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# THE *RENTON* DECISION: A NEW STANDARD FOR ADULT BUSINESS REGULATION

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## INTRODUCTION

In *City of Renton v. Playtime Theaters, Inc.*<sup>1</sup> the Supreme Court upheld a local zoning ordinance that limited the location of theaters exhibiting adult movies<sup>2</sup> in Renton, Washington<sup>3</sup> to a 520 acre area in one corner of the city. Municipal restrictions on "adult businesses"<sup>4</sup> raise serious constitutional issues because the first amendment guarantee of freedom of speech<sup>5</sup> extends to sexually-oriented media as long as

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1. 106 S. Ct. 925 (1986).

2. In April 1981 the City of Renton enacted Ordinance Number 3526, which restricted the location of any "adult motion picture theater." The ordinance defined an "adult motion picture theater" as

an enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or related to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

*Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 529 (9th Cir. 1984).

3. Renton is a suburban community of approximately 32,000 people bordering Seattle to the south. 106 S. Ct. at 927.

4. The terms "adult businesses" or "adult entertainment businesses" typically refer to theaters, bookstores, mini-theaters, bars, and cabarets that purvey entertainment or merchandise characterized by an emphasis on nudity and sex.

See generally F. STROM, *ZONING CONTROL OF SEX BUSINESSES* (1977); P. ROHAN, *ZONING & LAND USE CONTROLS* § 11.01[2] (1986).

5. "Congress shall make no law . . . abridging the freedom of speech, or of the

the material is merely pornographic and not considered obscene.<sup>6</sup> This article traces the development of the case law governing zoning regulation of adult businesses and critically examines the *Renton* decision in the light of those cases.

### BACKGROUND

Only a decade before the *Renton* decision, the Supreme Court, in *Young v. American Mini-Theatres*,<sup>7</sup> first decided a case "in which the interests in free expression protected by the first and fourteenth amendments have been implicated by a municipality's commercial zoning ordinance."<sup>8</sup> *Young*, like *Renton*, considered the constitutionality of zoning restrictions applied to adult businesses. At issue was the legality of amendments to Detroit's "Anti-Skid Row" ordinance that singled-out adult bookstores and theaters for special zoning treatment.<sup>9</sup>

The Detroit zoning amendments added adult motion picture theaters and adult bookstores to a list of businesses that, absent special approval, could not be located within 1,000 feet of any two other similarly regulated uses.<sup>10</sup> The amendment also prohibited adult bookstores and theaters from locating within 500 feet of a residential dwelling.<sup>11</sup> The original "Anti-Skid Row" ordinance, adopted in 1962, was based on findings by the Detroit Common Council that concentrations of certain types of businesses can have a blighting effect on the sur-

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press. . . ." The first amendment is made applicable to the states by the due process clause of the fourteenth amendment. *See Edwards v. South Carolina*, 372 U.S. 229 (1963).

6. The first amendment does not protect obscene material. *See Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). Non-obscene pornography, however, is entitled to protection under the first amendment. *See Young v. American Mini-Theatres*, 427 U.S. 50 (1976). The Supreme Court in *Miller* set forth a test for determining whether pornography is obscene. The Court found material obscene if the average person would find that the work, taken as a whole, appeals to a "prurient interest in sex," portrays sex in a "patently offensive" manner, and "lacks serious literary, artistic, political or scientific value." 413 U.S. at 24.

7. 427 U.S. 50 (1976).

8. *Id.* at 76 (Powell, J., concurring).

9. *Id.* at 54-55.

10. Detroit, Mich., Ordinance 742-G (Nov. 2, 1972) (amending DETROIT, MICH., OFFICIAL ZONING ORDINANCE §§ 32.007, 66.0000, 66.0101 (1962)).

11. Detroit, Mich., Ordinance 743-G (Nov. 2, 1972). Following enactment of these amendments, "regulated uses" included adult bookstores, adult theaters and mini-theaters, bars, cabarets, hotels and motels, pawnshops, pool and billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls.

rounding neighborhood.<sup>12</sup> The council's 1972 addition of adult theaters and bookstores to the list of "regulated uses" was made in response to the rapid increase in the number of these businesses in the previous five years.<sup>13</sup> Supporters of the amendments, including urban planners and real estate experts, claimed that "the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."<sup>14</sup>

The Supreme Court upheld the ordinance, but could not agree on a majority opinion for doing so.<sup>15</sup> Justice Stevens wrote for a majority in the first two parts of his opinion, in which he rejected claims that the amendments were void for vagueness<sup>16</sup> and invalid as prior restraints

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12. Section 66.0000 of the Official Zoning Ordinance stated:

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e. not more than two such uses within one thousand feet of each other which would create such adverse effects).

DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.0000 (1962).

13. Police statistics indicate that between 1967 and 1972 the number of adult theaters had increased from two to twenty-five, and a comparable increase occurred in the number of adult bookstores and other adult businesses. *Young*, 427 U.S. at 55 n.8.

14. *Id.* at 55.

15. The Court split 4-1-4. Justice Stevens' opinion, joined by Justices Burger, White, Powell, and Rehnquist, upheld the ordinance but Justice Powell rejected the part of Stevens' opinion that dealt with the issue of how courts should review zoning regulations that distinguish among businesses based on the content of speech. Justice Stevens wrote a separate concurring opinion on that point. Justices Brennan, Stewart, Marshall, and Blackmun dissented. 427 U.S. at 50.

16. The alleged vagueness of the amendments did not affect the parties before the Court because the ordinance unquestionably applied to them. The respondents argued, however, that they could raise the vagueness issue because the Court had ruled on several occasions that a litigant could assert the rights of third parties in first amendment cases. These rulings reasoned that an ordinance affecting speech could cause parties not before the Court to refrain from exercising their right to free expression.

Justice Stevens noted that while the overriding importance of the first amendment justifies such an exception to traditional standing rules, the Court will make an exception only if the statute's deterrent effect on legitimate expression is "real and substantial" and the statute is not "readily subject to a narrowing construction by the state courts." Finding that the litigants could meet neither of these requirements, Justice

on free speech.<sup>17</sup> Justice Stevens, however, lost Justice Powell in the third part of his opinion, which held that on equal protection grounds, adult theaters could be treated differently under first amendment principles from other types of protected speech. Stevens argued that many instances exist in which courts examine the content of speech to determine if it should be protected<sup>18</sup> or, if the speech is unarguably protected, whether a different governmental response, based on content, is required.<sup>19</sup> Having argued that government may appraise the content of speech to determine the degree of first amendment protection to be afforded, Justice Stevens justified Detroit's differing treatment of adult and non-adult films by placing pornography on a lower constitutional

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Stevens rejected their claims. 427 U.S. at 60 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)).

Justice Blackmun's dissent was sharply critical of Stevens' view of the vagueness claim. Justice Blackmun argued that the amendment's definition of what made a bookstore or theater "adult" was impermissibly vague. The "adult" classification depended on whether the bookstore or theater presented material "'distinguished or characterized by an emphasis on' certain specified activities, including sexual intercourse or specified anatomical areas." 427 U.S. at 89. Blackmun contended that a movie exhibitor would find no help in such a definition when he showed films: "It will be simple enough, as the operator screens films, to tell when one of these areas or activities is being depicted, but if the depiction represents only a part of the films' subject matter, I am at a loss to know how he will tell whether they 'are distinguished or characterized by an emphasis' on those areas and activities. The ordinance gives him no guidance. . . ." *Id.*

17. In what the author finds the most persuasive portion of Stevens' opinion, the Justice argues that Detroit's restrictions on adult theaters do not impose a limit on the number of theaters, but merely restrict their location: "There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained." *Id.*

18. *Id.* at 66. Justice Stevens cited as one example the content-based distinction between an epithet (protected) and "fighting words" (unprotected).

