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First Amendment and Land Use, in Recent Developments in Land Use, Planning, and Zoning

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V. First Amendment and Land Use[90]

A. *Introduction*

In the mid-1980s, the focus in this area of the law was on nuisance closures and license revocation actions affecting adult bookstores and other kinds of establishments where either obscenity or illicit sexual activities were taking place. In our last committee report focusing on the first amendment area[91] we reported on those areas of the law in light of the Supreme Court's decision in *Arcara v. Cloud Books, Inc.*[92] Since then, there has been one important Fifth Circuit decision, *FW/PBS Inc. v. City of Dallas*,[93] that the Supreme Court has agreed to review, with a decision expected in 1989.

There have been two recent important federal court decisions involving the zoning of religious institutions and religious uses, and a number of significant federal and state court decisions applying the Supreme Court's standards for assessing the constitutionality of sign regulations established in *Metromedia, Inc. v. City of San Diego*.[94] But, by far the most important decision in the last year in this area of land-use law was the Supreme Court's decision in *City of Lakewood v. Plain Dealer Publishing Co.*,[95] involving regulation of newspaper vending machines on public property.

B. *Regulation of Newsracks*

City of Lakewood v. Plain Dealer Publishing Co. is the first Supreme Court case to address municipal regulation of newsracks. Although the 4-3 decision[96] striking down the city's newsrack ordinance addresses some important issues, it leaves a great deal still to be decided.

Prior to 1983, the Cleveland suburb of Lakewood prohibited the placement of any privately owned structure on public property. After the *Plain Dealer* successfully challenged this prohibition in federal court,[97] the city adopted an ordinance that allowed newsracks to be located on public property in commercial districts, while still banning

90. This section is taken from the report of the First Amendment and Land Use Law Subcommittee, Professors Alan Weinstein, Touro University Law School, and Edward H. Ziegler, Jr., University of Denver School of Law, Co-Chairmen.

91. *See* 19 URB. LAW. 939–47 (1988).

92. 478 U.S. 697 (1986).

93. 837 F.2d 1298 (5th Cir. 1988), *cert. granted*, 109 S. Ct. 1309 (1989).

94. 453 U.S. 490 (1981).

95. _____ U.S. _____, 108 S. Ct. 2138 (1988).

96. Chief Justice Rehnquist and Justice Kennedy did not participate in the case.

97. The District Court for the Northern District of Ohio delayed entering a permanent injunction to give the city time to amend its ordinance.

them in residential districts. The ordinance gave the mayor the authority to grant or deny applications for annual newsrack permits. If the mayor denied an application, he was required to "stat[e] the reasons for such denial."[98] If the mayor granted an application, the city issued an annual permit subject to several terms and conditions, including approval of the newsrack's design by the city's architectural review board; an agreement by the newsrack owner to indemnify the city against any liability arising from the newsrack, guaranteed by a $100,000 insurance policy; and such other terms and conditions deemed necessary and reasonable by the mayor.[99]

The *Plain Dealer* elected to challenge the ordinance on its face rather than seek a permit. The district court declared the ordinance constitutional in its entirety and entered judgment in the city's favor. The U.S. Court of Appeals for the Sixth Circuit reversed,[100] finding that the ordinance was unconstitutional for three reasons. First, it gave the mayor unbounded discretion to grant or deny a permit application and to place unlimited additional terms and conditions on any permit. Second, because the ordinance lacked any express standards governing newsrack design, the architectural review board too had unbounded discretion to deny applications. Third, the indemnity and insurance requirements violated the first amendment because no similar requirements were placed on owners of other structures on public property. Because it found that these three provisions were not severable, the court held the entire ordinance unconstitutional as applied to newsracks in commercial districts; however, the court decided that the absolute ban on newsracks in residential areas was both constitutional and severable.[101]

In his majority opinion, Justice Brennan, joined by Justices Marshall, Blackmun,and Scalia, first concluded that the *Plain Dealer* could facially challenge the ordinance. Brennan argued that where first amendment guarantees are involved, a licensing statute that allegedly gives a government official unbridled discretion over whether to permit or deny an expressive activity may be challenged facially by one who is subject to the law, without the necessity of first applying for and being denied a permit. This recognizes that such unbridled discretion can constitute a prior restraint on expression and may result in censorship. The prior restraint problem was particularly acute under this ordinance, Brennan

