmwlth. 1998), *aff'd*, 572 Pa. 171, 813 A.2d 801 (2002)). This is especially true where the judiciary has narrowed the interpretation of a law specifically for a particular establishment. *Id.*

intelligence would know that "sexual conduct" includes a male acting out a "sexual fantasy" with a female wearing only a g-string. A person of ordinary intelligence would know that "sexually explicit nudity" includes a female exposing her breasts, buttocks, vagina and anus to a male. Finally, a person of ordinary intelligence would know that, if an establishment has created special areas for certain types of dances, the establishment has given special prominence to them.

Accordingly, we conclude that the Township's zoning ordinance is not unconstitutionally vague with respect to its regulation of adult cabarets, and, thus, the Township does not have unfettered discretion to deprive a business of its right to free expression.

**Constitutionality: Alternative Avenues**

Property Owner argues that the trial court erred in concluding that, in permitting adult cabarets in the industrial zoning district, the Township's zoning ordinance has provided alternative avenues for the freedom of expression offered by adult cabarets.[16] We disagree.

As indicated above, content-neutral, time, place and manner regulations are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. *City of Renton*,

[16] When a use is not expressly excluded throughout a municipality, a presumption of validity and constitutionality attaches to the ordinance, even when it is challenged as *de facto* exclusionary. *Villa, Inc. v. Zoning Hearing Board*, 426 A.2d 1209, 1211 (Pa. Cmwlth. 1981). A party asserting otherwise has a heavy burden of proof and must prove that a lawful use is effectively prohibited although apparently permitted. *Id*.

475 U.S. at 47. In *City of Renton*, an ordinance restricting the location of adult theaters left 520 acres, or more than 5% of the entire land area of the city, open for use as adult theater sites. In response to the argument that some of the land is already occupied by existing businesses, that practically none of the undeveloped land is currently for sale or lease and that there are no commercially viable adult theater sites within the 520 acres, the U.S. Supreme Court stated:

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. In our view, the First Amendment requires only that [the city] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . .

*Id.* at 54 (citations omitted). Here, the trial court found that there are at least seventeen lots in the industrial zoning district available for the development of an adult cabaret. Property Owner concedes that, "[i]f there were indeed 17 sites legally available, as the trial court believed, that would surely be enough to satisfy Renton." (Property Owner's Brief at 41.)

However, Property Owner questions whether seventeen sites are actually available, pointing out that, under section 2 of Ordinance 97-100, an adult cabaret cannot be located within 1,000 feet of: (1) another adult facility; (2) a public or private school; (3) a day care facility; (4) an indoor or outdoor public recreation

facility; or (5) a religious house of worship. (R.R. at 22a.) The trial court addressed this issue as follows:

> The majority of the testimony in the final hearing dealt with the availability of alternative available sites for an adult cabaret. [The Township] presented exhibits and testimony that there are at least 27 sites in the industrial zoning district that provide reasonable alternative avenues of communication. However, *after taking into account the isolation distances* as required by Section 2 of the Ordinance, the number of available lots was reduced to 17.[17] Nevertheless, the engineers who testified on behalf of [the Township] . . . indicated that they were not aware of any ordinance features or other physical features regarding these properties that would preclude their use of development as an adult facility.

(Trial Ct. Op., 10/19/10, at 12) (emphasis added). Thus, in finding seventeen sites available for development as an adult cabaret, the trial court considered the 1,000-foot isolation distance.

Even so, Property Owner asserts that, in taking into account the isolation distances, the trial court erred in measuring the 1,000 feet from the structures rather than the property lines of the lots containing the school, the recreation facility and the house of worship.[18] However, an examination of the plain language of the ordinance

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[17] Exhibit P-10 shows the twenty-seven parcels located within the Township's industrial zoning district and applicable isolation distances. (R.R. at 1133a.)

[18] We note that, currently, there are no other adult facilities in the industrial zoning district. Nevertheless, Property Owner argues that the construction of future adult facilities in the industrial zone would limit the development of others in the industrial zone. However, in making this argument, Property Owner does not point to evidence showing that an adult facility on a particular site among the seventeen would be within 1,000 feet of an adult facility on another site.

shows that it does *not* prohibit an adult facility within 1,000 feet of the *property line of a lot containing* another adult facility, a school, a day care facility, a public recreation facility or a house of worship. The isolation distance pertains to a facility, school or house of worship.