19. *Id.* at 66-70. Stevens' examples in this category include the limitations placed on the state's power to enforce their libel laws, *see New York Times v. Sullivan*, 376 U.S. 254 (1964) (constitutional protections for speech and press limit state powers to award damages in libel actions brought by public officials against critics of official conduct) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (standard of libel recovery for private individuals is a matter for the states to determine as long as they do not impose liability without fault); the differing measure of protection afforded to commercial speech, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (state may regulate commercial speech in ways that would be impermissible if applied to ideological communication); and differing treatment of the sale of sexually oriented materials to minors, *see Ginsberg v. New York*, 390 U.S. 629 (1968) (statute making sale of magazine to minor criminal offense although magazine would not be obscene if shown to adults).

level than other forms of expression.<sup>20</sup>

Justice Stevens concluded his opinion by questioning whether the interest that Detroit asserted in neighborhood preservation justified the limitations placed on protected speech. For Stevens, this inquiry was answered satisfactorily by the fact that the record below disclosed a factual basis for Detroit's conclusion that the amendments would have the desired effect. Finally, Stevens reiterated that the ordinance would not have the effect of suppressing or greatly restricting access to lawful speech, and noted that "the situation would be quite different" if it did.<sup>21</sup>

The Stevens opinion stated three critical components for judicial review of ordinances that regulate adult businesses. First, the ordinance must have as its objective the control of the "secondary effects" of adult businesses, urban decay in Detroit's case, rather than protecting citizens from exposure to the content of the speech itself.<sup>22</sup> Second, the ordinance must not have the effect of "suppressing, or greatly restricting access to" adult businesses,<sup>23</sup> but must leave the market for this commodity "essentially unrestrained."<sup>24</sup> Third, the municipality must provide a factual basis for its regulatory scheme.<sup>25</sup> If an ordinance meets these tests, Stevens calls for the reviewing court to defer to the judgment of the municipality and uphold the ordinance.

The dissenting Justices viewed Stevens' opinion as a "drastic depar-

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20. Justice Stevens wrote:

[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice. Even though the first amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

427 U.S. at 70-71. "Voltaire's immortal comment" refers to a quote from Voltaire that appeared earlier in Stevens' opinion: "I disapprove of what you say, but I will defend to the death your right to say it." 427 U.S. at 63 (footnote omitted).

21. *Id.* at 71-72 n.35. See *supra* note 17.

22. 427 U.S. at 71 n.34.

23. *Id.* at 71 n.35.

24. *Id.* at 62.

25. *Id.* at 71.

ture from established principles of first amendment law."<sup>26</sup> They saw the ordinance as a forbidden content-based restriction on freedom of expression.<sup>27</sup> Justice Powell's concurring opinion, while disagreeing with Stevens' justification for treating pornography differently from other forms of protected speech, found the Detroit scheme acceptable on constitutional grounds. Powell saw the dispersal of adult businesses as "innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."<sup>28</sup> In Powell's view, Detroit had broad regulatory authority to deal with neighborhood blight through its zoning laws. What distinguished the case, however, is that it presented to the Court the novel question of potential conflict between the first amendment and land-use regulation.

Justice Powell found that the impact of the ordinance on freedom of expression was merely incidental to the goal of the regulation because the Detroit scheme did not impose any content limitation on the creators of adult movies and did not restrict exhibition of the movies in any significant way.<sup>29</sup> In these circumstances, Powell argued, the ap-

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26. *Id.* at 84.

27. As has been noted, Justice Blackmun's dissenting opinion focused on the vagueness issue. *See supra* note 16. Justice Stewart directly countered Stevens' contention that pornography was not entitled to the fullest protection of the first amendment. Invoking the philosophical underpinnings of the first amendment, Stewart attacked Stevens for denigrating the constitutional status of pornography just because most people may not consider the right to sell and read pornography to be as important as other constitutional rights. Justice Stewart stated:

[I]f the guarantees of the First Amendment were reserved for expression that more than a 'few of us' would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty. . . .

The fact that the 'offensive' speech here may not address 'important topics'—ideas of social and political significance in the Court's terminology, . . .—does not mean that it is less worthy of constitutional protection.

427 U.S. at 86-87 (footnotes omitted).

28. *Id.* at 73. Powell traced the evolution of zoning from the early efforts at comprehensive land-use regulation in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (municipality divided into residential, commercial and industrial zones), to the complex and innovative forms necessary to deal with the problems of modern urban life in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning regulation restricting land use to single-family dwellings and defining "family" so that no more than two unrelated persons could reside in a single dwelling upheld on ground that desire to avoid congestion and noise from both people and vehicles were legitimate goals in a community devoted to family values).

29. 427 U.S. at 78-79.

appropriate test for analyzing the Detroit zoning is the four-part test of *United States v. O'Brien*.<sup>30</sup> Under *O'Brien* a governmental regulation is sufficiently justified, despite its incidental impact upon first amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>31</sup> Applying this test to the Detroit ordinance, Powell found that Detroit had the power to enact zoning regulations; that the interest in neighborhood preservation was substantial; that no indication existed that Detroit was engaging in any effort to suppress free expression; and that the degree of incidental encroachment on freedom of expression was the minimum necessary to achieve the city's purpose.<sup>32</sup>

#### DEVELOPMENTS AFTER *YOUNG*

In the wake of the *Young* decision, a number of municipalities adopted the Detroit dispersion technique to address the problems they claimed resulted from the negative effects adult businesses have on neighborhoods.<sup>33</sup> While many of these ordinances were validated,<sup>34</sup>

30. 391 U.S. 367 (1968).

31. *Id.* at 377.

32. 427 U.S. at 80-82.

33. See Note, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1557 (1978).

34. Courts have generally upheld ordinances that include substantially the same locational restrictions as the Detroit ordinance in *Young*. Courts, however, have often invalidated additional restrictions on adult businesses such as licensing or special-permit requirements. See, e.g., *Grand Faloan Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.), *cert. denied*, 459 U.S. 859 (1982); *15192 Thirteen Mile Road v. City of Warren*, 593 F. Supp. 147 (E.D. Mich. 1984) (locational restrictions upheld but special permit requirement invalid); *Genusa v. City of Peoria*, 475 F. Supp. 1199 (C.D. Ill. 1979) (zoning upheld, but licensing provisions invalid), *aff'd in part, rev'd in part, and vacated in part*, 619 F.2d 1203 (7th Cir. 1980); *Bayside Enterprises, Inc. v. Carson*, 470 F. Supp. 1140 (M.D. Fla. 1979) (locational restrictions upheld, but licensing restrictions invalid); *Walnut Properties, Inc. v. Ussery*, 178 Cal. App. 2d 173, 223 Cal. Rptr. 511 (1986); *City of Whittier v. Walnut Properties, Inc.*, 149 Cal. App. 3d 633, 197 Cal. Rptr. 127 (1983); *Strand Property Corp. v. Municipal Court*, 148 Cal. App. 3d 882, 200 Cal. Rptr. 47 (1983); *Castner v. City of Oakland*, 129 Cal. App. 3d 94, 180 Cal. App. 3d 369, 181 Cal. Rptr. 1 (1982) (zoning requirements upheld); *Pringle v. City of Covina*, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981); *City of Chicago v. Scandia Books, Inc.*, 102 Ill. App. 3d 292, 430 N.E.2d 14 (1981); *Texas Nat'l Theatres, Inc. v. City of Albuquerque*, 97 N.M. 282, 639 P.2d 569 (1982); *Kacar, Inc. v. Zoning Hearing Bd.*, 432 A.2d 310 (Pa. Commw. Ct. 1981).

court challenges to several dispersion schemes revealed that some cities had disregarded the guidelines provided by *Young* and enacted ordinances that failed one or more of the tests set out in the Powell and Stevens opinions.<sup>35</sup> Thus, courts struck down adult business ordinances because of vagueness,<sup>36</sup> a lack of legislative findings supporting the restrictions,<sup>37</sup> or because the enactment had the effect of banning or severely restricting access to adult entertainment.<sup>38</sup>

The courts commonly found that an adult business ordinance suffered from a multitude of sins. The Atlanta, Georgia effort to restrict adult businesses provides a good example of the abuses courts often found. Atlanta's ordinance, patterned on the Detroit scheme, was enacted in November 1976, five months after the Supreme Court decided *Young*.<sup>39</sup> Section 1 of the ordinance set out the findings of fact and

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35. Because no majority upheld the Detroit ordinance without Justice Powell's vote, most courts reviewed adult business ordinances under both the Stevens and Powell opinions or under Powell's *O'Brien* test alone on the theory that, as the more demanding standard, it included Stevens' requirements. See *infra* notes 36-38.

Some courts have been critical of Stevens' approach. See *International Food & Beverage Sys. v. City of Fort Lauderdale*, 614 F. Supp. 1517, 1519 (S.D. Fla. 1985) (Stevens approach is an "aberration in First Amendment jurisprudence, for his analysis would have the courts judge the societal worth of each class of expression."). Other courts have relied solely on the Stevens opinion. See *Walnut Properties, Inc. v. Ussery*, 178 Cal. App. 3d 173, 223 Cal. Rptr. 511 (1986); *North Street Book Shoppe, Inc. v. Village of Endicott*, 582 F. Supp. 1428 (N.D.N.Y. 1984).

36. See, e.g., *Harris Books, Inc. v. City of Santa Fe*, 98 N.M. 235, 647 P.2d 868 (1982) (term "residential area" impermissibly vague); *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980) (ordinance subjecting "adult" movies to special permit requirement void for vagueness when the term "adult" is not defined).