98. 108 S. Ct. at 2140.
99. *Id.*
100. Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139 (6th Cir. 1986).
101. This portion of the court's decision was not challenged.

noted, because it is directed specifically at expressive conduct—the circulation of newspapers—and, because permits must be sought annually, the licensing authority's permit decisions may be influenced by the views expressed in the newspapers during the previous year.[102]

Turning to the merits of the case, the Court readily found "those portions of the Lakewood ordinance giving the Mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable,' "[103] to be unconstitutional. The Court then remanded the case to the court of appeals to decide whether the provisions held unconstitutional could be severed.[104]

The dissenting members of the Court, Justices White, Stevens, and O'Connor, took strong issue with the majority's allowing the *Plain Dealer* to challenge the newsrack ordinance on its face.[105] The critical difference between the majority and the dissenters was whether the ordinance should be viewed as a regulation of newspaper circulation (the majority's view) or only as a regulation of the placement of newsracks on public property (the dissenters' view). Further, although the majority opinion declined to rule on whether newsracks could be banned from public property entirely, the dissenters stated they would not find such a ban unconstitutional, since it would leave newspaper publishers with ample alternative channels for newspaper circulation.

Unfortunately, the Supreme Court's ruling did little to resolve the significant issues raised by this case. First, the narrow holding that the Lakewood newsrack licensing scheme was invalid because it vested unbridled discretion in a government official to grant or deny licenses for conduct protected by the first amendment is not new or surprising.[106] Second, the majority's "liberal" ruling on the validity of facial challenges to newsrack ordinances must be viewed with great caution because the Court's 4-3 vote could swiftly change, given that the two members of the Court who did not participate in the decision were the Chief Justice and Justice Kennedy. Finally, the Court failed to reach any of the novel issues in the case, including whether newsracks could be

102. *Plain Dealer Publishing Co.*, 108 S. Ct. at 2143-50 (1988).
103. *Id.* at 2152.
104. *Id.*
105. Justice White's dissenting opinion begins "Today the majority takes an extraordinary doctrine, developed cautiously by this Court over the past fifty years, and applies it to a circumstance, and in a manner, that is without precedent. Because of this unwarranted expansion of our previous cases, I dissent." *Id.*
106. Lower federal courts have upheld newsrack ordinances that established neutral criteria to ensure that permitting decisions are not based on the content or viewpoint of the newspaper. *See, e.g.*, Jacobson v. Crivaro, 851 F.2d 1067 (8th Cir. 1988).

totally banned from public property[107] and whether the licensing fees and indemnity requirements in the ordinance could pass constitutional muster.

C. *Zoning of Religious Institutions*

Until 1983, litigation over zoning of religious institutions seemed confined to state courts;[108] however, that year, both the Sixth and Eleventh Circuit Courts of Appeal decided cases involving the conflict between zoning and religious institutions. As opposed to the state courts, which normally addressed this conflict by means of a due process analysis, the federal courts directly confronted the claim that zoning restrictions on religious institutions violated the free exercise clause of the first amendment.

In both *Lakewood, Ohio, Congregation of Jehovah's Witnesses v. City of Lakewood*,[109] and *Grosz v. City of Miami Beach*,[110] the courts upheld zoning regulations against first amendment challenges, using different variations of a balancing test that weighed the competing interests of municipal regulation and freedom of religion. In *Lakewood*, the court used a two-step inquiry, first evaluating the nature of the religious observance at stake and then the nature of the burden which the municipality sought to place on the religious observance.[111] The *Grosz* court em-

107. Several state and federal courts have struck down ordinances that had the effect of totally prohibiting the placement of newsracks. *See, e.g.*, Chicago Newspaper Publishers Ass'n v. City of Wheaton, 697 F. Supp. 1464 (N.D. Ill. 1988) (prohibition of newsracks in residential area unconstitutional).

