When First Amendment Principles And Local Zoning Regulations Collide

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INTRODUCTION

When two well-established and important constitutional principles face off against one another in the modern day forum of the courts, fundamental changes will occur which affect the nature of those principles and their interrelationships. Such is the case when the First Amendment protections afforded non-obscene but sexually explicit material have collided with the strong presumption of validity traditionally afforded local zoning regulations.

The First Amendment to the United States Constitution provides important protection of an individual's freedom of speech and freedom of expression,1 including protection of non-obscene but sexually explicit movies, books, magazines and dancing.2 Since Village of

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1. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST., amend. I. The First Amendment has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See Edwards v. South Carolina, 372 U.S. 229 (1963).

2. 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). Under the Supreme Court's test, enunciated in Miller, for determining whether material is obscene, the Court found material obscene if:

(a) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
(b) [if] the work depicts or describes; in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) [if] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citation omitted). However, sexually explicit material which is non-obscene is entitled to First Amendment protection. See Young v. American Mini-Theatres, 427 U.S. 50 (1976); see also Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (en banc) (held that nonobscene nude dancing is entitled to limited First Amendment protection and statute providing for total ban on nudity in public places was unconstitutional).
Euclid v. Ambler Realty Co., local zoning regulation has enjoyed a strong presumption of validity. In assessing the constitutionality of local zoning regulations, courts have generally applied the highly deferential "mere rationality" standard of review.

Inevitable conflicts have arisen between local governments attempting to regulate sexually oriented businesses, and the First Amendment, which protects the owners and operators, as well as purveyors, of such sexually oriented businesses. The resulting case law has wrestled with the difficult problem of the lawful scope of local zoning power over businesses that deal in these forms of expression.

The initial determination for any court reviewing a zoning ordinance which impacts First Amendment expression is the standard of review to be applied. If the ordinance is merely a time, place and manner restriction, the court will review the ordinance under the tests set forth in Heffron v. International Society for Krishna Consciousness, Inc., and United States v. O'Brien. That initial determination will be based on the court's determination of whether the ordinance in question focuses merely on the place and manner in which adult uses can be operated (content-neutral), or whether the ordinance is aimed at restricting the content of the expression (content-based).

5. For purposes of this Article, the term "sexually oriented businesses" refers only to non-obscene sexually explicit material and entertainment such as adult bookstores, adult theatres and the like.
6. In addition to these questions being raised with respect to adult uses, similar First Amendment/zoning issues have arisen with respect to the zoning of religious uses. See generally Mark C. Cordes, Where to Pray? Religious Zoning & the First Amendment, 35 Kan. L. Rev. 697 (1987).
9. See infra text accompanying notes 40-41. Practically, the courts will generally use the O'Brien test. However, in addition to the four-part test enunciated in O'Brien, the courts will also mandate that the third prong of the Heffron test be satisfied, i.e., reasonable alternative channels of communication. The combination of the O'Brien factors and the reasonable alternative channels of communication prong of Heffron make up what Professor Tribe calls the "track one" approach to content-neutral First Amendment questions. See infra notes 18-49 and accompanying text.
Most courts which have reviewed adult use zoning ordinances have found the legislation to be content-neutral and have reviewed the ordinance under the *O'Brien/Heffron* tests.

The case law to date strongly suggests that under the *O'Brien/Heffron* analysis there are three areas of concern for municipalities which pass adult use zoning ordinances and adult use owners who contemplate challenges to those ordinances: (1) the ordinance must provide a sufficient factual basis to support a finding of substantial or important governmental interest; (2) the ordinance's definitions of adult uses and restrictions must be narrowly tailored to affect only those businesses which the ordinance intends to regulate; and (3) the ordinance must provide reasonable alternative channels of communication for the dissemination of the affected expression protected under the First Amendment.

I. BACKGROUND

A. FREEDOM OF SPEECH

The fundamental right to freedom of speech is guaranteed in the First Amendment to the United States Constitution. The framers of the Constitution intentionally provided for freedom of speech in order to promote an informed arena for ideological debate. One cannot be punished or discriminated against simply because his opinions or expressions are unpopular or are inconsistent with contemporary thinking. The Supreme Court has even adopted the following state-

10. See U.S. CONST., amend. 1.
"[T]he court must remain attentive to the guarantees of the First Amendment, and in particular to the protection they afford to minorities against the 'standardization of ideas ... by ... dominate [sic] political or community groups.'" *Id.*; see also Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (5th Cir. 1982); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1217-18 (N.D. Ga. 1981) ("that expression is sexually oriented ... does not affect its First Amendment protection").

The Court in *Terminiello* stated that 

That is why freedom of speech, though not absolute, is nevertheless
ment made by Voltaire in summarizing its zealous adherence to First Amendment principles: "I [may] disapprove of what you say, but I will defend to the death your right to say it." Thus, the principle of freedom of speech and protection of that right is a fundamental component of the First Amendment and the guarantees provided by the Constitution.

Although the public has a right to free speech, and the Supreme Court gives First Amendment guarantees broad protection, the Court has recognized that government has the right to reasonably control the dissemination of information, provided the government complies protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello v. City of Chicago, 337 U.S. 1, 4-5, reh'g denied, 337 U.S. 934 (1949).

Voltaire did not write: "I disapprove of what you say, but will defend to the death your right to say it, unless the subject is sex." Nor did the framers of the United States Constitution. So-called adult bookstores are established to sell merchandise intended to arouse sexual passions. They also seem to arouse passions of an entirely different sort. If a merchant announced his intention to open a store dedicated to murder mysteries, no matter how violent or bloody, nary a picket or protester would appear. But should one announce that sex is to be the main theme, then organized opposition is inevitable. The public permits books, movies and television to inundate us with murder by gun or knife, strangling, rape, beatings and mayhem, all of which are illegal. But the depiction of sexual acts, most of which are legal, are condemned with a furor. We will tolerate without a murmur a movie showing the most brutal murder, but display a couple in the act of love and the outcry is deafening. This is not meant to be a defense of the sleazy movies and adult bookstores which pander to the bizarre and the deviant, but it is a plea for perspective in deciding whether such materials genuinely warrant an intrusion into the rights guaranteed by the first amendment.

No matter how offensive the majority may find a particular form of speech, it is fundamental to our democracy that the views of the minority cannot be and should not be stifled.

Id. at 1477-78.

14. See Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (municipality has the right to control speech through the use of reasonable time, place and manner restrictions); Heffron v. International Society for
with certain constitutional dictates. According to Professor Tribe, the abridgment of First Amendment speech usually takes one of two forms. First, the government can regulate protected speech by "singling out actions for government control or penalty either (a) because of the specific message or viewpoint such actions express, or (b) because of the effects produced by awareness of the information or ideas such actions impart." Second, the government, without aiming at the examples above, may restrict the flow of information and ideas while pursuing other goals either "(a) by limiting an activity through which information and ideas might be conveyed, or (b) by enforcing rules compliance with which might discourage the communication of ideas or information." Professor Tribe suggests that the legal challenges to such restrictions have ultimately led to the Supreme Court's application of a "two track" approach to determining whether governmental regulation is violative of the First Amendment.

1. Track One Analysis

Under the "track one" approach, the governmental regulation is aimed at the communicative aspects or impact of the speech or expression. This track is commonly referred to as "content-based" regulation in that governmental regulation or restriction is based on the content of the speech or because of the ideas which are contained in the speech. In a track one analysis, Professor Tribe suggests that the Court will use a strict scrutiny analysis, asking whether the content-based regulation is "a precisely drawn means of serving a compelling state interest." In *Police Department of Chicago v. Mosley*, the Court struck down an ordinance which prohibited non-labor picketing in or near public schools, except for "the peaceful picketing of any school involved in a labor dispute." In striking down the ordinance,

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16. Id.
17. Id.
18. Id.
21. Id. at 73 (citing from the Municipal Code, c. 193-1(i)).
the Court reiterated the importance of the first amendment guarantees stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."  

Thus, the requirements under a track one analysis recognize that protected speech may not be regulated according to a scheme accomplished on the basis of the content of such speech. It is important to recognize, however, that the Court has held that certain types of speech, although protected, warrant a lower degree of protection than others, even under a track one analysis. Those types of speech afforded less protection include: fighting words, obscenity, advocacy to incite unlawful action, false statements of fact, and child pornography.