37. See, e.g., *North Street Book Shoppe, Inc. v. Village of Endicott*, 582 F. Supp. 1428 (N.D.N.Y. 1984); *CLR Corp. v. Henline*, 520 F. Supp. 760 (W.D. Mich. 1981) (city failed to provide any legislative history or factual background for ordinance, claiming it could rely on the experience of Detroit and other cities), *aff'd*, 702 F.2d 637 (6th Cir. 1983); *Ellwest Stereo Theaters, Inc. v. Byrd*, 472 F. Supp. 702 (N.D. Tex. 1979); *but see Genusa v. City of Peoria*, 475 F. Supp. 1199 (C.D. Ill. 1979) (legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action), *aff'd in part, rev'd in part, and vacated in part*, 619 F.2d 1203 (7th Cir. 1980).

38. See, e.g., *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983) (ordinance reduced permissible locations for adult businesses by two-thirds); *Basiardanes v. City of Galveston*, 513 F. Supp. 975 (S.D. Tex. 1981) (ordinance banned adult uses from most of the city, and areas where allowed were unsuitable for such use), *aff'd in part, rev'd in part, and remanded*, 682 F.2d 1203 (8th Cir. 1983); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981) (ordinance left no location available for adult use); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981) (ordinance that restricted adult uses to only three zoning districts would reduce access to adult entertainment).

39. *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207, 1209 (N.D. Ga. 1981).

statements of purpose in language quite similar to Detroit's ordinance. The Atlanta city council deemed it necessary that adult businesses "be subject to special regulations in order to insure that such uses and the effects thereof will not contribute to the blighting of or the downgrading of the surrounding neighborhood."<sup>40</sup>

The "special regulations" were embodied in a dispersion scheme that used locational restrictions significantly more stringent than Detroit's. Not only were the distance requirements stiffened, but all new adult businesses were restricted to three zoning districts. Certain existing businesses would either become non-conforming uses<sup>41</sup> or have to cease operation.<sup>42</sup> These restrictions were significant departures from the Detroit ordinance, which had not limited the zoning districts in which adult businesses could operate and had applied only to new adult businesses.

At trial, the district court was concerned whether the additional locational restrictions of the ordinance were so severe that they would significantly reduce, and possibly eliminate altogether, public access to sexually oriented businesses. The city, while contending that it was not required to assure a sufficient number of sites for adult businesses in the three permitted zoning districts, claimed that at least eighty-one sites existed that would be suitable for adult businesses. On the basis of a careful review of the evidence, the court found that all but ten of these sites were wholly unacceptable as sites for adult businesses. Of those ten acceptable sites, no more than three or four would be considered by a reasonably prudent investor as a possible site for an adult business.<sup>43</sup>

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40. *Id.* at 1210.

41. A non-conforming use is a use of land or a building that does not comply with the terms of a zoning ordinance. Non-conforming uses are normally subject to restrictions on enlargement, change of use, and rebuilding in the event of destruction of the premises. See D. MANDELKER, *LAND USE LAW* 130-37 (1982).

42. 511 F. Supp. at 1211-13. The ordinance prohibited any adult bookstore, theater, or "entertainment establishment" from locating within 1,000 feet of any *one* other such use, or within 500 feet of the boundaries of any residential district or property used for residential purposes, or within 500 feet of any permanent structure used as a church or place of religious worship. The ordinance restricted new adult businesses to three zoning districts: the C-4 central business district in the heart of the city and two industrial districts—M-1 and M-2—located some distance from the central business district. Existing adult bookstores and theaters not in these three districts became non-conforming uses, and adult entertainment establishments (generally nightclubs) located outside the three districts were subject to amortization provisions that required them to cease operations within four years or less.

43. *Id.* at 1216-17. The court did not consider either the price of the land or whether the land was presently for sale. Although the court did not examine each of

At the time of trial, forty-two or forty-three sexually oriented businesses existed in Atlanta, twelve or thirteen of which offered live entertainment. The amortization provision would effect all but one of the establishments offering live entertainment. These establishments, therefore, would have to relocate. The adult businesses outside the three zones in which the ordinance permitted new uses would become non-conforming uses under the ordinance and, therefore, faced a ban on enlarging, extending, or reconstructing their businesses. In the court's view, this would have the effect of slowly reducing the number of adult businesses outside the permitted districts. Because nearly all the adult entertainment businesses would have to relocate within four years, as would any existing non-conforming adult business that wanted to enlarge, and because these relocating businesses would have to compete with any new businesses for no more than ten sites, the court concluded that the ordinance would reduce public access in Atlanta to both live entertainment and books and movies characterized by an emphasis on sex.<sup>44</sup>

Although the court's finding of restricted access was, by itself, sufficient to invalidate the ordinance, the Atlanta scheme suffered from other faults. The court found that the ordinance used definitions of "adult bookstores" and "adult theaters" that were substantially overbroad<sup>45</sup> and found strong evidence of an improper motive in enacting

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the eighty-one sites, by reviewing the maps, documentary evidence, photographs, and testimony regarding site availability the court was able to find only ten acceptable sites. A few of the claimed eighty-one sites were unavailable simply because they violated the ordinance's locational criteria. Many other sites were wholly unsuited for retail or commercial use because the lots were too small or oddly-shaped to allow construction of a building of suitable size. Several sites were twenty to thirty feet below street level, making commercial use impossible. One site was in a floodplain and another was bisected by an easement for electric transmission wires. A number of other sites were unsuitable due to nearby noxious uses including, in one case, the Atlanta sewage treatment plant.

Going further, the court found that a large number of sites were simply unavailable and would remain so for the foreseeable future. Some sites were occupied by buildings housing substantial businesses or were in use as employee parking lots for successful manufacturing plants. In a number of cases, the ownership of potential sites made their sale to the operator of an adult business highly unlikely. For example, one landowner was the City of Atlanta, while another was the Southern Railway.

44. This forced relocation would clearly violate both the Stevens and Powell opinions in *Young*. See *Young v. American Mini-Theatres*, 427 U.S. 50, 71 n.35, 84 (1976).

45. 511 F. Supp. at 1219-23. The definition of an "adult bookstore" was so broad that it would include any building, including the federal courthouse, in which a copy of *Playboy* or a similar publication might be found. Similarly, the definition of an "adult theater" easily encompassed major downtown hotels, such as the Hyatt and Marriott,

the ordinance.<sup>46</sup> While sympathetic with the stated aims of the city in passing the ordinance, the court found that the ordinance could not pass muster on constitutional grounds.

Five years after *Young* the Supreme Court again considered a zoning restriction on adult entertainment in *Schad v. Borough of Mount Ephraim*.<sup>47</sup> The Mount Ephraim ordinance achieved its goal of banning nude dancing by prohibiting all live entertainment in the borough, a suburban New Jersey community. The ban included live entertainment that did not deal with sex or nudity.<sup>48</sup> A sharply divided Court<sup>49</sup> held that the ordinance, by banning all live entertainment, was invalid because it intruded too far on rights protected by the first amendment.

Justice White's majority opinion set out a two-part test to determine whether a zoning ordinance infringes on first amendment rights: the ordinance must be narrowly drawn and must further a sufficiently substantial government interest.<sup>50</sup> Further, he found that *Young* did not control this case because the restriction on all live entertainment went well beyond the minimal burden on protected speech that *Young* addressed.<sup>51</sup> Finding that the borough could not adequately justify its substantial restriction of protected activity, Justice White found the ordinance unconstitutional.<sup>52</sup>

Two interesting aspects of the *Schad* case introduced issues not con-

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that made films emphasizing sexual activity or nudity available in guest rooms on cable television.

46. *Id.* at 1210. The minutes of a zoning review board meeting revealed that, in addition to the ordinance's stated purposes, the ordinance as designed "would help those citizens disgusted by the conduct of these businesses to zone them out of business." *Id.* At that same meeting, an assistant city attorney indicated that the adult zoning ordinance was the "strongest vehicle toward elimination" of adult businesses and the city was "hoping for complete eradication" of adult businesses. *Id.* The city attorney also stated that the effect of the ordinance would be to reduce the number of these establishments. *Id.* (citations omitted).

47. 452 U.S. 61.

48. *Id.* at 66.

49. Justice White wrote the majority opinion, joined by Justices Brennan, Stewart, Marshall, Blackmun, and Powell. Justice Blackmun wrote a concurring opinion as did Justice Powell, with whom Justice Stewart joined. Justice Stevens filed an opinion concurring in the judgment. Chief Justice Burger dissented, joined by Justice Rehnquist.

50. 452 U.S. at 68.

51. *Id.* at 71. Because the Mount Ephraim ordinance banned *all* live entertainment in the borough, the issue of content-based regulation, so critical in *Young*, was not relevant here.