108. The majority of state courts will strike down zoning regulations that bar religious institutions from residential areas, relying on a due process analysis which finds that such restrictions do not advance the public good. In these jurisdictions, restrictions on the location of religious institutions cannot be justified by such normal zoning concerns as potential traffic hazards, effect on property values, noise and decreased enjoyment of neighboring properties. *See, e.g.*, Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 379 N.Y.2d 283, 342 N.E.2d 534 (1975), *cert. denied*, 426 U.S. 950 (1976). A minority of state courts allow municipalities the right to exclude religious institutions from residential areas, so long as they are not totally excluded from the community. *See, e.g.*, Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (1949). Recently, however, the New York Court of Appeals, the leading voice for the majority position, ruled that its former presumption that religious uses are always in furtherance of the public welfare may now be rebutted by a showing that the proposed use would actually have a negative impact on the community. Cornell University v. Bagnardi, 68 N.Y.2d 583, 503 N.E.2d 509 (1986).

109. 699 F.2d 303 (6th Cir. 1983).

110. 721 F.2d 729 (11th Cir. 1983).

111. The court found that the only burden on religious observance posed by the ordinance was financial in nature: the congregation could worship as it pleased, it was merely restricted in the choice of a location for its sanctuary to an area comprising approximately 10 percent of the city. The court distinguished this minor burden from an ordinance that forced the congregation to forego religious observance through financial

ployed a more sophisticated analysis, considering two threshold tests before it undertook to balance the competing interests of municipal regulation and freedom of religion.

The first of the *Grosz* threshold tests inquires whether the government seeks to regulate religious beliefs or opinions rather than merely restricting religious conduct. While the government may never regulate religious beliefs, the first amendment does not absolutely prohibit government regulation of religious conduct. The second test requires that the challenged ordinance have both a secular purpose and a secular effect. Government action may not have a sectarian purpose; regulation based upon disagreement with religious tenets or practices or aimed at impeding religion is unconstitutional. Similarly, if government action has the effect of negatively influencing the pursuit of religious activity or the expression of religious belief it fails to pass constitutional muster. Only if a government regulation passes both of these threshold tests, should a court balance the burden on the city's legitimate interests in maintaining its zoning objectives against the burden on a plaintiff's right to free exercise of his religion.[112]

Subsequent federal court cases have adopted either the *Grosz* or *Lakewood* analysis, and generally upheld municipal ordinances against first amendment challenges.[113] In two recent cases, however, federal courts have struck down zoning ordinances that intruded too deeply on the right to the free exercise of religion guaranteed by the first amendment.

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or criminal penalties or by placing burdensome taxes on the exercise of religious beliefs. Since the court found no restriction of the first amendment right to freedom of religion, it determined that the municipality was free to regulate the location of churches in a reasonable manner so as to maintain the residential environment of certain districts.

112. In *Grosz*, an elderly Orthodox Jewish rabbi had converted his home's garage into a sanctuary for religious worship. Although the city stipulated that it would not enforce its zoning laws if no more than ten persons gathered for worship in the rabbi's home, on occasion, as many as fifty congregants attended religious services in the garage. At least 50 percent of the city's residential zones permitted religious institutions, including an area four blocks from the rabbi's home. On these facts, the court found that the ordinance passed both threshold tests and proceeded to balance the burden on the city's legitimate interest in maintaining its zoning objectives against the burden on the plaintiffs' right to free exercise of their religion. The court found the city's interest in maintaining certain wholly residential districts free of the noise and crowds associated with religious services to be substantial. Although the zoning law imposed some burden on freedom of religion, since more than half of the city was available for religious institutions, the regulation was valid.

113. *See* Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988) (municipality which barred construction of church in agricultural zone either as "of right" or by special permit found to have acted reasonably); First Assembly of God v. City of Alexandria, 739 F.2d 942 (4th Cir. 1984) (zoning ordinance which required a church to comply with fencing, shrubbery and enrollment restrictions held not to violate either the first or fourteenth amendments because the public welfare was the motive

In *Islamic Center of Mississippi, Inc. v. City of Starkville*,[114] the Fifth Circuit Court of Appeals held that the Board of Aldermen of the City of Starkville violated the free exercise clause when it denied a special exception to a Muslim religious institution. In *Love Church v. City of Evanston*,[115] a federal district court held that a zoning ordinance requiring churches to obtain a special permit, in a zone where meeting halls, theatres, and schools were permitted uses, violated equal protection.[116]

Islamic Center is the first federal appellate decision to find a municipal zoning activity violative of the free exercise clause. Starkville, home of Mississippi State University, does not allow churches as a permitted use near the university campus, but the zoning ordinance provides that churches may be permitted as a special exception. In fact, there are no churches in any part of Starkville in which churches are permitted as of right. The city's twenty-five churches are all located in restricted areas, nine having obtained special exceptions while the other sixteen occupied their sites before the ordinance became effective.