2. Track Two Analysis

Under the track two approach, four basic elements are weighed to determine the constitutionality of the regulation: (1) the regulations

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22. Id. at 95.
24. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In upholding a conviction under a statute which prohibited addressing another person in an offensive or annoying way in a public place, the Court stated that "fighting words . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. at 572.
25. See Roth v. United States, 354 U.S. 476 (1957). In Roth, the Court held that obscenity is not protected under the First Amendment and that material would be tested for obscenity under the following standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Id. at 489.
26. See Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). The Court here held that regulation proscribing speech advocating the use of force or crime could only be upheld when two conditions have been met: (1) the advocacy is "directed to inciting or producing imminent lawless action;" and (2) the advocacy is also "likely to incite or produce such action." Id. at 477.
27. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Court upheld the ability of government to define liability for a publisher of defamatory statements, held that "there is no constitutional value in false statements of fact." Id. at 340.
28. See New York v. Ferber, 458 U.S. 747 (1982). The Court stated that First Amendment value of permitting children to be photographed while involved in sexual conduct is "exceedingly modest, if not de minimus." Id. at 762. The Court went on to state that it is "not rare that a content-based classification of speech has been accepted because . . . the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." Id. at 763-64.
must be content-neutral; (2) the regulations must further a substantial governmental interest which is unrelated to the suppression of speech; (3) the restrictions must be narrowly tailored; and (4) reasonable alternative channels of communication must remain open for the dissemination of the restricted speech.

a. Regulations Must Be Content-Neutral

The Supreme Court has recognized that First Amendment protected speech may not be constitutionally regulated or restricted based on its content without the strictest judicial scrutiny. Therefore, restrictions affecting protected First Amendment speech generally will be upheld only if the regulations are content-neutral. In order to determine whether regulations are content-neutral, and are not seeking to suppress protected speech, the Court has interpreted the Constitution to require that three criteria be met. First, the government must demonstrate that it has a substantial governmental interest which is unrelated to the suppression of protected speech. Second, the government must show that the means which are utilized to promote the substantial governmental interest are narrowly tailored to accomplish that goal. And third, the government must show that there remain

29. E.g., Carey v. Brown, 447 U.S. 455 (1980). Put another way, the Court has consistently held that government may not suppress ideas by impeding the free flow of protected speech. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citing Cohen v. California, 403 U.S. 15, 24 (1971) (conviction for wearing jacket bearing the words ‘‘Fuck the Draft’’ held violative of First and Fourteenth Amendments)); Street v. New York, 394 U.S. 576 (1969) (conviction for uttering defamatory words about the American flag held unconstitutional); Wood v. Georgia, 370 U.S. 375 (1962) (punishment for persons speaking out on public issues before grand jury, where such speech does not represent a ‘‘clear and present danger,’’ is violative of the First Amendment); De Jonge v. Oregon, 299 U.S. 353 (1937) (meeting held by advocate of violence was held to be within the protections of the Fourteenth Amendment).

30. Professor Tribe suggests that content-based restrictions must be analyzed under a ‘‘track two’’ analysis. This analysis, employing strict judicial scrutiny, requires the governmental regulation to further a compelling state interest using the least restrictive means. See Laurence H. Tribe, American Constitutional Law § 12-2 (2d ed. 1988).


open reasonable alternative channels of communication for the dissemination of the affected speech.\textsuperscript{34}

b. Substantial Governmental Interest Unrelated to Suppression of Protected Speech

In order for a government regulation to meet this first prong of the time, place and manner restriction analysis, the primary motive for the restriction may not be the suppression of protected speech. In \textit{United States v. O'Brien},\textsuperscript{35} the United States government prosecuted O'Brien for the destruction of his draft card. O'Brien asserted that the destruction of his draft card in violation of the law was a symbolic means of expressing his dissatisfaction with the war in Vietnam. The government, however, countered that the law providing for "in tact" draft cards was necessary to promote the smooth and efficient functioning of the organization of the military.\textsuperscript{36} The government argued that there existed a substantial government interest in the ability of the government to locate and identify persons for national defense purposes.\textsuperscript{37} The Court held that the government had shown a substantial government interest in promoting the smooth operation of the military, especially during times of war or conflict.\textsuperscript{38} The Court thus concluded that although O'Brien's display of dissatisfaction was intended to convey a message and, indeed, was perceived as a message by observers, his conduct was subject to regulation.\textsuperscript{39} Therefore, where the primary motive of the restrictions is not the suppression of ideas, no First Amendment violation is found to have occurred.

In another more recent case, \textit{Heffron v. International Society for Krishna Consciousness, Inc.},\textsuperscript{40} the Supreme Court upheld another government restriction on protected speech, this time a regulation which dealt with the dissemination of religious material. The Minne-
sota Agricultural Society, a Minnesota public corporation that runs the state fair, promulgated a rule which prohibits the sale or distribution of any merchandise, including printed or written material, except from duly licensed fixed locations at the fairgrounds. The International Society for Krishna Consciousness, Inc. challenged the rule as an abridgment of their First Amendment rights. The State of Minnesota maintained that the rule was necessary due to the sheer volume of the crowd and the particular nature of the temporary forum which created substantial safety concerns for the State. The Court held that the State's asserted governmental interest must be assessed in light of the forum's "special attributes." Therefore, what will constitute a substantial governmental interest will vary depending on the factual situation presented. In Heffron, the temporary nature of the forum and the safety concerns due to the large crowd constituted a substantial governmental interest sufficient to justify the restrictive rule.

c. Narrowly Tailored

Assuming that a given restriction on protected speech does serve a substantial governmental interest, the restriction must also be narrowly tailored to fulfill the governmental interest sought to be served. In Erznoznik v. City of Jacksonville, an ordinance was passed which banned all nudity from being displayed on outdoor movie theater screens which were visible from any public place by characterizing such displays as a public nuisance. The City of Jacksonville conceded that the ordinance went far beyond banning "obscene" material as previously defined by the Court. With that in mind, the Court held that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . , the burden normally falls upon the viewer to avoid further bombardment

41. Id. at 650-51 ("[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.").
42. Heffron, 452 U.S. at 654-55 (holding that broad-based restrictions on fair activities were necessary and appropriate given the important governmental objective of crowd control); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (substantial restriction on all types of live entertainment failed this prong as not being narrowly tailored).
43. 422 U.S. 205 (1975).
44. Id. at 208.
45. Id. (citing Miller v. California, 413 U.S. 15 (1973)).
of [his] sensibilities simply by averting [his] eyes." The Court also struck down the ordinance as impermissibly vague because the ordinance did not take into account differing degrees or types of nudity which fell within the realm of protected speech. Thus, the regulation failed the second prong of the time, place and manner test which mandates that the restriction be narrowly tailored in order to protect against the abrogation of fundamental constitutional rights.

d. Reasonable Open Alternative Channels of Communication

The final prong of the time, place and manner test requires that the narrowly-tailored means employed to promote a substantial governmental interest must additionally leave open reasonable alternative channels of communication for the dissemination of the protected speech. The First Amendment requires that the public have open access to information and that any regulations which impinge on protected speech impose no restrictions which cut out the public's reasonable access to such information. The government may impose restrictions on the free flow of information only to the extent that the public maintains reasonable access to the expression. Therefore, no government regulation of protected speech can permissibly restrict adequate channels of communication which obstruct the public's access to such information.

B. GOVERNMENTAL POWER TO ZONE

Unlike the constitutional right to freedom of speech, the power of government to zone is of relatively recent origin. Zoning essentially developed as an outgrowth of the law of nuisance law. The Supreme Court had upheld "nuisance-like" municipal land use regulations at

46. Id. at 210-11 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).
47. Erznoznik, 422 U.S. at 212-14 ("[The ordinance] sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus is would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous . . . Clearly all nudity cannot be deemed obscene even as to minors.").
49. E.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (First Amendment protections are afforded both to the source and the recipient of the protected speech).
50. See Daniel R. Mandelker, Land Use Law § 1.3 (1982).
least three times\textsuperscript{51} by the early part of the twentieth century — prior to the passage of the first comprehensive zoning ordinance by the City of New York in 1916.\textsuperscript{52} Within ten years of the enactment of New York's zoning ordinance, approximately 425 municipalities (representing more than half of the country’s urban population) had passed similar measures.\textsuperscript{53} It was not until the end of that ten-year zoning boom that the Supreme Court first upheld the constitutionality of zoning regulation in \textit{Village of Euclid v. Ambler Realty Co.}\textsuperscript{54} In \textit{Euclid}, the Supreme Court upheld the validity of an ordinance passed by a suburb of Cleveland, Ohio.\textsuperscript{55} The Supreme Court reasoned that the zoning ordinance represented a valid exercise of the police power and rejected the landowner’s argument that the ordinance deprived him of his liberty and property in contravention of the dictates of the Fourteenth Amendment.\textsuperscript{56} The Court held that so long as the classifications made under a zoning ordinance were "fairly debatable,"\textsuperscript{57} and the provisions were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,"\textsuperscript{58} the ordinance would be upheld as constitutional.

Following its decision in \textit{Euclid} in 1926, the Supreme Court heard only three cases\textsuperscript{59} dealing with zoning law until its 1974 decision in

\textsuperscript{51} Hadacheck v. Los Angeles, 239 U.S. 394 (1915) (upholding ordinance which excluded brickyards within certain areas of the city); Reinman v. Little Rock, 237 U.S. 171 (1915) (upholding ordinance which excluded livery stables from certain areas of the town); Welch v. Swasey, 214 U.S. 91 (1909) (upholding ordinance which divided Boston into two building districts with different height limitations applicable to each).


\textsuperscript{53} Nelson, supra note 52, at 9.

\textsuperscript{54} 272 U.S. 365 (1926).

\textsuperscript{55} Id.

\textsuperscript{56} Id. at 397. The landowner relied on that portion of the Fourteenth Amendment which provided that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1, cl. 3.

\textsuperscript{57} 272 U.S. at 388.

\textsuperscript{58} Id. at 395.