52. *Id.* at 72-76.

sidered in the *Young* decision. First, Mount Empraim argued that it need not allow live entertainment, and nude dancing in particular, within its boundaries if such adult entertainment is readily available in nearby communities. The Court rejected this position, finding that the right to freedom of expression in any one locale may not be abridged by an ordinance that asserts as its justification that the right to expression may be exercised in some other place.<sup>53</sup> Second, Mount Ephraim also suggested that its ordinance was a reasonable "time, place, and manner" restriction.<sup>54</sup> The Court also rejected this claim on the grounds that the borough could offer no legitimate governmental interest for the restriction and did not leave open adequate alternative channels of communication.<sup>55</sup>

Lower courts, which had not been hesitant before *Schad* to invalidate overly restrictive adult zoning schemes,<sup>56</sup> now could also look to this most recent pronouncement of the Supreme Court to support their decisions. Over the next few years, the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit Courts of Appeal struck down overly restrictive adult zoning regulations, justifying their decisions, in part, on *Schad*.<sup>57</sup>

Considering the decisions of the Supreme Court in *Young* and *Schad* along with the rulings of other federal and state courts, one would conclude that zoning cases involving restrictions on adult businesses such as theaters and bookstores with first amendment protection showed a clear pattern of judicial concern with maintaining community access to such businesses. Four rules appeared to guide the courts' decisions: (1) locational restrictions on adult businesses would be upheld only if the market for this commodity was essentially unrestrained; (2) vaguely worded ordinances were unacceptable; (3) ordinances that did not develop a factual basis for their restrictions or that did not relate those restrictions directly to recognized zoning purposes would be struck down; and (4) ordinances that granted government officials

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53. *Id.* at 76-77.

54. *Id.* at 74-75. The state may place reasonable time, place, and manner restrictions on speech as long as it does not endeavor to restrict the content of speech itself under the guise of regulating how, when, and where the speech occurs. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 115 (1971).

55. 452 U.S. at 75-76.

56. *See supra* notes 36-38.

57. *See Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Playtime Theaters v. City of Renton*, 748 F.2d 527 (9th Cir. 1984); *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983); *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

overbroad discretionary powers to determine whether or not an adult business would be permitted to operate would be struck down.

The Supreme Court's decision in *City of Renton v. Playtime Theatres, Inc.*<sup>58</sup> made significant changes in two of these rules, allowing local governments more freedom to regulate adult businesses. *Renton* is silent on the other rules, however, and the ultimate effect of the case depends in large part on how lower courts apply the new rulings to specific cases. The remainder of this article discusses the *Renton* case and explores the implications it holds for adult business zoning in light of other recent state and federal court decisions.

### THE *RENTON* DECISION

The controversy that gave rise to the *Renton* case began in May 1980 when the mayor of Renton, a Seattle suburb of 32,000 people, requested that the City Council consider enacting adult business legislation. At the time, no adult businesses were located in the city. The City Council referred the matter to the city's Planning and Development Committee, which held public hearings, reviewed the experience of Seattle and other cities, and sought the advice of the City Attorney. The City Council also enacted a moratorium on the licensing of adult businesses, explaining its action on the ground that such businesses "would have a severe impact upon surrounding businesses and residences."<sup>59</sup>

In April 1981 the City Council enacted an ordinance, based on the Committee's recommendation, that restricted the location of adult theaters to a 520 acre area.<sup>60</sup> At the time, no theaters were located in the 520 acre area and none of the theaters outside that area exhibited adult films. In January 1982 Playtime Theaters acquired two movie theaters in Renton, with the intention of exhibiting adult films at one of the locations. Playtime then sued in federal district court to challenge the constitutionality of the ordinance.<sup>61</sup>

On January 11, 1983 the district court judge adopted a federal mag-

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58. 106 S. Ct. 925 (1986).

59. *Id.* at 927.

60. *Id.* The ordinance originally prohibited adult theaters from locating within 1,000 feet of any residential zone or dwelling, any church, synagogue, or other religious institution, or any park. It also prohibited an adult theater from locating within one mile of any public or private school. The city later amended the ordinance to reduce the locational restriction regarding schools from one mile to 1,000 feet.

61. *Id.*

istrate's findings that: (1) the ordinance "for all practical purposes excludes adult theaters from the City;" (2) Renton had not established a factual basis for the adoption of the ordinance; and (3) the motivation behind the ordinance reflected "simple distaste for adult theaters because of the content of the films shown." The court granted Playtime a preliminary injunction barring enforcement of the ordinance and Playtime began to exhibit adult movies.<sup>62</sup>

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62. *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 532 (9th Cir. 1984). In the midst of this litigation, Renton passed an emergency ordinance amending its earlier ordinance by changing certain locational restrictions, providing additional definitions, and adding an elaborate statement of reasons for the enactment of the ordinances.

The City gave the following reasons in the amended ordinance:

1. Areas within close walking distance of single and multiple family dwellings should be free of adult entertainment land uses.
2. Areas where children could be expected to walk, patronize or recreate should be free of adult entertainment land uses.
3. Adult entertainment land uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks and other public facilities, and schools.
4. The image of the City of Renton as a pleasant and attractive place to reside will be adversely affected by the presence of adult entertainment land uses in close proximity to residential land uses, churches, parks and other public facilities, and schools.
5. Regulation of adult entertainment land uses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather than in response to an existing problem.
6. Commercial areas of the City patronized by young people and children should be free of adult entertainment land uses.
7. The Renton School District opposes a location of adult entertainment land uses within the perimeters of its policy regarding bussing of students, so that students walking to school will not be subjected to confrontation with the existence of adult entertainment land uses.
8. The Renton School District finds that location of adult entertainment land uses in areas of the City which are in close proximity to schools, and commercial areas patronized by students and young people, will have a detrimental effect upon the quality of education which the School District is providing for its students.
9. The Renton School District finds that education of its students will be negatively affected by location of adult entertainment land uses in close proximity to location of schools.
10. Adult entertainment land uses should be regulations [sic] by zoning to separate it from other dissimilar uses just as any other land use should be separated from uses with characteristics different from itself.
11. Residents of the City of Renton, and persons who are non-residents but use the City of Renton for shopping and other commercial needs, will move from the community or shop elsewhere if adult entertainment land uses are allowed to locate in close proximity to residential uses, churches, parks and other public facilities, and schools.

In February 1983 the parties agreed to submit the case for hearing on whether a permanent injunction should issue on the basis of the record already developed. On February 17 the district court vacated

12. Location of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses.
13. Merchants in the commercial area of the City are concerned about adverse impacts upon the character and quality of the City in the event that adult entertainment land uses are located within close proximity to residential uses, churches, parks and other public facilities, and schools. Location of adult entertainment land uses in close proximity to residential uses, churches, parks and other public facilities, and schools, will reduce retail trade to commercial uses in the vicinity, thus reducing property values and tax revenues to the City. Such adverse affect [sic] on property values will cause the loss of some commercial establishments followed by a blighting effect upon the commercial districts within the City, leading to further deterioration of the commercial quality of the City.
14. Experience in numerous other cities, including Seattle, Tacoma and Detroit, Michigan, has shown that location of adult entertainment land uses degrade the quality of the area of the City in which they are located and cause a blighting effect upon the City. The skid row effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger affect [sic] upon the City of Renton than other major cities due to the relative sizes of the cities.
15. No evidence has been presented to show that location of adult entertainment land uses within the City will improve the commercial viability of the community.
16. Location of adult entertainment land uses within walking distance of churches and other religious facilities will have an adverse effect upon the ministry of such churches and will discourage attendance at such churches by the proximity of adult entertainment land uses.
17. A reasonable regulation of the location of adult entertainment land uses will provide for the protection of the image of the community and its property values, and protect the residents of the community from the adverse effects of such adult entertainment land uses, while providing to those who desire to patronize adult entertainment land uses such an opportunity in areas within the City which are appropriate for location of adult entertainment land uses.
18. The community will be an undesirable place to live if it is known on the basis of its image as the location of adult entertainment land uses.
19. A stable atmosphere for the rearing of families cannot be achieved in close proximity to adult entertainment land uses.
20. The initial location of adult entertainment land uses will lead to the location of additional and similar uses within the same vicinity, thus multiplying the adverse impact of the initial location of adult entertainment land uses upon the residential, [sic] churches, parks and other public facilities, and schools, and the impact upon the image and quality of the character of the community.