In 1977, a group of Muslim university students began to search for a building they could use as a mosque. Because few of the Muslim students owned cars, they sought a site within walking distance of the campus. Over the next few years, the students proposed numerous sites to city planning officials, but were told in each case that the site was unsuitable. Finally, in 1983, the city planning commission recommended approval of a site, within two blocks of the campus, next door to an existing residence and worship center for a Pentecostal Christian denomination. Despite this recommendation, the Board of Aldermen voted unanimously to deny the required special exception because of purported concerns about traffic congestion and neighborhood safety. Ignoring the Board's denial, the students proceeded to renovate the property and began to use it as both a student residence and mosque. Approximately one year later, the city ordered the Islamic Center to stop holding worship services. The students then instituted this litigation.

behind the ordinance and the regulations imposed by the ordinance were reasonable); Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (enforcement of local occupancy and fire safety regulations upheld because such regulations do not contravene any tenet of religious belief but merely make the practice of one's religious beliefs more difficult).

114. 840 F.2d 293 (5th Cir. 1988).

115. 671 F. Supp. 515 (N.D. Ill. 1987).

116. *See also* Jehovah's Witnesses Assembly Halls of New Jersey, Inc. v. City of Jersey City, 597 F. Supp. 972 (D.N.J. 1984) (preliminarily injunction granted to allow initial repairs of theater to be used for religious worship where, although zoning ordinance prohibits religious uses in the particular commercial zone involved, use of the theater for religious worship would not have impacts any different from permitted use as a commercial theater).

The U.S. district court upheld the Board, but was reversed on appeal. The Fifth Circuit's opinion examined both the *Lakewood* and *Grosz* decisions in deciding that the Starkville ordinance, as applied, placed more than an incidental burden on the free exercise of religion because it had the effect of forcing the relatively impecunious students to establish their mosque at sites that were reasonably accessible only by automobile. The court also found that the city did not treat all religious institutions that applied for special exceptions alike and could advance no rational basis other than neighborhood opposition to show why the exception granted all other religious centers was denied the Islamic Center.[117] The court concluded that the Board of Aldermen had denied the Islamic Center a special exception for reasons other than considerations of traffic control and public safety and that it applied different standards to approving a mosque than it had adopted for Christian institutions. Moreover, the city failed to show the importance of its purpose for the denial or that it could be accomplished by means less burdensome to the Muslim students' exercise of their religious freedom. For these reasons, the court declared the ordinance unconstitutional as applied to the Islamic Center and enjoined the city from enforcing the ordinance.

Love Church[118] involved a congregation of about thirty young black people who meet in public halls and private homes on Sunday to conduct worship services. Since April 1986, the church had attempted to lease property for its Sunday services. The Evanston zoning ordinance does not permit churches as of right in any zoning district, but will allow them to locate in any residential or business-commercial district after obtaining a special use permit. The city normally takes four to six months after application to grant a permit. The church, claiming that no landlord would agree to a lease contingent on the church's obtaining a special permit, sought summary judgment against the city on the grounds that the ordinance violated the first amendment's establishment and free exercise clauses and the fourteenth amendment's due process and equal protection clauses.

Ruling on the church's motion for summary judgment, the district court held that the church's establishment clause claim failed because the city's special permit provision had the clearly secular purpose of in-

117. The Fifth Circuit cited City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), as support for the proposition that neighbors' negative attitudes or fears, unsubstantiated by factors properly cognizable in a zoning proceeding, are not a permissible basis for differentiating between religious institutions.