\textsuperscript{59} Nectow v. City of Cambridge, 277 U.S. 183 (1928) (struck zoning ordinance down as applied to plaintiff's property because application of the zoning regulations would not promote general welfare); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (struck down a zoning ordinance regulating certain uses with two-thirds consent of adjoining landowners as an unlawful delegation of power); Zahn v. Board of Public Works, 274 U.S. 325 (1927) (upheld Los Angeles' comprehensive zoning ordinance).
Village of Belle Terre v. Boraas.60 In Belle Terre, a landowner challenged that portion of a zoning ordinance which restricted his land to use as a one-family dwelling which allowed the housing of either a "family" or no more than two unrelated persons.61 The plaintiffs, the landowner and three of the six unrelated college students renting from him, attempted to have the ordinance reviewed under more exacting constitutional scrutiny by alleging that the ordinance infringed on their fundamental constitutional rights of privacy and travel.62 The Court did not agree that any fundamental constitutional rights were implicated by the zoning ordinance and upheld the regulation under the mere rationality test.63 However, three years later, in Moore v. City of East Cleveland,64 the Court was faced with an ordinance similar to that which had been upheld in Belle Terre, but which did not even allow related persons to live together under certain circumstances.65 The Court struck down the ordinance as an abridgment of the fundamental right of freedom of choice relating to family matters, and applied the strict scrutiny test requiring the ordinance to be the least restrictive means of achieving a compelling state interest.66

60. 416 U.S. 1 (1974).
61. Id. at 2. The zoning ordinance in question defined a "family" as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of servants. A number of persons but not exceeding two (2) living and cooking together . . . though not related . . . shall be deemed to constitute a family." Id.
62. The plaintiffs in Belle Terre were attempting to have the Court scrutinize the ordinance under a standard more exacting than the mere rationality standard adopted almost fifty years earlier in Euclid.
63. Id. at 7.
64. In upholding the Belle Terre zoning ordinance, the Court recognized the broad range of values which may be protected and served by zoning restrictions:
A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . .
The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.
Belle Terre, 416 U.S. at 9.
66. Id. at 498-99. In striking down the East Cleveland ordinance, the Court distinguished its holding in Belle Terre on the grounds that while the Belle Terre ordinance had preserved the family, the East Cleveland ordinance "slic[ed] deeply" into the family by prohibiting even cousins to live together in a single household. Id. at 498.
67. Id. at 499-500. The Court concluded that although the governmental interests sought to be achieved were "legitimate," the ordinance only had a "tenuous relation" to the achievement of those ends. Id. at 500.
Thus, these decisions established that the normal deference accorded to zoning legislation through use of the mere rationality standard does not apply where fundamental rights are implicated. In such cases, the imposition of strict scrutiny is appropriate.68

II. **ZONING AND THE FIRST AMENDMENT**

In the seminal cases involving the interplay of zoning and the First Amendment, the Court has been urged to utilize the strict scrutiny analysis in determining whether local ordinances pass constitutional muster. A closer look at the Court's decisions in *Young v. American Mini-Theatres, Inc.*,69 *Schad v. Borough of Mount Ephraim*,70 and *City of Renton v. Playtime Theatres, Inc.*,71 provide a clearer understanding of the direction of zoning/First Amendment law, and provide a useful backdrop with which to evaluate more recent lower court decisions and local ordinances.

A. **YOUNG V. AMERICAN MINI-THEATERS, INC.**72

In *Young*, the Supreme Court first decided a case “in which the interests of freedom of expression protected by the First and Fourteenth Amendments have been implicated by a municipality’s commercial zoning ordinance.”73 At issue in the *Young* case was the constitutionality of certain portions of Detroit’s “Anti-Skid Row” ordinance which singled out adult bookstores and theatres for special treatment under the ordinance.74 The original Detroit “Anti-Skid Row” ordinance, passed in 1962, was based on findings by the Detroit Common Council that certain types of businesses, when concentrated,
can have a blighting effect on the surrounding neighborhood.\textsuperscript{75}

Under certain amendments to Detroit’s zoning ordinance, adult bookstores and adult theatres were added to a list of businesses which could not be located within 1,000 feet of any two other similarly regulated uses without first obtaining prior special approval.\textsuperscript{76} The ordinance also prohibited the location of adult bookstores and theatres within 500 feet of a residential dwelling.\textsuperscript{77} The Detroit City Council added adult bookstores and theatres to the list of regulated uses in response to the rapid increase in such uses over the previous five years.\textsuperscript{78}

In a plurality opinion,\textsuperscript{79} the Court upheld the constitutionality of the Detroit ordinances. The Court held that the ordinance was not

\textsuperscript{75} DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.0000 (1972). The 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).

\textsuperscript{76} DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.0000 (1972).

Supporters of the amendments to the ordinance, 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.” \textit{Young}, 427 U.S. at 55.

\textsuperscript{77} DETROIT, MICH., ORDINANCE 742-G (Nov. 2, 1972) (amending DETROIT, MICH., OFFICIAL ZONING ORDINANCE §§ 32.007, 66.0000, 66.0101 (1972)). Following amendment of the zoning ordinance, “regulated uses” included adult bookstores, adult theatres, mini-theatres, bars, cabarets, hotels and motels, pawnshops, pool and billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls.

\textsuperscript{78} \textit{Young}, 427 U.S. at 55 n.8. Police statistics indicated that between 1967 and 1972 the number of adult theatres had increased from two to twenty-five, and a comparable increase had occurred in the number of adult bookstores and other adult uses. \textit{Id.}

\textsuperscript{79} The Court split 4-1-4. Justice Stevens’ opinion, joined by Justices Burger, White, Powell, and Rehnquist, upheld the ordinance. However, Justice Powell rejected that portion of Justice Stevens’ opinion that dealt with the issue of how courts should review zoning regulations that distinguish among businesses based on
unconstitutionally vague as it applied to an "adults only" movie theater that displayed sexually explicit films on a regular basis. More importantly, however, the Court held that despite the fact that sexually oriented businesses were singled out for special treatment under the zoning ordinances, such classification did not violate the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. The Court held that the ordinance constituted a permissible content-neutral time, place and manner restriction because the purpose of the ordinance was not to eliminate, censor or suppress the protected speech, but rather, to "preserve the quality of urban life" by avoiding the "secondary effects" of such businesses on the community through the content of the speech at issue. Justice Stevens wrote a separate concurring opinion on that issue. Justices Brennan, Marshall, Stewart, and Blackmun dissented. Young, 427 U.S. at 50.

80. Id. at 61. The Court reasoned that because the challenged ordinance unquestionably applied to the parties before the Court, the vagueness claim did not affect the litigants. The Respondents argued, however, that they had standing to raise the vagueness claim because the Court had previously ruled that litigants in First Amendment cases could raise claims affecting third parties because an ordinance affecting protected First Amendment speech could cause parties not before the Court to refrain from exercising their First Amendment rights.

Responding to this argument, Justice Stevens noted that such an exception to the traditional standing rules was justified by the overriding importance of First Amendment protections, the exception is only justified where the ordinance's deterrent effect on protected speech is "real and substantial" and the ordinance is not "readily subject to a narrowing construction by the state courts." Justice Stevens concluded that the litigants could not meet either of these requirements and rejected the vagueness claims. Young, 427 U.S. at 60 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975)).

In his dissent, Justice Blackmun sharply criticized Stevens' view on the vagueness issue. Justice Blackmun reasoned that the definition of what made a book or movie "adult" was impermissibly vague. Under the ordinances, the "adult" classification rested 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, J., dissenting). Blackmun's dissent argued that this definition was not helpful to a theater owner in determining whether the ordinance was applicable:

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.


82. The secondary effects identified included neighborhood deterioration, increased crime rates, and the like, associated with adult businesses. See text accompanying supra note 73.
regulation of the placement and concentration of such businesses. Justice Stevens' plurality opinion pointed out that the city's goal of avoiding or mitigating these "secondary effects" is one which "must be accorded high respect" and is a substantial enough governmental interest to justify the resulting incidental restriction on First Amendment speech. Justice Stevens' opinion recognized three elements for judicial review of a zoning ordinance which regulates adult uses or impinges on First Amendment rights. First, the ordinance must be content-neutral — it must seek only to control the "secondary effects" of adult uses and must not have as its objective the protection of citizens from exposure to the content of the speech. Second, there must remain open alternative channels of communication — the ordinance must not have the effect of "suppressing, or greatly restricting access to 'adult businesses,' but must leave the market 'essentially unrestrained.'" Third, the municipality must provide a factual record which supports the regulatory scheme. Thus, if a zoning ordinance which impacts First Amendment rights meets all these tests, the plurality opinion calls for a reviewing court to defer to the judgment of the legislative body and uphold the constitutionality of the ordinance.

Justice Powell adopted the four-part test enunciated in United States v. O'Brien for determining the constitutionality of a zoning ordinance.