*Id.* at 530-31 n.3. See *supra* note 60.

the preliminary injunction and denied Playtime a permanent injunction, thus reinstating the ordinance. The court, departing from the magistrate's findings, found that 520 acres were available for the location of adult theaters and that the ordinance did not impermissibly restrict Playtime's first amendment rights. The court also found no improper motive behind enactment of the ordinance and ruled that Renton could rely on the experiences of other cities in its legislative findings supporting the ordinance. Renton appealed the district court's decision.<sup>63</sup>

The Ninth Circuit Court of Appeals reversed the district court.<sup>64</sup> Although the court of appeals accepted the district court's finding that 520 acres remained outside the ordinance's locational restrictions, the appellate court did not agree that the land was "available" for adult theaters. Noting that a substantial part of the 520 acres was occupied by a sewage treatment plant, a horse racing track, an industrial park, warehouse and manufacturing facilities, an oil tank farm, and a fully developed shopping center, the Ninth Circuit found that limiting adult theaters to these areas was a substantial restriction on speech. Thus, the Renton ordinance, although patterned after the Detroit ordinance approved in *Young*, had a quite different effect because it restricted the number of adult theaters.<sup>65</sup>

The court of appeals examined the Renton ordinance under the four-part test developed in *United States v. O'Brien*.<sup>66</sup> Applying the test to the challenged ordinance, the court found two problems: Renton had not demonstrated a substantial governmental interest<sup>67</sup> and had not

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63. 748 F.2d at 532.

64. *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984).

65. *Id.* at 534.

66. 391 U.S. 367, 377 (1968). Under this test, a regulation is constitutional only "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is to the furtherance of that interest." *Id.*

67. 748 F.2d at 536-37. Renton had presented a very thin record to support its enactment of the ordinance. To uphold the substantiality of Renton's governmental interest, the district court had to rely on Renton's recitation of the experience of other cities, particularly Detroit and Seattle. The Ninth Circuit found this reliance misplaced, ruling that Renton had not studied the effects of adult theaters and applied those findings to the specific problems of Renton. In particular, the Detroit experience, involving the problems raised by a concentration of adult uses, was irrelevant to Renton's stated interest in isolating adult theaters from residential districts and certain other uses. The court stopped short of ruling that Renton could not use the experiences of other cities as part of its findings in support of the ordinance, but found that "in this case those exper-

proved that the ordinance was unrelated to the suppression of speech.<sup>68</sup>

The Supreme Court overruled the Ninth Circuit in a decision in which only Justices Brennan and Marshall dissented. Justice Rehnquist's majority opinion found this case essentially similar to *Young* and found that it could be properly analyzed as a form of time, place, and manner regulation.<sup>69</sup> While the ordinance singled out adult theaters for separate zoning treatment, Rehnquist argued that the ordinance was aimed "not at the *content* of the films shown, but at the *secondary effects* of such theaters on the surrounding community."<sup>70</sup> Thus, he found that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" <sup>71</sup> In reaching this conclusion, Rehnquist rejected the Ninth Circuit's claim that a "motivating factor" in the zoning decision was the restriction of plaintiffs' exercise of first amendment rights.<sup>72</sup>

Justice Rehnquist's line of reasoning brought the case squarely within the precedent created in *Young*. The test for such an ordinance, according to Rehnquist, has two parts: (1) whether the ordinance serves a substantial governmental interest and (2) whether it allows for reasonable alternative means of communication.<sup>73</sup> The major issue in the first prong of this inquiry was whether Renton was justified in relying on the experiences of other cities in finding that adult theaters pose a serious threat of urban deterioration. The Ninth Circuit had ruled that because Renton enacted the ordinance without the benefit of studies specifically relating to its particular problems or needs, the city's

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iences simply are not sufficient to sustain Renton's burden of showing a significant governmental interest." *Id.*

68. *Id.* at 537-38. Renton also had not proved that its zoning decision was "motivated by a desire to further a compelling governmental interest unrelated to the suppression of free expression." The Ninth Circuit noted that both the federal magistrate and the district court recognized that many of the reasons Renton offered for its ordinance "were no more than expressions of dislike for the subject matter." On these facts, the Ninth Circuit remanded the case to the district court to determine whether Renton could prove that suppression of speech was not a motivating factor in its adoption of the ordinance.

69. 106 S. Ct. at 928.

70. *Id.* at 929 (emphasis in original).

71. *Id.*

72. See *supra* note 68. Justice Rehnquist rejected this reasoning, reading *O'Brien* as precluding invalidation of "an otherwise constitutional statute on the basis of alleged illicit legislative motive. . . ." See *infra* notes 120-26 and accompanying text.

73. 106 S. Ct. at 930.

justifications for the ordinance were "conclusory and speculative."<sup>74</sup>

The Supreme Court rejected the Ninth Circuit's approach as imposing an unnecessarily rigid burden of proof. Noting that Renton had considered the detailed findings regarding the effects of adult theaters in neighboring Seattle, the majority held that Renton was entitled to rely on the experiences of Seattle and other cities.<sup>75</sup> The majority also provided guidance for other municipalities that seek to rely on the experience of other cities: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."<sup>76</sup>

After dismissing claims that the Renton ordinance was flawed because it concentrated the location of theaters rather than dispersing them like the Detroit ordinance,<sup>77</sup> and was underinclusive because it regulated only adult theaters and not the other kinds of adult businesses that are likely to produce secondary effects,<sup>78</sup> the majority addressed the second prong of its test: whether the Renton ordinance allowed for reasonable alternative avenues of communication. There was no question that the ordinance permitted adult theaters to locate within a 520 acre portion of the city. A dispute, however, existed over whether "commercially viable" sites were available for adult theaters within this restricted area. The Ninth Circuit found that none existed and held that the Renton ordinance would result in a substantial restriction on speech.<sup>79</sup>

The majority rejected the Ninth Circuit's conclusion, relying instead

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74. 748 F.2d at 537.

75. 106 S. Ct. at 931. Renton had relied extensively on the "detailed findings" of Seattle's study on the effects of adult movie theaters summarized in the Washington Supreme Court's opinion in *Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978).

76. 106 S. Ct. at 931.

77. The majority supported its position by quoting from the plurality opinion in *Young*: "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71. For examples of other "concentration" ordinances, see F. STROM, *ZONING CONTROL OF SEX BUSINESSES* (1977).

78. The majority upheld the Renton ordinance on this point because no other adult business was located in, or was contemplating moving into, the city at the time the ordinance was enacted.

79. 748 F.2d at 534.

on the district court's finding that the 520 acres of land consisted of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads."<sup>80</sup> Because land and buildings were ample and accessible, the majority argued that Renton had not effectively denied the adult theater operators a reasonable opportunity to open and operate an adult theater within the city.<sup>81</sup>

Adult theater operators, the majority said, "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. . . . [W]e 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."<sup>82</sup> The majority concluded that the Renton ordinance represented a valid governmental response to the serious problems created by adult theaters and had not used "the power to zone as a pretext for suppressing expression."<sup>83</sup>

Justice Brennan's dissent, joined by Justice Marshall, labeled the majority's analysis "misguided." Justice Brennan attacked the argument that the Renton ordinance was aimed at the secondary effects of the adult theaters and not at the content of the films shown there. For Brennan, the fact that the ordinance imposed "special restrictions on certain kinds of speech on the basis of *content*" belied Renton's claim that the ordinance was not designed to suppress the content of adult movies.<sup>84</sup> Not only did the ordinance discriminate on its face against adult theaters but, Brennan claimed, the circumstances surrounding the adoption and amendment of the ordinance strongly suggested that the ordinance was designed to suppress expression. Justice Brennan asserted that the findings supporting the ordinance were adopted only after the commencement of the lawsuit; the findings were based primarily on the experiences of other cities; the City Council conducted no studies and heard no expert testimony on how the community would be affected by the presence of an adult movie theater; and a number of these findings did not relate to legitimate land use concerns and were no more than expressions of dislike for the subject matter

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80. 106 S. Ct. at 932.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 934.

depicted at adult theaters.<sup>85</sup>

Based on these circumstances, Justice Brennan concluded that the Renton ordinance was designed to suppress expression and thus should not be analyzed as a content-neutral time, place, and manner restriction.<sup>86</sup> Viewed as a content-based restriction on speech, the ordinance is constitutional, he argued, "only if the [city] can show that [it] is a precisely drawn means of serving a compelling [governmental] interest."<sup>87</sup> Applying this standard to the facts of this case, Brennan found the ordinance unconstitutional because Renton had not shown that locating adult theaters near its churches, schools, and homes would necessarily result in undesirable "secondary effects," or that it could not effectively address these problems by less intrusive restrictions.<sup>88</sup>

Justice Brennan also found the ordinance unconstitutional when analyzed as a content-neutral time, place, and manner restriction. Applying the majority's two-prong test, Brennan found that the record justifying the city's asserted interest was insufficient to support that interest<sup>89</sup> and that the ordinance did not provide for reasonable alternative avenues of communication.<sup>90</sup> With respect to the last point, he found fault with the majority's argument that the ordinance did nothing more than require adult theater operators to participate in the real estate market like anyone else, pointing out that adult theater operators were not being treated the same as others because the ordinance re-

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85. *Id.* at 934-36. Brennan cited two findings of the City Council as examples of "expressions of dislike for the subject matter:"

Location of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for the marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive, consensual sexual relations. . . .