118. Love Church v. City of Evanston, 671 F. Supp. 508 (N.D. Ill. 1987).

suring that institutional uses were properly zoned; the free exercise claim failed because the burden this ordinance placed on the church was only financial;[119] but, the church's equal protection claim had merit because the ordinance required all churches to obtain special permits while other institutional uses were permitted as of right. The court then directed the city to respond to plaintiffs' motion for summary judgment on the equal protection issue.

In deciding the equal protection claim, the court first addressed the appropriate standard of review. At issue, of course, was whether the city had based its special exception requirement on the basis of religion—which would require that the city show a compelling state interest for the classification—or, purely on land-use concerns, requiring only a rational basis for the distinction. The city claimed that because numerous other uses faced the same special permit requirement as churches, the distinction was not based on religion but on purely secular purposes.[120] The court rejected this claim, arguing that when a law burdens a constitutionally protected interest, it is irrelevant that it also burdens interests and classes that are unprotected. The real test, the court said, was not which uses the city required to obtain special permits, but how Evanston treated uses "similarly situated" to churches.

Characterizing churches as primarily "assembly uses," the court found that secular assembly uses were not subjected to the same treatment as churches and the only distinguishable feature among these various assembly uses was the purpose and content of the assembly. The court concluded that Evanston's ordinance distinguished between religious assembly uses and secular assembly uses and thus the special permit requirement was a classification based on religion. The court then held that the city could not meet its burden of showing that the classification was narrowly tailored to achieve a compelling governmental interest. The court granted the church's motion for summary judgment and declared the special permit requirement, as applied to churches, unconstitutional as a violation of the equal protection clause.

D. *Regulation of Adult Businesses*

Between 1976 and 1986, the Supreme Court handed down three rulings on the constitutionality of zoning restrictions regulating the location or operation of sexually oriented "adult" businesses. Beginning with

119. Citing *Lakewood* and *Grosz*.

120. Included in the special permit requirement were, among others, nursing and retirement homes, hospitals, airports, cemeteries, and private clubs and lodges.

Young v. American Mini Theatres,[121] and then continuing with *Schad v. Borough of Mt. Ephraim*[122] and *City of Renton v. Playtime Theatres, Inc.*,[123] the Court established that municipalities could single-out adult businesses for special regulatory treatment in the form of time, place, and manner regulations that restricted the locations where such businesses could operate, so long as the municipality could show it had a substantial governmental interest in regulating such businesses and the regulations still allowed for reasonable alternative avenues of communication.[124]

In February 1989, the Court signaled its return to the subject of adult business regulation when it granted review in three consolidated cases that raise issues new to the Court in the adult business context. In the ruling below, *FW/PBS, Inc. v. City of Dallas*,[125] a divided Fifth Circuit Court of Appeals affirmed a district court's finding that the adult business zoning and licensing ordinance adopted by Dallas in 1986 was valid.[126]

Two judges found no constitutional problems with the ordinance.

121. 427 U.S. 50 (1976).
122. 452 U.S. 61 (1981).
123. 475 U.S. 41 (1986).
124. For a discussion of these rulings, *see* Weinstein, *The Renton Decision: A New Standard for Adult Business Regulation*, 32 WASH. U.J. URB. & CONTEMP. L. 91 (1987). The Supreme Court has also addressed adult entertainment regulation outside the zoning context in cases involving either the application of criminal nuisance statutes to shutdown adult businesses that were the site of criminal activity or state liquor regulations that restricted the presentation of adult entertainment, normally topless or nude dancing, in establishments that serve alcoholic beverages. In Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), the Court upheld the application of New York's one year nuisance closure statute to shut down an adult bookstore that was the site of illicit sexual activities. For a discussion of this case, *see* Ziegler, *Sexually Oriented Businesses, the First Amendment, and the Supreme Court's 1985-86 Term: The New Prerogatives of Local Community Control*, 32 WASH. U.J. URB. & CONTEMP. L. 123, 138-146 (1987). In a line of cases beginning with California v. LaRue, 409 U.S. 109 (1972), the Supreme Court has recognized that when adult entertainment takes place in establishments that serve alcoholic beverages, the added presumption in favor of the validity of state regulation that the twenty-first amendment (repeal of prohibition) confers requires that the regulation be upheld so long as it is not an irrational exercise of the police power. *See* City of Newport v. Iacobucci, 479 U.S. 92 (1986); New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).
125. 837 F.2d at 1298.
126. *See* Dumas v. City of Dallas, 648 F. Supp. 1061 (N.D.Tex. 1986). The Dallas adult business zoning and licensing ordinance includes, among others, the following provisions: (1) a business must be at least 1,000 feet from another adult business or a church, school, residential area or park; (2) adult businesses must obtain a license issued by the chief of police and permit inspection of their premises; (3) a license is not available to persons formerly convicted of specified crimes, such as promotion of prostitution; (4) viewing rooms in adult theaters must be configured to allow visual surveillance by management; and (5) rental of a motel room for less than ten hours at a time is prohibited.