83. Young, 427 U.S. at 70-71.
84. Id. at 71. The Court did note, however, that the situation would be quite different if adoption of the ordinance was motivated simply by a distaste for the content of the speech itself or if the ordinance would have the effect of suppressing or greatly restricting access to this form of protected expression. Id. at 71-72 n.35.
85. 427 U.S. at 71 n.34.
86. Id. at 71 n.35.
87. Id. at 62.
88. In Justice Powell's concurring opinion, he likewise found the Detroit ordinance constitutional, but argued that the four-part test enunciated in United States v. O'Brien, 391 U.S. 367 (1968), was the appropriate test for determining the ordinance's constitutionality. Under the O'Brien test, a governmental regulation is justified, despite its incidental impact on protected First Amendment rights, "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." Id. at 377. Finding that the Detroit ordinance met all four parts of the O'Brien test, Justice Powell concluded the ordinance was constitutional. Young, 427 U.S. at 80-82 (Powell, J., concurring).
ordinance which impacts First Amendment protected speech. The O'Brien test mandates: (1) that an ordinance must be within the constitutional powers of the government; (2) that an ordinance must further an important or substantial governmental interest; (3) that the governmental interest must be unrelated to the suppression of free expression; and (4) that the incidental restriction on First Amendment freedoms must be no more than necessary to accomplish the governmental interest. A number of post-Young courts have also adopted the O'Brien factors as the proper approach.

Following Young, in Hart Book Stores, Inc. v. Edmisten, the Fourth Circuit analyzed an ordinance similar to that in Young by employing the four-part O'Brien test. The North Carolina statute prohibited any two regulated uses from being located in the same building. The court concluded that the North Carolina statute was merely a place and manner restriction, and, as such, satisfied the O'Brien test. Even though one district court predicted that the

90. Id. at 377.
92. 612 F.2d 821 (4th Cir. 1979).
93. For the elements of the O'Brien test, see text accompanying supra note 90.
94. The statute prohibited the location of any one "adult establishment" in the same "building, premises, structure, or other facility" being occupied by another "adult establishment" or "sexual device vendor." (citing N.C. GEN. STAT. § 14-202.11 (1977)). Under the statute, "adult establishment" is defined to include adult bookstores, adult motion picture theaters, and adult mini-theaters having a preponderance of wares "distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas."
95. Hart Book Stores, 612 F.2d at 826-27.
96. Id. at 828-30. After concluding that the North Carolina statute was actually less restrictive than the Detroit ordinance at issue in Young and that the zoning
ordinance would fail to be effective,\textsuperscript{97} this did not, in the court’s view, alter the fact that the statute was constitutional. Likewise, the court rejected the owners’ claims that the six-month amortization provision made the statute too burdensome.\textsuperscript{98}

B. SCHAD V. BOROUGH OF MOUNT EPHRAIM\textsuperscript{99}

The next Supreme Court case which dealt with adult uses and zoning came five years later in \textit{Schad}. In \textit{Schad}, a local zoning ordinance prohibited live entertainment, including nude dancing, in any establishment within the borough.\textsuperscript{100} James Schad, the owner of an adult bookstore, was prosecuted and fined under the ordinance for having installed glass booths through which patrons could watch nude dancers.\textsuperscript{101} In holding the ordinance unconstitutional, the Supreme Court stated that “when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.”\textsuperscript{102} The Court held that the ordinance failed to satisfy either requirement.

First, the Court held that the ordinance was unconstitutionally overbroad. In addition to prohibiting nude dancing, the ordinance would have the effect of banning dancing in musical and dramatic works,\textsuperscript{103} as well as any other forms of live commercial entertainment.\textsuperscript{104} Second, the Court held that Mount Ephraim’s rationale for enacting the ordinance did not constitute a substantial governmental

\begin{footnotesize}
\begin{enumerate}
\item The court went on to hold that the statute passed all four parts of the \textit{O’Brien} test. \textit{Id.} at 828-30.
\item \textit{Hart Book Stores}, 450 F. Supp. at 907 (“statute would ‘have a minimal effect on degenerate conduct’”).
\item \textit{Hart Book Stores}, 612 F.2d at 834; see also, Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1160 (1978) (en banc).
\item \textit{Mount Ephraim, N.J., Ordinance} § 99-15B (1975).
\item 452 U.S. 61 (1981).
\item \textit{Id.} at 68.
\item Id. at 65. The Court did not say that nude dancing, as prohibited in the Mount Ephraim ordinance, is protected First Amendment expression. However, the Court did say that nude dancing, in some forms, is entitled to First Amendment protection. In addition, the Court stated that other activities prohibited under the ordinance, such as dancing in musical or dramatic works, were protected under the First Amendment. \textit{Id.} at 65-66.
\item \textit{Id.} at 66 n.5. The ordinance did not prohibit non-commercial live entertainment. Therefore, a high school could enact a play if no admission was charged and it was not performed in a commercial theater. \textit{Id.}
\end{enumerate}
\end{footnotesize}
The municipality had argued that a ban on live entertainment would help solve problems created by the "secondary effects" of such enterprises, but no factual evidence in the record supported the claim. Justice White, writing for the majority, distinguished the holding in *Young* as involving a "minimal burden on protected speech," rather than the total ban on a type of protected speech found in *Schad*. Although *Schad* noted that the Court in *Young* had "stated that a zoning ordinance is not invalid merely because it regulates activity protected under the First Amendment," Justice White recognized that *Young* had "not implied that a municipality could ban all adult theatres — much less all live entertainment or all nude dancing — from its commercial districts citywide."

Although *Young* upheld that portion of a zoning ordinance impacting free expression and *Schad* struck one down, the two holdings are not in conflict. *Young* upheld an ordinance which merely restricted the location of adult uses, while *Schad* struck down an ordinance which totally banned a protected First Amendment right. However, the two decisions did differ in one important respect: the Court in each case identified a different analysis to be employed in zoning cases where the regulations involved adult uses and impacted First Amendment rights. Thus, where *Young* stressed that the objective of the regulation must not be the suppression of protected expression and that access to that expression must remain available, *Schad* emphasized that regulation cannot be so broad as to completely prohibit protected expression and that the regulation must further a substantial governmental interest.

Following the Court's decision in *Schad*, the Fifth Circuit had occasion to review the constitutionality of an adult use zoning ordi-

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105. *Id.* at 72.
106. *Id.* at 73-74. Mount Ephraim argued that problems such as parking, trash, police protection and medical care could be solved through the live entertainment ban. However, the city provided no factual evidence in the record which supported the conclusion that live entertainment presented more significant problems in these areas than any other business enterprises. *Id.*
107. *Id.* The city also argued that without the ban, live entertainment would take up commercial space necessary to serve the immediate needs of the community. *Id.* at 72-73. The Court rejected this argument, finding that just about the only service not available in the community at the time was live entertainment. *Id.*
108. *Id.* at 71.
109. *Id.*
110. *Id.*
111. 427 U.S. at 52. *See supra* notes 73-92 and accompanying text.
112. 452 U.S. at 65-66. *See supra* notes 100-111 and accompanying text.
nance from the City of Galveston in Basiardanes v. City of Galves-
ton.\textsuperscript{113} In Basiardanes, the court found that the ordinance was not a
time, place and manner restriction because it "drastically impair[ed] the availability in Galveston of films protected for adult viewing by
the First Amendment."\textsuperscript{114} Therefore, the ordinance had to be assessed
in light of the strict scrutiny standard applied in Schad.\textsuperscript{115} The court
focused on the failure of the city to study the effects of adult uses and take into account the findings of such studies.\textsuperscript{116} The court noted
the sharp contrast between the factual record presented in Young and
the record from the city of Galveston.\textsuperscript{117} This failure to provide a
sufficient factual record led the court to conclude that the city had
neither shown a substantial governmental interest nor established a
nexus between adult uses and urban blight or crime.\textsuperscript{118} Finally, the
court determined that the ordinance was overbroad in basing its
definition of adult movies on a Texas law relating to the showing of
movies which minors may not view without accompaniment by an
adult.\textsuperscript{119} "Whatever connection there is between crime or blight and
adult theaters, the requisite connection is surely missing with respect
to popular but sexually oriented films, which are covered by Ordinance
78-1."\textsuperscript{120}

\textsuperscript{113} 682 F.2d 1203 (5th Cir. 1982).
\textsuperscript{114} Id. at 1214. This conclusion was supported, in large measure, by the fact
that of the 10-15% of the City in which adult uses were not banned outright, adult
uses were excluded from approximately 80-90% of those sites by the City's dispersal
requirements. Id. at 1209. The dispersal requirements prohibited an adult theater
from operating (1) within 500 feet of any residentially zoned area, or from any two,
or any combination of "pool halls, liquor stores, or bars"; (2) within 1,000 feet of
any other adult theater or bookstore; and (3) within 1,000 feet of any "church,
school, public park, or recreational facility where minors congregate." Id.
\textsuperscript{115} Id. at 1214-15.
\textsuperscript{116} Id. at 1215; see also Schad v. Borough of Mount Ephraim, 452 U.S. 61,
71-72 (1981); Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 661 (8th Cir. 1981)
(en banc); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98 (6th Cir.
\textsuperscript{117} 682 F.2d at 1215.
\textsuperscript{118} 682 F.2d at 1215-16. The court also concluded that the timing of the
enactment of the ordinance casts doubt on the City's purported purposes of the
ordinance. Id. at 1216. The court speculated that the ordinance was prompted not
by concerns of crime and urban blight, but rather by the fact that the proposed adult
theater was located across from the renovation project of the City's Grand Opera
House. Id. This conclusion was buttressed by the fact that other uses, such as bars,
pool halls, pawn shops, and massage parlors remained unregulated. Id.
\textsuperscript{119} Id. at 1212-13.
\textsuperscript{120} Id. at 1217.
In *Alexander v. City of Minneapolis*, a pre-*Renton* case involving the constitutionality of a Minneapolis, Minnesota zoning ordinance which restricted the location of certain "adults-only" enterprises including bookstores, theatres, saunas, massage parlors and "rap parlors," the court held the ordinance violative of the First and Fourteenth Amendments. Relying primarily on *Young* and *Schad*, the court held that because approximately thirty to thirty-two adult uses must compete in the marketplace for only twelve available sites for relocation, enforcement of the ordinance would have the effect of "substantially reducing the number of adult bookstores and theatres in Minneapolis" and "no new adult bookstores or theatres would be able to open." Equating this with an unlawful restriction on the right to purvey sexually oriented material and the public's right of access to such material, the court agreed with the district court that enforcement of the ordinance would not allow reasonable alternative channels of communication for the dissemination of the protected expression.