Location of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses.

106 S. Ct. at 935 n.3.

86. 106 S. Ct. at 934-36.

87. *Id.* at 937 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1979)).

88. *Id.*

89. *Id.* Brennan contrasted the substantial factual record in *Young* with the slim record here: "the Renton Council was aware only that some residents had complained about adult movie theaters, and that other localities had adopted special zoning restrictions for such establishments." *Id.*

90. *Id.* at 938.

quired them to conduct business under severe restrictions not imposed on others. In short, while other businesses seeking to locate in the 520 acre area could likely go elsewhere if economics demanded, the adult theater operators could not.<sup>91</sup>

### THE IMPORTANCE OF THE *RENTON* DECISION

*Renton* is an important decision for a number of reasons. Primarily, it shows that a clear majority of the Supreme Court now accept Justice Stevens' argument in *Young* that zoning ordinances may single out adult businesses for regulatory treatment different from that accorded other types of businesses. Justice Rehnquist's opinion found that the *Renton* ordinance was a valid content-neutral time, place, and manner restriction because the ordinance was aimed "not at the content of the films shown, but at the secondary effects of such theaters on the surrounding community."<sup>92</sup> By placing adult business zoning squarely in the category of time, place, and manner regulation, the majority directs courts to apply the relatively lenient *Renton* standard of review to judge the validity of such ordinances, rather than the more demanding *O'Brien* test called for in Powell's concurring opinion in *Young*. This dichotomy is of critical importance because lower courts have, in the past, usually required that adult business zoning pass muster under both the Stevens and Powell tests.<sup>93</sup>

The majority opinion also makes clear that both dispersion and concentration are constitutionally valid strategies for addressing the problems of adult businesses. Because *Young* dealt only with a dispersion ordinance, *Renton* is the first Supreme Court case upholding the concentration of adult businesses, a technique used in Boston and Seattle, among other cities. Local governments may now safely adopt either a concentration or dispersion approach to adult businesses.

To explore the likely effects of the *Renton* decision in more detail, it will be helpful to refer again to the four "rules" that appeared to guide the courts in the years after the *Young* decision. The *Renton* case addresses two of these directly: the effect of zoning on the number of adult businesses and the development of findings of fact to support the ordinance.

*Young* required that the market for adult entertainment remain "es-

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91. *Id.*

92. *Id.* at 929.

93. *See supra* note 35.

entially unrestrained” after the enactment of adult business zoning.<sup>94</sup> The Detroit ordinance passed this test because the Court found that the dispersion scheme, while prohibiting adult businesses from certain locations, would not have the effect of diminishing the number of adult businesses that could operate in the city. When other cities attempted to use the dispersion technique to severely restrict or effectively ban adult businesses, however, the lower courts did not hesitate to invalidate the offending ordinances.<sup>95</sup>

The real controversy on this issue involves ordinances like Renton’s that have the effect of restricting adult businesses to sites arguably unsuited to such uses.<sup>96</sup> Justice Rehnquist’s test for judging such an ordinance is whether the enactment effectively denies adult businesses a reasonable opportunity to open and operate an adult theater. In Renton’s case, he found that the ordinance “easily” met this requirement, dismissing the concerns of the Ninth Circuit by arguing that the ordinance did nothing more than require that adult businesses “must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. . . .”<sup>97</sup> Justice Brennan disagreed, arguing that the ordinance itself precluded adult businesses from entering the real estate market on an “equal footing” with other businesses because only adult businesses were subject to the severe restrictions imposed by the ordinance.<sup>98</sup>

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94. 427 U.S. at 62. See *supra* text accompanying notes 23-24.

95. See *supra* note 38 and accompanying text.

96. In *Renton* the suitability of the 520 acres for adult businesses was a significant factual issue. The federal magistrate found that the areas to which the ordinance restricted theaters were “entirely unsuited to movie theater use.” 748 F.2d at 532. The district court approved these findings when it issued its preliminary injunction against the ordinance in January 1983, but in February it refused Playtime’s request for a permanent injunction, finding that the ordinance did not substantially restrict first amendment interests. The district court offered no explanation for this variance between its two sets of findings. 748 F.2d at 532 n.7.

The Ninth Circuit, while agreeing that 520 acres were available for adult theaters, disagreed that the land was “available” for that use because of the nature of the existing uses, which included: (1) a sewage treatment plant; (2) a racetrack; (3) a business park suitable only for industry; (4) a warehouse and manufacturing facilities; (5) an oil tank farm; and (6) a fully-developed shopping center. 748 F.2d at 534. In its brief to the Supreme Court, Playtime argued that it could not locate its theater on sites already occupied by existing businesses, that “practically none” of the undeveloped land was currently for sale or lease, and that in general no “commercially viable” adult theater locations existed in the areas left open by the ordinance. 106 S. Ct. at 932.

97. 106 S. Ct. at 932.

98. *Id.* at 938.

Justice Rehnquist's "reasonable opportunity" test does not provide lower courts with much guidance to judge the validity of ordinances with speculative impact on adult businesses. An ordinance that leaves a "myriad" of sites available for adult uses is certainly valid.<sup>99</sup> An ordinance that "greatly restricts" or bans adult businesses altogether is certainly invalid.<sup>100</sup> But how does a court apply the "reasonable opportunity" test when, as in *Renton*, the ordinance bans use of existing theaters and new theaters face significant locational restrictions? Two lower courts, in addition to the Ninth Circuit in *Renton*, have addressed this question.

In *Basiardanes v. City of Galveston*<sup>101</sup> the Fifth Circuit overturned an adult business ordinance because the locational restrictions were so severe that adult businesses could operate only under "oppressive" conditions. The court found that adult businesses were banned in 85 to 90 percent of the city, while the remaining areas in which adult businesses could locate were unsuited for such uses.<sup>102</sup> Based on these findings, the court concluded that the areas were available for adult businesses only in theory and, because the ordinance's locational restrictions could readily have the effect of reducing the number of adult businesses, the ordinance was an invalid restriction on activities protected by the first amendment.<sup>103</sup>

*Basiardanes* is instructive because the district court had held that the ordinance could be sustained as long as sites were available for adult businesses, regardless of the relative attractiveness of those sites to adult business operators. For the district court, the restrictions on adult business locations were nothing more than the "reasonable economic burden that befalls some activity in every land-use program."<sup>104</sup>

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99. See *Young v. American Mini-Theatres*, 427 U.S. 50, 71-72 n.35 (1976).

100. See, e.g., *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983) (ordinance would have the effect of diminishing the number of adult businesses by two-thirds); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981) (ordinance had effect of totally banning adult theaters).

101. 682 F.2d 1203 (5th Cir. 1982).

102. 682 F.2d at 1214. The Galveston ordinance permitted adult businesses only in industrial zones that were distant from other shopping and entertainment areas and that contained only warehouses, shipyards, undeveloped areas, and swamps. These areas had few roads and were "poorly lit, barren of structures suitable for showing films, and perhaps unsafe." *Id.*

103. Because the court of appeals found that the ordinance drastically impaired access to adult films in Galveston, it tested the ordinance under the two-part *Schad* test. See *supra* notes 50-52 and accompanying text.

104. *Basiardanes v. City of Galveston*, 514 F. Supp. 975, 982 (S.D. Tex. 1981). The

The Fifth Circuit argued that while a zoning ordinance may normally impose an economic burden on business, "when a claim of suppression of speech is raised, an exclusive focus on economic impact is improper."<sup>105</sup> Because the appellate court felt the ordinance greatly restricted access to adult businesses in Galveston, the ordinance could not be viewed as merely placing an economic burden on adult businesses.

*International Food and Beverage Systems v. City of Fort Lauderdale*<sup>106</sup> presented a similar case. Fort Lauderdale's adult business ordinance left no more than twenty-two sites available for adult businesses. Of these, the majority were located in areas that, in the view of the court, were "patently unsuitable," leaving a total of twelve sites available for adult businesses. The court, in language quite similar to that used later by Justice Rehnquist, stated that while the Constitution does not grant one the right to be a business success, the city has a duty "to make reasonably available suitably zoned property . . . [where adult businesses] have a reasonable chance to operate."<sup>107</sup> Acknowledging that determination of how many sites are needed to satisfy the "reasonably available" standard is difficult, the court, relying on *Young*, found that twelve sites would be insufficient.<sup>108</sup>

The facts in *Renton* are quite similar to those in *Basiardanes* and more egregious than those in *International Food*. In all three cases, factors such as incompatible neighboring uses, lack of existing suitable structures, and distance from established retail and commercial dis-

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district court looked to Justice Powell's concurring opinion in *Young* to support its position:

The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage. . . .

The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression. . . .

*Id.* at n.15 (quoting *Young*, 427 U.S. at 78 (Powell, J., concurring)).

105. 682 F.2d at 1214.

106. 614 F. Supp. 1517 (S.D. Fla. 1985).

107. *Id.* at 1521.

108. *Id.* at 1521-22. The court quoted the observation in *Young* that there were "myriad locations in the City of Detroit" available for adult businesses, and observed that "[a] dozen or so potential sites in the City of Fort Lauderdale does not a 'myriad' make." *Id.* at 1522.

tricts led the lower courts to the conclusion that sites for adult businesses would not be "reasonably" available. In light of the Supreme Court's decision in *Renton*, however, such factors are now irrelevant. As long as the restricted area contains sufficient vacant or developed land, is accessible by road, and is eligible for utility services, then a community has created a "reasonable opportunity" for the operation of adult businesses. While courts obviously enjoy a great deal of leeway in deciding individual cases, the tone of the opinion calls for less stringent judicial review of the probable effect of restrictions on adult businesses.

At a minimum, *Renton* places the burden of proof on those challenging an adult business ordinance to prove that its locational restrictions preclude a "reasonable opportunity" to operate in that community. If a party challenging an ordinance can make a strong, uncontradicted factual showing that the restrictions severely restrict or effectively prohibit adult businesses from operating, the *Renton* decision clearly empowers a court to invalidate the ordinance. What is troubling about the decision, however, is that it may encourage cities to play a game of "chicken" with the courts to see how far adult businesses may be restricted before a court objects. The goal here, unfortunately, is to use zoning impermissibly as a technique for eliminating adult businesses, and because reasonableness is such an elusive term, the *Renton* decision has made that easier.

*Young* also sought to guard against ordinances motivated by a distaste for constitutionally protected forms of expression by requiring that communities demonstrate the adverse effects on neighborhoods associated with adult businesses and narrowly tailor their restrictions to further the specific governmental interests endangered by the presence of such businesses. In a number of subsequent cases, courts struck down ordinances in part because the city had not developed an adequate factual record or had relied on the findings of other communities rather than conducting its own studies.<sup>109</sup>

In *Renton* the city relied on the factual findings and experience of Seattle and Detroit rather than making any findings of its own. The Ninth Circuit found that because *Renton* enacted the ordinance with-

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109. See, e.g., *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981) (en banc); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981).

out the benefit of studies specifically relating to the particular problems or needs of Renton, the city's justifications for the ordinance were "conclusory and speculative."<sup>110</sup> The Supreme Court majority rejected this argument, claiming that it imposed an unnecessarily rigid burden of proof on the city, and held that Renton was justified in relying on the experience of other cities. To guide courts in the future on this issue, the majority stated: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."<sup>111</sup>

This "reasonable belief" standard for adopting another city's experience with adult businesses suffers from the same shortcomings as the "reasonable opportunity" standard discussed previously. The *Renton* majority opinion provides only minimal guidance in how to administer the standard. Justice Rehnquist noted that Seattle had shared Renton's concern with preventing the secondary effects caused by the presence of even one adult theater in a given neighborhood. Further, Rehnquist recognized that Renton had relied heavily on the "detailed findings" developed by Seattle, and that it was irrelevant that Renton ultimately chose a different method of adult theater zoning than Seattle's.<sup>112</sup>

Justice Rehnquist's opinion suggests that cities may safely rely on the experience of other communities if the problems addressed in the two cities are similar and there are "detailed findings" about the effects of adult businesses.<sup>113</sup> Courts will probably also require a city relying on another community's experience to offer some reasonable justification for doing so. This does not mean, however, that a city is totally free to forego its own fact-finding. For example, a court would have little trouble striking down an ordinance that justified its regulation of a single adult bookstore by reliance on Detroit's experience with the negative effects of a concentration of adult businesses.<sup>114</sup>

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110. 748 F.2d at 537.

111. 106 S. Ct. at 931.

112. *Id.* at 930-31.

113. *See, e.g., International Food & Beverage Sys. v. City of Fort Lauderdale*, 614 F. Supp. 1517 (S.D. Fla. 1985) (perpetuating the legal fiction that a city must first establish objective evidence in support of a legitimate reason for enacting a zoning regulation ignores the basic truth that adult entertainment causes similar problems in municipalities of similar composition and character).

114. *See, e.g., Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985) (govern-

Taken together, the two "reasonableness" standards for judging adult business ordinances would seem to make it simple for many communities to make the operation of adult businesses difficult, if not impossible, despite the fact that they are protected by the first amendment. *Young* granted communities the right to prevent neighborhood blight caused by a concentration of adult businesses if they could show the problem existed in their community and if the restrictions they imposed did not lessen access to this form of protected speech. *Renton* now effectively grants communities the power to ban the use of any existing theater for the exhibition of adult movies without any justification based on the conditions in that community and without any assurance that a new location would be commercially viable. What is particularly disturbing about this departure from *Young* is the Court's failure to acknowledge strong evidence from lower court cases that many adult business ordinances are motivated by either a distaste for the content of the expression associated with adult businesses or an impermissible intent to ban or severely restrict the operation of adult businesses.<sup>115</sup>

Following the Supreme Court's approval of adult business zoning in *Young*, some communities sought to restrict the number of adult uses or ban them entirely simply by extending the locational restrictions approved in *Young* until few, if any, sites were left for adult businesses.<sup>116</sup> Another simple method for restricting adult businesses was to make existing adult uses subject to the ordinance rather than limiting the zoning restrictions to future uses as in *Young*.<sup>117</sup> Other com-

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ment may not merely mimic another ordinance that has been found constitutional in another context, but must also show that the articulated concern had more than merely speculative factual grounds and that it was actually a motivating factor in the passage of the legislation).

115. See *infra* notes 116-24 and accompanying text.

116. See, e.g., *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983) (ordinance had effect of limiting adult business sites to four locations concentrated on a single street at one edge of a city of twenty-five square miles); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981) (restriction barring an adult motion picture theater within 500 feet of bar or other regulated use had the effect of banning adult theaters in resort community of 300 acres that contained twenty bars); *Bayside Enter. v. Carson*, 450 F. Supp. 696 (M.D. Fla. 1978); *E & B Enterprises v. City of University Park*, 449 F. Supp. 695 (N.D. Tex. 1977) (locational restrictions had effect of barring adult theaters when only two sites were unrestricted, one of which was owned by the city and the other already occupied).

117. See, e.g., *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983); *Alexander v. City of Minneapolis*, 698 F.2d 936 (9th Cir. 1983); *Basiardanes v. City of Galveston*, 514 F. Supp. 975 (S.D. Tex. 1981), *aff'd in part, rev'd in part, and remanded*, 682 F.2d

munities were able to place severe restrictions on the operation of adult businesses by adding to their adult zoning ordinances restrictive licensing provisions<sup>118</sup> or special permit procedures<sup>119</sup> that gave city officials nearly unbridled discretion to permit or deny adult businesses the right to open.

In light of the many instances in which ordinances had the effect of diminishing access to adult businesses, it is not surprising that a number of cases have expressly called into question the motivation or intent behind these enactments.<sup>120</sup> Courts have found an improper motive or intent in the following situations: when zoning appeared to be merely a subterfuge for eradication of adult businesses,<sup>121</sup> when jus-

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1203 (5th Cir. 1982); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981); *Ellwest Stereo Theaters, Inc. v. Byrd*, 472 F. Supp. 702 (N.D. Tex. 1979).

118. See, e.g., *Wendling v. City of Duluth*, 495 F. Supp. 1380 (D. Minn. 1980) (imposition of \$500 annual fee on adult businesses is an unlawful prior restraint, and provisions of general licensing requirements as applied to adult bookstores were unconstitutional for lack of necessary procedural safeguards); *Genusa v. City of Peoria*, 475 F. Supp. 1199 (C.D. Ill. 1979) (requirement that police conduct a special investigation of applicants for adult business licensing when other types of bookstores would not be inspected was unconstitutional), *aff'd in part, rev'd in part, and vacated in part*, 619 F.2d 1203 (7th Cir. 1980); *Bayside Enter. v. Carson*, 470 F. Supp. 1140 (M.D. Fla. 1979) (ordinance that authorized denial, suspension, or revocation of license based upon commission or conviction of specified criminal act was unconstitutional); *Wortham v. City of Tucson*, 624 P.2d 334 (Ariz. Ct. App. 1981) (licensing ordinance impinging on first amendment rights that gives the licensing authority broad discretion to refuse a license is unconstitutional prior restraint of such rights); *but see Chulchian v. City of Indianapolis*, 633 F.2d 27 (6th Cir. 1980) (general business licensing ordinance valid as applied to an adult business operated in such a way that it was a public nuisance).