They viewed the general licensing scheme in the ordinance as regulating only the secondary effects of adult businesses and found that these provisions met the standards applicable to time, place and manner restrictions as announced in *Renton*. The locational restrictions were also found to meet the adequate alternative locations test announced in *Renton*. They found the other constitutional attacks on the ordinance equally unconvincing.

As a threshold matter, they noted that the *Renton* standard applied to the details of the licensing scheme, arguing that the very title of the "time, place and *manner*" doctrine suggested that the analysis could not be limited to locational restrictions (emphasis added). On that basis, they held that the open viewing booth requirement was a valid regulation of "secondary effects" because the city could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity and upheld the ten hour minimum rental period for motel rooms because the city could reasonably find that short rental periods facilitate prostitution.

The provision that denies licenses to persons convicted of certain crimes was more troubling since it did not fit neatly into the previous *Renton*-based approach focused on regulating the manner in which an adult business was conducted and they debated whether a strict scrutiny standard was required; however, while claiming that the provision could withstand strict scrutiny, they declined to impose that standard on the city, ruling that only a substantial relationship need be shown between the conviction and the evil to be prevented. Since, in their view, denial of a license results only from offenses that are related to the criminal activity associated with adult businesses, they found the relationship between the offense and the evil to be direct and substantial. Finally, they found that the ordinance did not give overbroad discretion to the Chief of Police because the ordinance contained sufficiently objective standards to bound his exercise of discretion and they upheld the inspection provisions against first and fourth amendment challenges.

Judge Thornberry concurred with his colleagues that the ordinance's locational restrictions and regulation of businesses whose activities were not speech-related, such as adult motels, were valid, but dissented with respect to regulation of those businesses whose activities directly implicate the first amendment. He took sharp issue with the argument that *Renton* supports the view that time, place, and manner restrictions can be applied to licensing as well as zoning restrictions on adult businesses. In his view, licensing schemes raise serious prior restraint problems because, while zoning restrictions can still leave open alternative

avenues of communication, the denial of a license is a complete ban on speech. He also took exception to the majority's analysis upholding the provisions denying a license to persons convicted of certain crimes, contending that strict scrutiny was required and that some of the chosen licensing provisions could not withstand that scrutiny.

There have been numerous state and lower federal court decisions over the past three years involving the validity of adult business regulations under the Supreme Court's decision in *Renton*. A number of these cases have explored *Renton*'s requirement that there be reasonable alternative locations available for adult businesses. Courts have upheld ordinances that restricted adult businesses solely to industrially zoned areas[127] or set-aside areas comprising as little as 2.3 percent of the municipality's land area for adult businesses.[128] By contrast, other courts have struck down ordinances that left only 0.23 and 1.4 percent of the municipal land area available for adult businesses.[129] These decisions should not be read as imputing a talismanic quality to any given percentage as an arbiter of the validity of locational restrictions under *Renton*; rather, in each case, the court inquired into the effect the restrictions would have on existing businesses that would be forced to relocate and on the availability of additional sites for new adult businesses.