C. *CITY OF RENTON V. PLAYTIME THEATRES, INC.*

The most recent pronouncement from the Supreme Court regarding the interrelationship between First Amendment protections and zoning came in 1986 in *Renton*. The city of Renton, Washington enacted a zoning ordinance which, *inter alia*, prohibited adult motion picture theatres from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school.

121. 698 F.2d 936 (8th Cir. 1983).
122. 698 F.2d at 936. "Rap parlors" are "establishments at which men may converse with women who are not fully clothed." *Id.* at 936-37 n.2.
123. *Id.* at 938 (quoting *Alexander v. City of Minneapolis*, 531 F. Supp. 1162, 1172 (D. Minn. 1982)).
124. *Id.* at 939.
126. The term "adult movie picture theater" is defined in the ordinance as "[a]n 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 relating to specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." 475 U.S. at 44.
127. *Id.* The original ordinance, approved in April, 1981, prohibited an adult movie theater from locating within one mile of any school. In May, 1982, while the federal lawsuit was still pending, the City amended the ordinance adding a statement of reasons for its enactment and reducing the minimum allowable distance from any school to 1,000 feet. *Id.* at 45.
Following an initial entry of a preliminary injunction, the District Court vacated the injunction and held that the Renton ordinance did not substantially restrict any First Amendment rights, that the city could rely on the experience of other cities as a rationale for supporting passage of the ordinance, that the purpose of the ordinance was unrelated to the suppression of protected speech, and that the restrictions were no greater than necessary to further the governmental interests involved. The Ninth Circuit Court of Appeals applied the four-part test from O'Brien and reversed the District Court's judgment in favor of the City. First, the Court of Appeals found that the ordinance indeed constituted a substantial restriction on First Amendment freedoms. The Ninth Circuit went on to conclude that Renton had failed to support the ordinance with a factual record relating to the city of Renton itself; Renton had neither established a substantial governmental interest nor shown that the regulation was unrelated to the suppression of speech.

Characterizing the ordinance as a content-neutral time, place and manner restriction designed to further substantial governmental interest and one not unreasonably restricting alternative channels of communication, the Supreme Court reversed the Court of Appeals and held the zoning ordinance constitutional. The Court first concluded that the Renton ordinance was content-neutral because it was not aimed at suppressing speech on the basis of the content, but rather was aimed at alleviating the "secondary effects" of the presence of adult theatres on the surrounding community. The Court then defined the applicable test for such a case as "whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication."

128. Id. at 45.
129. Id.
131. Playtime Theatres, Inc. v. City of Renton, 748 F.2d 527, 534 (9th Cir. 1984).
132. Id. at 536-37.
133. Id. at 537-38.
135. Id. at 48-49.
136. Id. at 50. The Court discussed the purposes of the ordinance as relating to the prevention of the "secondary effects" such as protection of the city's retail trade, maintenance of property values, and the protection of the city's neighborhoods. The Court concluded that the city's purpose of attempting to "preserve the quality of urban life" must be given "high respect." Id. at 48-50; see also Young v. American Mini-Theatres, 427 U.S. 50, 71 (1976).
The Ninth Circuit found that the city had not shown the requisite substantial governmental interest due, in large part, to its failure to provide any factual record which related specifically to the city of Renton. The Supreme Court, however, stated that

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 ordinance the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

The Court distinguished the Renton ordinance from the one in Schad, characterizing the Renton ordinance as "narrowly tailored" to achieve the desired goals because the ordinance would only affect theatres which are shown to produce secondary effects.

In assessing whether the Renton ordinance had left open reasonable alternative channels of communication for disseminating the protected expression, the Court rejected the reasoning of the Ninth Circuit that, under the ordinance, the available land in Renton

137. Playtime Theatres, Inc. v. City of Renton, 748 F.2d 527, 536-37 (1984). The Court of Appeals noted that in Young, the Supreme Court had found that "the record disclosed a factual basis for the council's determination," id. at 536, and that Justice Powell had cited to "reports and affidavits from sociologists and urban planning experts, as well as some laymen." Id. The Ninth Circuit also noted that in Schad, the Supreme Court had invalidated an ordinance stressing that the Borough had failed to adequately justify the First Amendment restriction through evidence in the record. Id. See also Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) (summary judgment reversed in part due to lack of evidence in the record); Basiardanes v. City of Galveston, 682 F.2d 1203, 1215 (5th Cir. 1982) (court contrasted record in Young to "empty" record before it); Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115, 1125 (1st Cir. 1981) (remanded case for factual findings stating, "the government bears the burden of proving some empirical basis for the projections on which it relies"); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98 (6th Cir. 1981) (post hoc rationalizations are inadequate to support city's ordinance). But see Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153 (Wash. 1978), cert. denied, 441 U.S. 945 (1979) (Zoning ordinance held valid in part due to the fact that the ordinance was the "culmination of a long period of study and discussion.").

138. 475 U.S. at 51-52. Renton did not conduct any independent tests or empirical data-gathering to justify or support the ordinance. Instead, Renton relied on studies conducted in Seattle. See Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (Wash. 1978). In addition, the Court noted the deference given to the substantial governmental interest in attempting to preserve the quality of urban life in Young.

139. Id. at 52.
precluded alternative locations for adult movie theatres. The Court found that the 520 acres was "ample accessible real estate" and stated that "we have never suggested that the First Amendment compels the Government to ensure that adult theatres, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." The Court held that under First Amendment principles, the city must only refrain from completely denying an owner of an adult use the reasonable opportunity to open an adult theater, and that Renton's ordinance "easily meets this requirement."

It appears from the holding in Renton that municipalities have been given much wider latitude in fashioning zoning ordinances which restrict, either by dispersion or concentration, the location of adult uses. The threshold issues of whether Renton-type ordinances abridge, to some extent, protected First Amendment freedoms appears to have been answered in the affirmative. This conclusion mandates that the cases be analyzed at some higher level of scrutiny; however, the Supreme Court has not definitively agreed whether these cases should be analyzed under the four-part O'Brien test or the three-part Heffron test.

In Renton, the Supreme Court has clearly stated that curbing the "secondary effects" of adult uses is a legitimate and substantial

140. Id. While the Court of Appeals did not quarrel with the district court's finding that 520 acres were located in those zones where the location of adult theatres were allowed, the appellate court did not agree that those parcels were "available." Playtime Theatres, Inc. v. City of Renton, 748 F.2d 527, 534 (9th Cir. 1984). The court found that a substantial portion of the 520 acres were already occupied by a sewage disposal plant, a horseracing track, a developed business/industrial park, a warehouse and manufacturing facilities, a Mobil Oil tank farm and a fully developed shopping center. Id. The court also distinguished the situation from that found in Young, suggesting that nothing about the Detroit ordinance seriously limited the number of sites available for adult uses, whereas the Renton ordinance did just that. Id.

141. 475 U.S. at 54. Justice Brennan's dissent took issue with this conclusion arguing that even if the ordinance was a content-neutral time, place and manner restriction (which he argued it was not), the ordinance was unconstitutional because a majority of the land zoned for adult theater use was either occupied or unsuitable for those purposes. Id. at 64 (Brennan, J., dissenting). Justice Brennan concluded that the Renton ordinance denied adult theatres the opportunity to relocate within the community and was, therefore, unconstitutional. Id.