Moreover, the trial court explained:

> [Property Owner] claims that by measuring from "property line to property line", these isolation distances would prohibit use of any of the available lots referenced by [the Township]. We agree. However, the testimony of the Township's Zoning Officer clearly established that for this purpose, the isolation distances would be measured from facility to facility, not property line to property line. When asked what she meant by "facility", Ms. Arner stated that she considers a "facility" a structure. [Property Owner], on the other hand, believes that the term "facility" also encompasses an outdoor recreational facility (with no structures) and therefore, the isolation distance would have to be measured using the property lines. We do not accept this interpretation.
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> The term "facility" is defined as a room, equipment, etc. provided for people to use . . . [an] area or building used for a particular purpose . . . [or] a place for doing something such as a commercial or institutional building. Based on this definition, we believe that the term "facility" can only mean man-made structures; i.e. a church building, park buildings, indoor or outdoor swimming pools, tennis courts, etc.
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> [Property Owner] argues that Big Pocono State Park, which is located . . . along [the Township's] industrial zone, is a "public recreation facility". However, Big Pocono State Park[,] while it is a recreation area open to the public, has no buildings, swimming pools, tennis courts, etc. – no amenities except for hiking trails. Therefore, we find that Big Pocono State Park is not a "facility" as that term is defined above.

> Next, [Property Owner] argues that the entire property owned and occupied by Streamside Camp is a "house of worship" and thus a "facility" for purposes of measuring isolation distances. While there may be two or three buildings located on the camp property where worship takes place, the camp property itself is not a "facility" i.e. a house of worship, as the term facility is defined above.

(Trial Ct. Op., 10/19/10, at 14-15.) Given the plain language of the ordinance, the testimony of the Township's zoning officer, the meaning of the word "facility" and the rule of construction requiring a court to presume that a lawmaker does not intend to violate constitutional rights,[19] we reject Property Owner's argument that the isolation distances must be measured from property line to property line.

Property Owner also asserts that "[i]t may or may not be possible" to build an adult cabaret on the small lots or lot fragments due to setback and parking requirements, but it was the Township's burden to prove that it was possible, and the Township failed to do so. (Property Owner's Brief at 40.) We disagree. First, the burden of proof was on Property Owner to establish that the Township's zoning ordinance was exclusionary with respect to adult cabarets. Second, the Township presented sufficient evidence to show that it was possible to build adult cabarets on seventeen sites in the industrial zoning district. If Property Owner believed that the development of small or partial lots was precluded because of setback and parking requirements, Property Owner needed to raise that issue. Third, in making this argument here, Property Owner does not claim that setback and parking requirements

[19] *See* section 1922(3) of the Statutory Construction Act of 1972, 1 Pa. C.S. §1922(3) (stating that, in ascertaining the intention of a legislature, a court may presume that the legislature does not intend to violate the Constitution of the United States or this Commonwealth).

preclude the development of any particular lot, asserting only that "[i]t may or may not be possible" to develop the small and partial lots. (Property Owner's Brief at 40.)

Property Owner next asserts that the Township's industrial zone contains the Butz Landfill Superfund Site, and three experts testified that land in the industrial zone is not suitable for development as an adult cabaret due to contamination of the groundwater and/or the lack of available commercial financing for such a project at the present time. (Property Owner's Brief at 44-46.) The trial court rejected this argument because: (1) the latest reports of the Environmental Protection Agency indicate that the Butz Landfill Superfund Site currently poses no public health hazard; (2) the Township offers public water to sites in the industrial zoning district; and (3) the lack of financing to develop an adult cabaret in the industrial zoning district is due to the present economic climate, not the presence of contamination. (Trial Ct. Op., 10/19/10, at 15-16.)

Property Owner does not argue that the record lacks competent evidence to support the trial court's findings; in fact, Property Owner acknowledges that the trial court did not find its experts credible. (Property Owner's Brief at 48.) However, Property Owner contends that this court may make *de novo* credibility determinations because the trial court "baldly stated that credible evidence did not exist." (*Id.*) Property Owner cites no law in support of that proposition. Moreover, Property Owner is incorrect; we are bound by the trial court's credibility determinations. *Big Bass Lake Community Association v. Warren*, 23 A.3d 619, 625 (Pa. Cmwlth. 2011).

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Jackson Township, a Second-Class Township of the Commonwealth of Pennsylvania | : | |
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O R D E R

AND NOW, this 2nd day of December 2, 2011, the order of the Court of Common Pleas of Monroe County, Forty-Third Judicial District, dated November 5, 2010, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge