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Alan C. Weinstein
Cleveland State University, a.weinstein@csuohio.edu

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Recent Developments in Land Use, Planning and Zoning Law

Zoning Restrictions on Location of Adult Businesses

Alan C. Weinstein

Chair, Land Use and the First Amendment Subcommittee;
Associate Professor & Director, Law & Public Policy Program,
Cleveland-Marshall College of Law, Cleveland State University;
M.C.P., Massachusetts Institute of Technology, 1979;
J.D., University of California-Berkeley, 1977;
B.A., University of Pennsylvania, 1967.

THIS YEAR'S REPORT CONCENTRATES on recent legal developments concerning regulation of the location of "adult entertainment businesses." Such regulations raise serious constitutional issues because the First Amendment's guarantee of freedom of expression extends to non-obscene sexually oriented media.[1] The U.S. Supreme Court, however, has established that local government may single out adult businesses for special regulatory treatment in the form of locational restrictions if the local government can show a substantial public interest in regulating such businesses unrelated to the suppression of speech and if the regulations allow for "reasonable alternative avenues of communication," which essentially translates into a reasonable number of alternative locations.[2] An ordinance will be struck down, however, when government officials attempt to regulate because they object to the sexually explicit messages conveyed by adult businesses or seek to exclude, or severely restrict, adult businesses through an outright ban or excessive locational requirements.[3]

1. The importance of these issues can be seen in the fact that between 1976 and 1991 the U.S. Supreme Court decided five cases challenging the constitutionality of state or local regulation of adult businesses, while state and lower federal courts have ruled on hundreds of such challenges over the past two decades. *See* Barnes v. Glen Theatres, Inc., 501 U.S. 560 (1991), FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976).

2. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), and Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976).

3. *See, e.g,* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (striking down ban on all live entertainment); Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) (requiring at least thirty of thirty-six adult businesses to relocate to 0.54 percent of the total land area of the city).

I. The Ongoing Search for a General Standard

Most recent decisions approach the "reasonable alternative avenues of communication" issue by asking whether there are an "adequate" number of "potential sites" for adult businesses within the "relevant local real estate market." As currently defined, this standard allows consideration of economic factors to define the "relevant real estate market" but bars consideration of "commercial viability" for particular sites that are found to be within the relevant market.[4] This definition affords local government ample opportunity to impose significant locational restrictions on adult businesses to avoid undesirable secondary effects, but prevents local government from effectively banning such businesses by limiting them either/both to an insufficient number of locations to meet the local demand for adult entertainment and/or to locations that present insuperable physical, legal, or economic barriers to development or operation.

Recent cases show that courts have applied this general standard somewhat differently in regard to the choice of a "yardstick" with which to determine whether the regulation meets the constitutional test. As stated in one case,

> Courts have looked to a variety of factors in assessing the sufficiency of available sites, including "the percentage of land theoretically available to adult businesses, the number of sites potentially available in relation to the population of the city, the number of sites compared with the existing number of adult businesses, or the number of businesses desiring to offer adult entertainment."[5]

The "percentage of land area" test derives from the *Renton* case, where the U.S. Supreme Court found that allowing 5 percent of the city's total land area for adult businesses was adequate.[6] Thus, for example, in *Z.J. Gifts D-2, L.L.C. v. City of Aurora,*[7] the Tenth Circuit upheld an ordinance because "[s]exually oriented businesses may locate within [10.9 percent of the city's area] . . . [which is] more land on which to relocate than was found to be adequate in *Renton* and its progeny."[8] The problem with this "percentage" approach is that it fails to inquire deeply enough into the factual setting for a given community. Percentage of land area is a meaningless number unless it is scrutinized within the context of the adult use ordinance and the number of adult businesses that are reasonably anticipated to require locations. While 5

4. *See, e.g.,* Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993).
5. Diamond v. City of Taft, 29 F. Supp. 2d 633, 645 (E.D. Cal. 1998).
6. 475 U.S. at 53–54.
7. 136 F.3d 683 (10th Cir. 1998).
8. *Id.* at 688.

percent may be adequate for suburban Renton, Washington—where, at most, only one existing adult business would have to relocate—that same percentage might be inadequate for an urban community where a relatively large number of adult businesses would be required to relocate. Conversely, a very small community with no existing businesses may only require a significantly smaller percentage.[9]

The "number of sites potentially available in relation to the population of the city" approach is illustrated by *University Books and Videos, Inc. v. Metropolitan Dade County.*[10] There, in ruling on a motion for a preliminary injunction, the court compared the sites/population ratio yielded by the ordinance in question (one site per 111,860 persons) with those from several cases involving other Florida jurisdictions—which ranged from a low of one per 4,091 for Boynton Beach to a high of one per 38,642 persons for Broward County—and found the ordinance was likely to be declared unconstitutional.[11] This approach is problematic for the same reason as the "percentage of area" approach: it fails to inquire sufficiently into the specific situation in the jurisdiction in question. The fact that a site/population ratio in a particular jurisdiction is high or low in comparison to other jurisdictions means little in itself. For example, a suburban community (population 60,000) with one current adult business and an "available" site for one additional adult business would, by the foregoing analysis, have a relatively high ratio of one site per 30,000 persons, but this by itself is meaningless absent some indication that potential adult businesses are unable to find "available" sites. Moreover, there is no consistency in the ratios for decided cases. For example, while in *Centerfold Club, Inc. v. City of St. Petersburg,*[12] a Florida federal district court struck down an ordinance yielding a ratio of one site for every 12,526 residents, a different Florida federal district court upheld an ordinance more than three times as restrictive (one site for every 38,462 residents).[13]

In contrast, "the number of sites compared with the existing number of adult businesses" standard is clearly meaningful, since an ordinance does not provide an "adequate" number of sites if existing businesses that are required to relocate cannot find available sites. Thus, courts

9. *See, e.g.,* Diamond v. City of Taft, 29 F. Supp. 2d 633 (E.D. Cal. 1998).
10. 33 F. Supp. 2d 1364 (S.D. Fla. 1999).
11. *Id.* at 1372–73.
12. 969 F. Supp. 1288 (M.D. Fla. 1997).
13. *See* International Eateries of America, Inc. v. Broward County, 726 F. Supp. 1568 (S.D. Fla. 1989), *aff'd,* 941 F.2d 1157 (11th Cir. 1991).

will strike down ordinances that provide fewer sites than are needed for relocation and uphold ordinances that provide an adequate number.[14]

Finally, "the number of businesses desiring to offer adult entertainment" standard may or may not be useful depending on how it is applied by the court. If the court engages in nothing more than speculation about the "number of businesses," then the standard is meaningless. On the other hand, the standard can be meaningful if the court requires those challenging the ordinance to provide evidence about potential businesses that can be examined and weighed by the trier of fact.

The bottom line is that there is no one measurement, ratio, or approach that will yield a "magic number" defining how many sites are needed for an adult businesses ordinance to be declared constitutional. The "adequate alternative avenues of communication" standard is extremely fact-dependent, and the number of sites needed to satisfy the standard may vary quite dramatically from community to community.

II. Other Locational Issues

A. *Statewide Zoning of Adult Businesses in New Jersey*

In *Schad v. Borough of Mount Ephraim,*[15] the U.S. Supreme Court ruled that a New Jersey community could not justify its exclusion of adult entertainment businesses by contending that access to such entertainment was readily available in neighboring communities. The Court speculated, however, that if there had been some form of county zoning in place, then it might be constitutional to allow adult entertainment in "only selected areas of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim."[16]

Eighteen years later, the Court's speculation on the relationship between extraterritorial zoning and zoning of adult businesses has become reality. In *Township of Saddle Brook v. A.B. Family Center, Inc.*,[17] the New Jersey Supreme Court ruled that the constitutionality of a state statute[18] that imposed locational restrictions on adult businesses need not be determined solely by reference to the boundaries of the munici-

14. *Compare* Levi v. City of Ontario, 44 F. Supp. 2d 1042 (C.D. Cal. 1999) (striking down an ordinance because it provided only one site for relocating two businesses) *with* Lim v. City of Long Beach, 12 F. Supp. 2d 1050 (C.D. Cal. 1998) (upholding ordinance creating 109 sites, which could accommodate up to twenty-seven businesses simultaneously, where no more than five businesses would be required to relocate).

15. 452 U.S. 61 (1981).

16. *Id.* at 76.

17. 722 A.2d 530 (N.J. 1999).

18. N.J. STAT. ANN. § 2C:34–7 (West 1991).

pality in which the business challenging the restriction seeks to locate. In this case, the plaintiff business argued that the statute was unconstitutional because there were no sites in the township that met the statute's locational criteria.[19] Citing *Schad,* the New Jersey Supreme Court remanded the matter to a lower court for determination of whether adequate alternative sites are available in the relevant market area, defined as "areas located in other municipalities 'within reasonable proximity to the Saddle Brook location.' "[20] The court instructed the lower court to examine both "market" (the regional supply and distribution of customers for and providers of adult entertainment) and regulatory (local zoning codes) factors in determining the regional availability of adult entertainment.[21]

B. *"Natural Barriers"*

In *Restaurant Row Associates v. Horry County,*[22] the South Carolina Supreme Court, *inter alia,* rejected an adult business owner's claim that the Atlantic Intracoastal Waterway served as a "natural barrier" that insulated properties from the "secondary effects" of the adult business. The business owner claimed that because of this "natural barrier," he should not be required to meet the ordinance's distancing requirements since their purpose—protecting properties from negative secondary effects—was adequately served by the waterway.[23] The court rejected the claim, noting that the waterway was currently served by a ferry and would soon be crossed by a bridge near the adult business.[24] This ruling is in line with a similar rejection of the "natural barriers" theory by the Ninth Circuit.[25]

19. 722 A.2d at 532.
20. *Id.* at 535.
21. *Id.* at 535–36.
22. 516 S.E.2d 442 (S.C. 1999).
23. *Id.* at 448.
24. *Id.* at 448–49.
25. *See* Vicary v. City of Corona, 119 F.3d 8, 1997 WL 406768 (9th Cir. 1997) (unpublished decision), *overturning* Vicary v. City of Corona, 935 F. Supp. 1083 (C.D. Cal. 1996).