142. Id. at 53-54.


144. See supra note 9 and accompanying text.
governmental interest which may be addressed through zoning regulation. This has even been noted by one Justice to be the case where an ordinance is silent on the issue of secondary effects. But some lower courts have not hesitated to strike down ordinances which do not provide a sufficient factual record to support the enactment of the ordinance. While the question of whether the enactment of this type of zoning scheme is unrelated to the suppression of protected expression is relatively settled, zoning ordinances which completely ban some form of protected First Amendment expression will likely be treated as content-based legislation and subjected to strict judicial scrutiny. In the future, the major battleground between municipalities

145. See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-52 (1986); Young v. American Mini-Theatres, 427 U.S. 50 (1976); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1276-77 (5th Cir. 1988), cert. denied, 489 U.S. 1052 (1989); see also International Eateries of America v. Broward County, 941 F.2d 1157 (11th Cir. 1991). In Int'l Eateries, the Eleventh Circuit discussed the requirement that an ordinance be “narrowly tailored” in the context of fact that the Broward County ordinance was intended to combat the “secondary effects” of adult uses. Finding refuge in the Supreme Court’s decision in Renton, the court circularly reasoned that although there is no evidence that secondary effects follow from the adult uses, so long as the ordinance’s distance requirements are no greater than necessary to combat these unproven secondary effects, the ordinance is, ipso facto, narrowly tailored. And because the Broward County ordinances went no further than the ordinances approved in Renton, the ordinances must be narrowly tailored. 941 F.2d at 1163. But see Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987) (lack of record evidence relating to purposes of the zoning ordinance means district court abused its discretion in holding that City has offered sufficient justification to support finding of substantial governmental interest).

146. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (Souter, J., concurring). Justice Souter, concurring in a plurality opinion, disagreed with Chief Justice Rehnquist’s opinion that “protecting societal order and morality” is a sufficient governmental interest on which to uphold an ordinance banning all public nudity. Instead, Justice Souter rested his opinion that a substantial governmental interest existed on the fact that the ordinance would combat the “secondary effects” of adult uses, despite the fact that the statute in question in Barnes was silent as to its purposes. In fact, Justice Souter’s concurrence specifically recognized this deficiency when he wrote “It is, of course, true that this justification [secondary effects] has not been articulated by Indiana’s legislature or by its courts.” Id. at 2469 (Souter, J., concurring). But see International Eateries of America v. Broward County, 941 F.2d 1157, 1162 n.3 (11th Cir. 1991) (refusing to imply a substantial governmental interest “where none is evident in the ordinance”).

147. See, e.g., Tollis, Inc. v. San Bernadino County, 827 F.2d 1329, 1332-33 (9th Cir. 1987); Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987).

and adult business owners and operators will probably focus essentially on whether the enacted regulation furthers a substantial governmental interest and whether the regulation allows reasonable alternative channels of communication.\textsuperscript{149} Without the benefit of any subsequent Supreme Court pronouncements on the subject since the decision in \textit{Renton}, it is necessary to look at the decisions of the lower courts, federal and state, to determine what standards and rules of law are being used to guide the legal decision-making, which, in turn, will ultimately guide the form that any future zoning regulations must take in order to pass muster under the federal constitution.

D. \textsc{Subsequent Lower Court Decisions}

The lower court decisions subsequent to \textit{Renton} have focused primarily on (1) whether the factual record is adequate to find that the ordinance furthers a substantial governmental interest and is narrowly tailored, and (2) whether the ordinance provides adequate alternative channels of communication by allowing a sufficient number of sites on which adult uses can be located.

1. \textit{Substantial Governmental Interest: Is There Sufficient Evidence in the Record to Support the Ordinance?}

A judicial determination of whether there is a substantial governmental interest has often rested on whether the municipality has prepared an adequate factual record supporting both the necessity of the ordinance and the fact that it is narrowly tailored to accomplish its goals. Courts have taken two alternative approaches to the adequacy of the factual record since \textit{Renton}. The first approach essentially defers to the municipality, and assumes that reliance on some other city's factual record, most often the Detroit record from \textit{Young}, is sufficient for constitutional purposes.\textsuperscript{150} The second approach is a

\textsuperscript{149} See \textit{ supra} notes 48-49 and accompanying text.

\textsuperscript{150} See, e.g., Barnes v. Glen Theatre, Inc, 111 S. Ct. 2456, 2468-69 (1991) (Souter, J., concurring). In the plurality opinion of Chief Justice Rehnquist, the Court also recognized that despite the fact that "[i]t is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind," the statute’s interest in “protecting societal order and morality is clear." \textit{Id.} at 2461, and that such a purpose furthers a substantial governmental interest. \textit{Id.} at 2462. Therefore, under the plurality’s approach, protecting societal order and morality may also be inferred as a substantial governmental interest implicated in the ordinance. The only disagreement, then, between the plurality and Justice Souter’s concurrence is what governmental interest can be inferred from a statute which is silent on that issue.
somewhat more critical analysis of the factual record developed by the municipality in light of the purposes of the specific ordinance.\footnote{151} The first approach, i.e., inferring a governmental interest from an ordinance which is otherwise silent on that issue, has been adopted most notably in the Supreme Court's decision in \textit{Barnes v. Glen Theatre, Inc.}\footnote{152} In \textit{International Eateries of America v. Broward County},\footnote{153} the court specifically noted in dictum that based on \textit{Barnes}, one could conclude that the second prong of \textit{O'Brien}, requiring an ordinance to further an important or substantial governmental interest, could be satisfied through inference.\footnote{154}

This second approach of critically analyzing the factual record has also been employed most notably in \textit{City of Renton v. Playtime Theatres, Inc.},\footnote{155} \textit{Christy v. City of Ann Arbor},\footnote{156} and \textit{Tollis, Inc. v. San Bernadino County}.\footnote{157} In these cases, the courts have consistently held that a municipality may rely on the factual studies and record

\footnote{151. See, e.g., \textit{Tollis, Inc. v. San Bernadino County}, 827 F.2d 1329, 1332-33 (9th Cir. 1987) ("At a minimum, however, there must be a logical relationship between the evil feared and the method selected to combat it. . . . The County must show that in enacting the particular limitations it places upon adult theaters, it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects."); \textit{Christy v. City of Ann Arbor}, 824 F.2d 489, 493 (6th Cir. 1987) ("Although both the Supreme Court in \textit{Renton}, 106 S. Ct. at 931, and the Sixth Circuit in \textit{CLR v. Henline}, 702 F.2d at 639, have stated that a city need not conduct new independent studies to justify adult business zoning ordinances, both courts have required some relevant evidence to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses."); see also \textit{Keego Harbor Co. v. City of Keego Harbor}, 657 F.2d 94, 97 & n.3. (6th Cir. 1981).


153. 941 F.2d 1157 (11th Cir. 1991).

154. \textit{Id.} at 1159-60. It was primarily because the plurality and concurring opinions in \textit{Barnes} differed on the issue of what governmental interest could be inferred did the court in \textit{Int'l Eateries} determine that the secondary-effects analysis in \textit{Renton} was still controlling. \textit{Id.} at 1161. In \textit{Int'l Eateries}, the owners argued that because the County relied on the Detroit factual record, and because the ordinance did not mirror the Detroit ordinance exactly, the County could not rely on the Detroit record to support the finding of a substantial governmental interest. The court, in applying the secondary-effects test outlined in \textit{Renton}, determined that the differences in the methodology chosen to "combat the secondary effects of adult theaters does not call into question [a city's] identification of those secondary effects or the relevance" of other city's experiences. \textit{Id.} at 1163 (quoting \textit{Renton}, 475 U.S. at 52). Thus, the court concluded that a substantial governmental interest was served.


156. 824 F.2d 489, 491, 493 (6th Cir. 1987).

157. 827 F.2d 1329, 1332-33 (9th Cir. 1987).}
of other cities. However, the record for the particular ordinance being challenged must reflect factual support for its substantial governmental interest. In practice, this likely means only that a city cannot defend its ordinance from attack on a completely blank record as were the cases in Christy and Tollis.

2. Adequate Reasonable Alternative Channels of Communication for the Dissemination of the Protected Expression

The determination of whether reasonable alternative channels of communication remain open for the dissemination of protected expression ultimately rests on a subjective judicial determination of how much available land constitutes enough to validate an ordinance. This subjectivity is evident from the wide range of available land, often measured as a percentage of total land space of the municipality, which has been used by the courts to justify either the striking down or upholding of substantively similar ordinances.

In Woodall v. City of El Paso, the most recent pronouncement on the subject from a United States Court of Appeal, the court focused its analysis on whether the ordinance enacted by the city of El Paso allowed reasonable alternative channels of communication for the dissemination of protected First Amendment expression. At trial, the city's evidence showed that the ordinances permitted the location of adult businesses on 1,433 of El Paso's 158,000 acres, or 0.91% of the available acreage in the City. The owners of the adult businesses then produced expert testimony showing that it is virtually impossible for the adult businesses to relocate on most of the 1,433 acres available for relocation under the ordinances. The jury in the case was instructed almost verbatim from the Supreme Court's holding in Renton, and the court entered judgment in favor of the city on

158. 950 F.2d 255 (5th Cir. 1992).
159. Much like the ordinances in Young and Renton, under the El Paso ordinance, adult businesses were prohibited from locating within 1,000 feet of churches, schools, residences, nurseries, parks, and each other. El Paso, Tex., Ordinances 6169 (1978), 8926 (1987), 9326 (1988); El Paso, Tex., Code Art. II § 20.08.080.A (Mar. 1989). Woodall, 950 F.2d at 257.
160. Woodall, 950 F.2d at 257.
161. Id.
162. The district court gave the following instruction:

For the purpose of determining whether acreage or sites are "reasonably available," you are instructed that adult entertainment businesses must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. Acreage and sites are not "unavailable"
the jury's verdict.163

The Fifth Circuit quoted extensively from the Renton decision,164 reviewed the facts found in the district court and court of appeals, and discussed the Supreme Court's language in Renton in light of those facts.165 The Fifth Circuit concluded that, despite the Ninth Circuit's determination in Renton that a "substantial part" of the 520 acres zoned for adult businesses was constitutionally unavailable, the Supreme Court could obviously have found two available sites on the remaining property zoned for adult businesses.166 The court's opinion concluded with an analysis of the jury instructions regarding reasonable alternative avenues of communication and held that the trial court should have instructed the jury that "land cannot be found to be reasonably available if its physical or legal characteristics make it impossible for any adult businesses to locate there."167

In Purple Onion, Inc. v. Jackson,168 the district court found, inter alia,169 that the ordinance unreasonably restricted public access

solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance. Although the First Amendment guards against the enactment of zoning ordinances which have "the effect of suppressing, or greatly restricting access to lawful speech," the First Amendment does not compel the City of El Paso to insure adult entertainment businesses, or any other kind of speech related businesses, will be able to obtain sites at bargain prices.