119. See, e.g., *15192 Thirteen Mile Rd. v. City of Warren*, 593 F. Supp. 147 (E.D. Mich. 1984) (requirement of special use permit was unconstitutional because it gave an improper degree of discretion to local officials); *County of Cook v. World Wide News Agency*, 98 Ill. App. 3d 1094, 424 N.E.2d 1173 (1981) (county officials given overbroad discretion to deny special permits).

120. See *Ebel v. City of Corona*, 767 F.2d 635 (9th Cir. 1985); *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1984); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1985); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981) (en banc); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981); *International Food & Beverage Sys. v. City of Fort Lauderdale*, 614 F. Supp. 1517 (S.D. Fla. 1985); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981).

121. *Purple Onion*, 511 F. Supp. at 1210. In *Purple Onion* the minutes of the Zoning Review Board showed an improper purpose of helping citizens disgusted with adult businesses to "zone them out of business," and an assistant city attorney indicated that the proposed ordinance was the "'strongest vehicle towards elimination' of adult businesses and that the City was 'hoping for complete eradication' of adult businesses." *Id.*

tifications for zoning appeared only after the ordinance was adopted,<sup>122</sup> when the justifications offered for the ordinance were not supported by the evidence,<sup>123</sup> or when the ordinance was enacted to prevent an adult business from ever opening its doors.<sup>124</sup>

According to Justice Rehnquist's opinion in *Renton*, such evidence of improper motive should have only a limited role in judging the validity of adult business ordinances. As long as the "predominate" intent is unrelated to the suppression of free speech, allegations of an illicit motive will not invalidate an ordinance.<sup>125</sup> Unfortunately, in too many cases, cities have proved adept at providing a record replete with proper motivations for zoning that results in a significant restriction on protected speech.<sup>126</sup> The better rule would be to examine the evidence carefully to determine the extent to which an impermissible intent to restrict access to adult entertainment motivated passage of a given ordinance.

#### OTHER ISSUES

The *Renton* case left undisturbed the two remaining rules that could be derived from *Young* and subsequent cases. First, courts have not hesitated to strike down ordinances that were vague or overbroad. Adult business ordinances must show great precision in their language, particularly in the text of definitions and standards for determining what is and what is not regulated. Courts will invalidate ordinances that leave the subjects of regulation unclear or that use definitions so broad that uses other than adult businesses come within the regulation.<sup>127</sup>

*Renton* also was silent on the issue of ordinances that create poten-

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122. See *Playtime Theatres v. City of Renton*, 748 F.2d 527 (9th Cir. 1984); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981).

123. See, e.g., *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982). In *Basiardanes* the Fifth Circuit found that Galveston had enacted its ordinance for the sole purpose of removing an adult theater from the immediate vicinity of a newly-renovated opera house because of a fear that opera patrons would find the adult theater offensive.

124. See, e.g., *International Food & Beverage Sys. v. City of Fort Lauderdale*, 614 F. Supp. 1517 (S.D. Fla. 1985).

125. 106 S. Ct. at 929.

126. In *International Food*, for example, the court found that evidence of a proper motive was only a "pretext" for a prior restraint of adult entertainment. 614 F. Supp. at 1520.

127. See *supra* notes 39-46 and accompanying text.

tial unconstitutional prior restraints on freedom of expression because they grant government officials discretionary powers to determine whether an adult business will be permitted to operate. Typically, such ordinances use special permits or business licensing requirements that allow officials to grant or deny an adult business permission to open. The courts have generally been hostile to such provisions. In *County of Cook v. World Wide News Agency*,<sup>128</sup> for example, an amendment to the Cook County zoning ordinance categorized adult businesses as special uses that required the issuance of a special use permit. The court struck down the ordinance as a prior restraint on freedom of expression, noting that the county board had unbridled discretion to grant or deny the permit.

Although not an issue in the *Renton* case, amortization provisions warrant discussion because the *Renton* decision may affect the courts' treatment of such provisions. Many cities that have enacted adult business ordinances have made the restrictions prospective only, allowing existing businesses to continue to operate as non-conforming uses.<sup>129</sup> No constitutional bar exists, however, to requiring such non-conforming uses to cease operation within a reasonable time limit. The general rule for determining the reasonableness of such an amortization period is whether the probable benefit to the community from closing the business outweighs the hardship incurred by the operator from such a closing. Thus, for example, in *Northend Cinema, Inc. v. City of Seattle*<sup>130</sup> the Supreme Court of Washington upheld a Seattle adult business zoning ordinance that had the effect of requiring the concentration of adult uses and included a provision terminating any non-conforming adult business within ninety days. The court found the ninety day amortization period reasonable as applied to a number of adult theaters because none of the theaters were bound by a lease to exhibit adult films nor were the theaters bound to remain at their existing locations. Accordingly, the court concluded that the public benefit from the termination of these uses outweighed the merely speculative harm asserted by the theater operators. Other courts have upheld amortization provisions of varying lengths.<sup>131</sup>

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128. 98 Ill. App. 3d 1094, 424 N.E.2d 1173 (1981).

129. See, e.g., *Texas Nat'l Theatres, Inc. v. City of Albuquerque*, 97 N.M. 282, 639 P.2d 569 (1982) (general rule is that non-conforming uses in existence at the time of amendment of the zoning ordinance may be continued).

130. 90 Wash. 2d 709, 585 P.2d 1153 (1978).

131. See, e.g., *Hurt Bookstores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979) (six month period); *Castner v. City of Oakland*, 129 Cal. App. 3d 94, 180 Cal. Rptr. 682

In cases in which amortization provisions have been combined with severe locational restrictions on adult businesses, however, courts have struck down ordinances. In *Alexander v. City of Minneapolis*,<sup>132</sup> for example, the court invalidated an ordinance that provided a three month amortization period for adult businesses. The court found that over thirty adult businesses would have to be terminated by the end of the amortization period, but because of the severe locational restrictions in the ordinance, only a limited number of available sites were left in the city where these businesses could relocate. On these facts, the court found that the ordinance was an excessive restriction on constitutionally protected speech and invalidated it.<sup>133</sup>

These cases suggest that courts may treat ordinances with locational restrictions like those in the *Renton* case more harshly if they contain amortization provisions rather than allowing non-conforming uses to remain in operation. Courts may find it appropriate to restrict future adult businesses to areas where they have a "reasonable opportunity" to operate, but may well draw the line if, in addition, existing businesses are required to terminate their operation at existing sites. The greater the number of existing businesses affected by the ordinance, the more likely that the ordinance will be invalidated, despite the Supreme Court's decision in *Renton*.

### CONCLUSION

The majority opinion in *Renton* directs courts to give more deference to the "reasonable" decisions of government officials when they place restrictions on adult businesses. Cities now have no need to conduct their own studies of the effects of adult businesses in their community, but may rely on the experiences of other cities that are reasonably related to their own conditions. Cities may also preclude adult businesses, particularly adult theaters, from using existing facilities and restrict their location to outlying areas, as long as the restricted area is reasonably capable of being developed for adult business use. *Renton*, therefore, appears to signal a major change in the courts' treatment of adult business ordinances. We should now expect to see far less judicial hostility towards ordinances that place significant restrictions on

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(1982) (one year amortization period for non-conforming uses that fail to obtain a conditional use permit, with additional one year grace period for adult businesses that demonstrate economic hardship).

132. 698 F.2d 936 (8th Cir. 1983).

133. See also *supra* notes 39-46 for discussion of the *Purple Onion* case.

such businesses. The courts, however, remain free to strike down ordinances that are vague, that create a system of prior restraints on speech, or that restrict adult businesses to such an extent that this form of expression is effectively banned.

Unfortunately, the Court's decision ignores the significant number of lower court cases in which zoning has been used to restrict or ban access to adult businesses rather than to regulate their location. Under the new "reasonableness" standards, it will be even more difficult for courts to strike down ordinances that impermissibly seek to regulate the content of speech because of a dislike for what is being expressed. Hopefully, the lower courts will find sufficient leeway within the *Renton* opinion to continue to invalidate ordinances that show clear evidence of improper motivation or that unduly restrict access to adult entertainment.