Renton also held that municipalities need not produce their own evidentiary findings on the secondary effects of adult businesses, but could rely on the findings of other cities. Applying this standard, the Eighth Circuit upheld an ordinance whose "findings" consisted of the "personal observations" of a member of the city's governing board who was familiar with the *Young* decision,[130] but the Sixth Circuit struck down an ordinance where, after a careful review of the record, the court could find no evidence of either a governmental purpose or findings to justify imposition of the ordinance.[131]

127. *See* Cook County v. Renaissance Arcade and Bookstore, 122 Ill. 2d 123, 522 N.E.2d 73 (1988) (the court found that the ordinance established approximately seventy-eight industrially zoned areas, located throughout the county and ranging in size from several acres up to 100 acres, in which adult businesses could locate as a matter of right); Town of Islip v. Caviglia, 532 N.Y.S.2d 783 (2d Dept. 1988), *aff'd*, 73 N.Y.2d 544, 540 N.E.2d 215 (1989).

128. *See* S & G News, Inc. v. City of Southgate, 638 F. Supp. 1060 (E.D. Mich. 1986) (2.3 percent); Dumas v. City of Dallas, 648 F. Supp. at 1061, *aff'd sub nom.*, FW/PBS, Inc. v. Dallas, 837 F.2d 1298 (5th Cir. 1988) (8 to 10 percent).

129. *See* Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988) (1.4 percent); Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987) (0.23 percent).

130. *See* Thames Enterprises, Inc. v. City of St. Louis, 851 F.2d 199 (8th Cir. 1988) (court found that the personal observations and judgment of a legislator can have substantial weight).

131. *See Christy*, 824 F.2d at 489.

Finally, in *Tollis, Inc. v. San Bernardino County*,[132] the court struck down an ordinance that was applied to make a theater an adult-oriented business on the basis of a single showing of an adult motion picture. The court found that the municipality could not demonstrate how a single showing of an adult movie would have any harmful secondary effect on the community.

E. *Local Regulation of Signs and Billboards*

Though the messages on signs or billboards, whether commercial or noncommercial in content, are forms of speech protected by the first amendment, the Supreme Court generally has sanctioned local regulation of these land uses. Standards for assessing the constitutionality of sign restrictions are set out in the Supreme Court's opinions in *Metromedia, Inc. v. City of San Diego*[133] and *Members of City Council v. Taxpayers for Vincent*.[134] Content-neutral, and reasonable time, place, and manner restrictions are permissible. For regulation to be valid it must directly further a sufficiently substantial governmental objective unrelated to the suppression of speech and be no more restrictive than necessary to achieve the governmental objective. In applying this balancing test, a court also may consider whether the impact of the regulation leaves open ample alternative channels of communication for the expression. Generally, courts in recent years in applying these standards for validity have upheld a variety of types of local regulation of signs and billboards, including total bans on off-site commercial signs, based on the governmental objectives of traffic safety and aesthetics.[135]

However, under the standards in *Metromedia*, an ordinance is invalid if it imposes greater restrictions on noncommercial (political or ideological) signs than on commercial signs or regulates noncommercial signs based on their content. These standards for validity have been applied in a number of recent court decisions holding sign restrictions unconstitutional. Ordinances granting commercial signs more favorable treatment than noncommercial signs, such as allowing only on-site commercial signs, continue to be struck down.[136] Similarly, content-based ordinances, allowing some but not other noncommercial signs,

132. 827 F.2d 1329 (9th Cir. 1987).
133. 453 U.S. 490 (1981).
134. 466 U.S. 789 (1984).
135. *See* Ziegler, *Local Control of Signs and Billboards: An Analysis of Recent Regulatory Efforts*, 8 ZONING & PLAN. L. REP. 161 (1985).
136. *E.g.*, Tauber v. Town of Longmeadow, 695 F. Supp. 1358 (D. Mass. 1988); Town of Carmel v. Suburban Outdoor Advertising Co., Inc., 514 N.Y.S.2d 387 (1987).

continue to be struck down since the first amendment clearly forbids the selective prohibition of protected noncommercial speech based on its content.[137]

The invalidity of sign ordinances that require an examination of the content of noncommercial messages along with the practical benefits in effective enforcement suggest both legal and practical reasons for utilization of truly content-neutral sign regulations, including the absence of a distinction between commercial and noncommercial signs.[138] Although the issue is not clearly settled, recent court decisions have upheld the constitutionality of ordinances that require that both noncommercial and commercial messages on signs in certain districts relate to on-site activities where other political signs are allowed in a community. These cases in effect sanction truly content-neutral restrictions for on-premises signs in certain districts where adequate alternative methods of communication are left open within a community.[139]