Woodall, 950 F.2d at 257.

163. Id. The jury found that there were 39 adult businesses operating in El Paso, and that there were 59 sites located within those areas designated for location of adult businesses under the ordinances. Id. The jury also found that the ordinances did not deny the adult business owners "a reasonable opportunity to open and operate their adult entertainment businesses." Id.

164. Id. at 259.

165. Id. The court stated that "[w]e will not read the Court's Renton decision to deem sewage treatment facilities as reasonable alternative avenues of communication for protected speech, especially when there is a much more plausible understanding of the Court's disagreement with the Ninth Circuit's reasoning." Id. In particular, the Fifth Circuit noted that in Renton, there were no existing adult entertainment businesses at the time of the enactment of the zoning ordinance. Therefore, it would not be necessary for the City to show that there were a great number of available sites in order for the ordinance to be found to have left open reasonable alternative channels of communication for the protected expression. Id.

166. Id. at 260.

167. Id. at 263.


169. In addition to finding that the ordinance was unconstitutional because of
to protected First Amendment expression.\textsuperscript{170} Pursuant to the ordinance, all but 81 sites were completely banned and, of those 81 sites, the court found at most 10 suitable for relocation of existing adult uses.\textsuperscript{171} Relying primarily on \textit{Young}, the court held that

\begin{quote}
[s]ince the effect of the ordinance’s overall scheme of both dispersing adult businesses from each other and confining them to undesirable industrial areas of the city and to the downtown business district, where there are very few possible adult business locations, is to greatly restrict public access to presumptively protected speech and expression, the ordinance is void for violation of the First Amendment to the Constitution.\textsuperscript{172}
\end{quote}

In \textit{North Street Book Shoppe, Inc. v. Village of Endicott},\textsuperscript{173} a challenge to an ordinance in a village where only one adult use was then located and only two possible relocation sites were available under the ordinance, the court found both possible sites unacceptable because “at the very least, plaintiff established that relocation would be commercially undesirable due to the difficulty and expense of obtaining a permissible site and of constructing or converting a structure for use as a bookstore, coupled with the probable decrease in business due to the less favorable location.”\textsuperscript{174} Therefore, the court concluded that the ordinance “would have the effect of significantly burdening plaintiff’s expression and impairing public access to sexually-oriented material in Endicott.”\textsuperscript{175}

\section*{III. Considerations}

Ultimately, whether one agrees or disagrees with the Supreme Court’s decisions in \textit{Young}, \textit{Schad} and \textit{Renton}, the questions which

\begin{itemize}
\item its failure to provide reasonable alternative channels of communication, 511 F. Supp. at 1223-25, the court struck down the ordinance for vagueness, \textit{id.} at 1218-19, overbreadth, \textit{id.} at 1219-23, and for violation of the Equal Protection Clause of the Fourteenth Amendment, \textit{id.} at 1225-27.
\item 170. \textit{Id.} at 1223-25.
\item 171. \textit{Id.} at 1216. In addition to finding that “all but ten or so of the 81 sites are wholly unacceptable as sites for adult businesses,” the court also found that “of these ten, no more than three or four of the sites are sites which a reasonably prudent investor owning an adult-type business would consider as a possible site to establish such a business.” \textit{Id.}
\item 172. \textit{Id.} at 1225 \& n.23. (emphasis in original).
\item 173. 582 F. Supp. 1428 (N.D.N.Y. 1984).
\item 174. \textit{Id.} at 1432.
\item 175. \textit{Id.}
\end{itemize}
remain for municipalities and adult use owners alike is how these decisions affect the roles of the respective parties, what can be expected of those parties in real-life situations, and how the standards are being applied in the lower courts where the majority of cases end.

The tension between the protections afforded under the First Amendment and the deference normally given local zoning ordinances has led to substantial litigation in order to clarify the place of each legal principle. The Supreme Court's pronouncements have led to the application of both the O'Brien factors and at least one factor from Heffron. The three most easily remedied problems found in zoning ordinances regulating adult uses are: (1) the ordinance must provide a sufficient factual basis to support a finding of substantial or important governmental interest; (2) the ordinance's definitions of adult uses and restrictions must be narrowly tailored to affect only those businesses which the ordinance intends to regulate; and (3) the ordinance must provide for reasonable alternative channels of communication for the dissemination of the affected expression protected under the First Amendment.

If municipalities take care not to attempt using their zoning ordinances to eliminate adult uses from their community and pay attention to these important aspects of their ordinances, the likelihood that the ordinance will be upheld in litigation should increase. On the other side, where owners and operators of adult uses understand the more common problem areas in proposed ordinances, and can help cure those deficiencies prior to enactment, the amount of litigation in this area should decrease.

This section is not intended to answer all the practical and legal questions a municipality may encounter in drafting and enforcing a zoning ordinance relating to adult uses. Instead, it is intended to raise questions in those areas most often litigated with an eye towards avoiding litigation and confrontation. If municipalities contemplating passage of adult use zoning restrictions attend to the issues raised in this section, the likelihood of confusion by owners and operators of adult uses will be diminished, and the possibility that an adult use zoning ordinance will be struck down as unconstitutional should be reduced.

A. SUBSTANTIAL GOVERNMENTAL INTEREST: IS THERE SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE ORDINANCE?

The first major area of concern in adult use zoning ordinances focuses on the factual record which is built by a municipality prior to the passage of any restrictive zoning legislation.\textsuperscript{176} Two basic types

\textsuperscript{176} It should be noted that some municipalities have attempted to both disperse
of zoning ordinances have been implemented which restrict adult businesses, both of which have withstood judicial scrutiny. First, municipalities have enacted ordinances which disperse adult uses, such as those used in Detroit177 and Seattle.178 Second, municipalities have enacted ordinances which concentrate adult uses to specified areas, such as that seen in Renton.179 In this context, there are two simple alternatives for building a factual record which will support an adult use ordinance, both of which have withstood Supreme Court scrutiny. First, and most expensive, a municipality can hire experts in demography, crime, traffic, housing, real estate valuation, commercial development, and an almost inexhaustible variety of other concerns in order to build its own factual record.

Every zoning ordinance should include a factual record, including a record of public meetings and discussions relating to the ordinance and a written statement of purpose for, and made a part of, the ordinance. The factual record should include two important components: first, the studies should indicate that there is a link between adult uses and the problems addressed by the study; and second, the study should indicate that the method chosen, whether dispersal or concentration, is likely to address those identified problems.

The second alternative is to borrow from the factual record of other cities who have enacted similar legislation. While the Supreme Court’s opinion in Renton teaches us that building an independent factual record is not necessary,180 be advised that language in Renton itself, and opinions from the Courts of Appeal subsequent to Renton, indicate clearly that a municipality’s failure to address the governmental interest issue can be fatal to the constitutionality of an ordinance. Therefore, if a municipality should choose to borrow from other cities’ experiences in building their factual record, the statement of purposes for the ordinance should clearly identify the finding of the municipality that there is a link or nexus between adult uses and certain secondary effects, the particular secondary effects of adult uses using minimum distance requirements from other uses such as residences, churches, schools and the like, as well as simultaneously concentrating those adult uses in industrial, light industrial or commercial zones.

180. Renton, 475 U.S. at 50-52. While the Court stated that it is not necessary for a municipality to conduct new studies and build an independent factual record, this is the case "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Id. at 51-52.
uses which the ordinance seeks to address, and a legislative finding that the ordinance in question in fact addresses those secondary effects. It is important to note that the situation of the borrowing municipality need not be identical to that of the municipality borrowed from, and the ordinances need not mirror one another. Courts have specifically rejected such challenges to findings of substantial governmental purpose; the fact that a municipality borrows its factual record from another city where the ordinances passed were not identical is irrelevant.

In addition to a statement of purpose which reflects the nexus between adult uses and their secondary effects, the factual record should also contain, to the extent practicable and feasible, some factual findings or record of presentations at public meetings which support the nexus between the secondary effects and the method chosen to combat those secondary effects. This additional information allows a court to determine that the legislative body understood the secondary effects and made a knowing and intelligent determination that the ordinance reasonably was believed to be a proper and effective method of combatting the secondary effects found. This suggestion becomes more difficult for those municipalities which choose to rely on the experiences and factual record of other cities. Under these circumstances, the borrowing municipality should obtain as complete a record as possible from the city from which they are borrowing. This should include, where possible, testimony or reports from urban planners, demographers, crime experts, traffic consultants, and experts in housing, real estate valuation, commercial development, and the like. Municipalities with more limited resources, or a desire to spend those resources in other areas, should not shy away from obtaining factual material from more than one municipality to buttress their factual record. Finally, in order to provide as complete a factual record as possible in anticipation of potential litigation, the borrowing municipality should place all the material relevant to its ordinance in the official record prior to passage of the ordinance.

These steps should minimize the possibility that a reviewing court will find a failure to provide adequate record support for a finding that the ordinance serves an important or substantial governmental interest.

181. Id. at 52.
B. ADULT USE ZONING ORDINANCE MUST BE NARROWLY TAILORED

Under both the tests set forth in O'Brien and Heffron, the governmental restriction must be tailored to accomplish that goal. Under the fourth prong of the O'Brien test, "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Under Heffron, the restrictions must be narrowly tailored. Under either standard, the lesson is the same for municipalities — the definitional portion of any zoning ordinance which restricts adult uses must be carefully crafted to avoid the fatal flaws of being either vague or overbroad.

Like it or not, adult uses are protected under the First Amendment. Ordinances which attempt to eliminate those uses, or preclude their entry into the community, will ultimately fail as unconstitutional. In keeping with the mandates of the First Amendment, an ordinance must define critical terms with some precision. Under Renton, the Supreme Court offered a simple and practical test for determining whether an ordinance is narrowly tailored. There, the ordinance was determined to be narrowly tailored because it affected "only that category of theatres shown to produce the unwanted secondary effects . . . ." This requirement actually contains two components: first, the definitions must allow those persons affected by the ordinance to have notice that they are or may be in violation of the ordinance; and second, the definitions must not be so broad as to include uses not shown to have produced the unwanted secondary effects.

The definitions contained in the ordinance must be reasonably precise. Definitions which are imprecise and cause confusion among those affected by the ordinance will likely lead to litigation and more likely fail judicial scrutiny. For example, in Purple Onion, Inc. v. Jackson, the court noted the definitions of the terms: "adult book store." "adult book store"
effects, municipalities are encouraged to refer to, and possibly borrow from, definitions which have already withstood constitutional scrutiny. For purposes of avoiding unwanted secondary effects, these definitions of adult uses and establishments are more than sufficient to accomplish those govern-

which are distinguished or characterized by their emphasis on matters depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", or an establishment with a segment or section devoted to the sale or display of such material . . . .

Purple Onion, 511 F. Supp. at 1211 (quoting ATLANTA ZONING ORDINANCE § 16-1003(56)).

189. Under the ordinance, an "adult theater" is defined as a building or structure which is used for the viewing of performances or activities by others, whether such performances or activities by others [sic], whether such performances are in the form of live shows, motion pictures, slide shows or other forms of photographic or visual display, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", as heretofore defined, or an establishment with a segment or section devoted to the sale or display of such material.

Id. (quoting ATLANTA ZONING ORDINANCE § 16-1003(58)).

190. An "adult entertainment establishment" is defined as any building or structure which contains, or is used for commercial entertainment where the patron directly or indirectly is charged a fee to engage in personal contact with or to allow personal contact by, employees, devices or equipment or by personnel provided by the establishment or views a series of dance routines, strip performances or other gyrational choreography provided by the establishment which appeals to the prurient interest of the patron, to include, but not to be limited to bath houses, massage parlors, and related or similar activities.

Id. (quoting ATLANTA ZONING ORDINANCE § 16-1003(57)).

191. Id. at 1220 n.20.
192. Id. at 1220-21.
mental goals. Even using those court-tested ordinances and definitions as a starting point, municipalities will find themselves in a better position by merely altering and amending those ordinances and definitions to suit their particular needs. As illustrated by the Atlanta experience, care should be taken to insure that the definitions are not overinclusive, potentially covering more businesses and situations than intended. This lack of care and foresight not only invites litigation from owners/operators of adult uses, but also provides the courts with a clear rationale for striking an ordinance.

C. AN ADULT USE ORDINANCE MUST LEAVE OPEN REASONABLE ALTERNATIVE CHANNELS OF COMMUNICATION FOR THE PROTECTED FIRST AMENDMENT EXPRESSION

A cursory survey of cases dealing with this prong of the Heffron test suggests that there is no mathematical formula which can be adopted or used by a municipality for determining in advance whether the amount of space available will satisfy constitutional standards. Following Renton, however, it appears that the Supreme Court has opened the door for a more relaxed view toward this requirement.

In Renton, the Supreme Court reiterated the mandate that an ordinance leave open reasonable alternative avenues of communication. This requirement generally is satisfied through the utilization of land use inventories which determine exactly how many sites will be available once the ordinance becomes effective. Where lower courts had previously looked at the commercial availability or the economic viability of the sites which remained to determine whether they were truly “available” for constitutional purposes, the Court in Renton stated that adult use owners must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. And although we have cautioned against the enactment of zoning regulations that have ‘the effect of suppressing, or greatly restricting access to, lawful speech,’ , we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of

193. Additionally, if the definitions in a dispersal ordinance are vague, it makes it virtually impossible to determine where alternative sites exist. In so limiting the potential alternative sites, the courts are more likely to find that the ordinance closes reasonable alternative channels of communication.

194. See supra notes 158-75 and accompanying text.

speech-related businesses for that matter, will be able to obtain sites at bargain prices.\textsuperscript{196}

The effect of the Court's pronouncement is not entirely clear at this time. What is clear is that the Court has opened up the door for the lower federal courts to make a subjective determination about the viability of available sites for adult uses, and that this subjective determination does readily allow an owner/operator of an adult use, or a municipality contemplating enactment of an adult use zoning ordinance, to determine in advance what number of sites, or what amount of land, will pass constitutional scrutiny.

As previously discussed, the court in \textit{Purple Onion} struck down an ordinance which provided acceptable locations on ten sites, where over forty existing adult uses were already located in Atlanta;\textsuperscript{197} the court in \textit{North Street Book Shoppe} struck down an ordinance which provided for two sites, where there was only one existing use;\textsuperscript{198} the Supreme Court in \textit{Renton} upheld an ordinance which provided for at least 520 acres, or something in excess of 5 percent of the city's land space, but where there were no existing adult uses;\textsuperscript{199} the court in \textit{S & G News, Inc. v. City of Southgate}\textsuperscript{200} upheld the constitutionality of an ordinance which restricted adult uses to only 2.3 percent of the county's land area; in \textit{Dumas v. City of Dallas},\textsuperscript{201} the court upheld an ordinance which provided relocation possibilities in eight to ten percent of the city; and in \textit{Christy v. City of Ann Arbor}, the trial court upheld an ordinance which restricted adult uses to .23 percent of the city.\textsuperscript{202}

While no mathematical percentage will guarantee that an ordinance will be found constitutional or unconstitutional, there are some helpful hints which can be followed to increase the likelihood that an ordinance will be upheld. First, never allow less relocation sites than there are existing adult uses in the community. As seen in \textit{Purple Onion}, this is a relatively easy way to have an ordinance struck down

\textsuperscript{196} \textit{Id.} at 54 (quoting Young v. American Mini-Theatres, 427 U.S. 50, 71 n.35 (1976)).


\textsuperscript{199} \textit{City of Renton v. Playtime Theatres, Inc.}, 475 U.S. 41 (1986).


for failure to meet the fourth prong of the Heffron test. Second, make a factual record relating to the economic and political viability of siting adult uses in the areas designated for adult uses under the proposed ordinance. Employing a land use survey serves two important purposes. First, it allows the municipality to know in advance of passage (and litigation) that there are sites which are economically and politically viable for the relocation of sites. Since the courts will surely examine this issue, a pre-passage land use survey may help a municipality to amend its plans in order to provide adequate sites for relocation in areas which are suitable for those purposes. Second, the ability to graphically show owners and operators of adult uses exactly where the relocation sites are under the new ordinance, and buttress the municipality's position that the sites are viable, may enable the city to avoid litigation entirely.

CONCLUSION

Striking a balance between two well-established and often contradictory legal principles has proven a difficult and imprecise judicial exercise. While the courts have not provided definitive guidance on all the legal questions involved in such an exercise of local zoning power, municipalities desiring to combat the secondary effects of adult uses have received sufficient judicial direction to enable passage of such legislation which is relatively safe from judicial veto. Municipalities should take care to provide three essential elements in its legislation and accompanying record: (1) a legislative record sufficient to show a nexus between adult uses and particular secondary effects, and a legislative finding that the legislation address those secondary effects; (2) a definitional section which is neither vague nor overbroad; and (3) sufficient available land for the location and/or relocation of adult uses. No amount of careful planning and drafting can preclude the possibility of litigation; however, careful attention to these areas may help reduce legal challenges and dramatically improve chances that adult use legislation will be upheld.