Also, in a recent case involving a local regulation affecting commercial speech that was not content-neutral, the Washington Court of Appeals upheld a prohibition on "sexually explicit" outdoor advertising as applied to an adult theater finding that the restriction would serve the governmental objective of mitigating the negative impact of the location of the adult theater on the surrounding area.[140]

Under the standards in *Metromedia*, recent court decisions have upheld the constitutionality of regulations banning all off-site commercial signs, banning all off-site billboards in certain areas, and prohibiting the construction of any new off-premises outdoor advertising structure.[141] However, in the recent case, *Bell v. Township of Stafford*,[142] the Supreme Court of New Jersey held unconstitutional a local ordinance totally prohibiting all off-premises advertising signs, including noncommercial signs, within the municipality. Following earlier decisions, the court held that a total municipal-wide ban on all off-premises signs dras-

137. *E.g.*, National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988); Adams Outdoor Advertising v. Newport News, 236 Va. 370, 373 S.E.2d 917 (1988).

138. *See* Kelly & Raso, *The Case for Content-Neutral Sign Regulations*, 40 LAND USE L. & ZONING DIG. 3 (1988).

139. *See* Rzadkowolski v. Village of Lake Orion, 845 F.2d 653, 655 (6th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987). *But see National Advertising Co.*, 861 F.2d at 246 (suggesting that limiting noncommercial signs in certain areas to on-premises activities would be unconstitutional).

140. City of Pasco v. Rhine, 51 Wash. App. 354, 753 P.2d 993 (1988).

141. *See Naegele Outdoor Advertising, Inc.*, 844 F.2d at 174; *Georgia Outdoor Advertising*, 873 F.2d at 43; Burns v. Barrett, 41 Conn. Supp. 66, 550 A.2d 23 (Conn. Super. 1988).

142. 110 N.J. 384, 541 A.2d 692 (1988).

tically encroached on freedom of speech and expression and that a city's burden in justifying such a ban was particularly strenuous. The New Jersey court found that the city had not shown that the total ban was the least restrictive means available to promote traffic safety and aesthetics and that, in any case, there was no adequate showing by the city that alternative means of communication of noncommercial messages were left open by the ordinance.

Since the *Metromedia* decision, regulation banning portable signs but allowing permanent or free-standing signs in the same area has in some cases been upheld by courts.[143] However, other courts have found no reasonable basis for such a distinction based on aesthetics or traffic safety, where free-standing permanent signs are allowed.[144] Two recent federal court decisions have upheld total bans on portable signs displaying commercial or noncommercial messages.[145] Both courts held that great deference should be shown to a local governmental body's decision that such a ban would further the city's interest in curing aesthetic blight.

Recent court decisions also have dealt with the "taking" issue where ordinances require the amortization of nonconforming signs. While earlier cases have held that this issue requires an ad hoc factual inquiry into the economic impact of regulation on a plaintiff, a recent case, *Naegele Outdoor Advertising, Inc.*,[146] discusses in some detail specific factors to be considered at an evidentiary hearing held to resolve this complex issue. Generally, this decision strongly favors the constitutionality of amortization provisions.[147]

VI. Federal Land-Use Policy Developments[148]

Nineteen eighty-eight was especially a year of transition in the field of federal policies and programs affecting land use. A number of significant bills were introduced but not enacted. Yet the course of their consideration portends that many if not all of them will be enacted in some

143. *See, e.g.*, Rent-A-Sign v. City of Rockford, 85 Ill. App. 3d 453, 406 N.E. 2d 943 (1980).

144. *See, e.g.*, Dills v. Cobb County, 593 F. Supp. 170 (N.D. Ga. 1984).

145. Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 707 (1988); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11 Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988).

146. 844 F.2d at 176.

147. For a recent court decision finding an unconstitutional "taking" of property as a result of a four-year sign amortization period based on the economic impact of the regulation, *see Georgia Outdoor Advertising*, 690 F. Supp. at 452.

148. This section is based upon the annual report of the Federal Land Use Policy Subcommittee, Michael Mantell, Chairman.