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# THE CONFLICT BETWEEN THE FIRST AMENDMENT AND ORDINANCES REGULATING ADULT ESTABLISHMENTS

## I. INTRODUCTION

Governmental units long have had the power to regulate the use of land located within their borders.<sup>1</sup> A dilemma arises, however, when governmental land use regulations conflict with protected first amendment rights.<sup>2</sup> Municipal regulation of adult entertainment facilities<sup>3</sup> is an example of such a conflict. This Recent Development will examine case law involving clashes between the first amendment<sup>4</sup> and governmental regulation of adult establishments.

## II. GUIDANCE BY THE SUPREME COURT

Prior restraints on freedom of expression are discouraged by the Constitution.<sup>5</sup> Any system of prior restraints is automatically suspect, and there is a heavy presumption against its constitutional validity.<sup>6</sup> Although obscenity is not constitutionally-protected speech,<sup>7</sup> nonob-

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1. See D. MANDELKER, LAND USE LAW § 1.1 (1982). In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court first recognized a municipality's ability to regulate the use of land. *Id.* at 390-97.

*Euclid* created a presumption of validity for municipal land use regulations by ruling that unless a court finds a zoning act arbitrary and unreasonable, the regulation should not be overturned. *Id.* at 395.

2. The first amendment provides in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. See G. GUNTHER, CONSTITUTIONAL LAW 1106-17 (10th ed. 1980). Only *protected* expressions are at issue. Activity determined to be "obscene" is not entitled to constitutional protection. *Roth v. United States*, 354 U.S. 476, 485 (1957). An activity is not obscene, however, merely because the topic of sex is involved. *Id.* at 487. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (first amendment protection applies to films involving nudity); *California v. LaRue*, 409 U.S. 109 (1972) (nude dancing); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (books).

3. For purposes of this article, the term "adult entertainment facilities" includes adult movie theaters, adult bookstores and similar businesses established to titillate sexual pleasure.

4. See *supra* note 2.

5. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

6. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

7. *Roth v. United States*, 354 U.S. 476, 485 (1957). In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court stated that, to decide whether an expression is obscene, the trier of fact must determine:

scene expressions, such as those commonly found in adult entertainment establishments, are protected.<sup>8</sup> Freedom of expression is not absolute, however, and courts will not prohibit all prior restraints.<sup>9</sup> As a result, the extent to which a municipality may regulate protected expressions in adult establishments is not clear.

The Supreme Court first addressed the conflict between the first amendment and adult establishment regulations in *Erznoznik v. City of Jacksonville*.<sup>10</sup> The *Erznoznik* court held unconstitutional an ordinance that prohibited drive-in movie theaters from showing films containing nudity if their screens were visible from a public street or place.<sup>11</sup> The Court's central concern was the ordinance's lack of content neutrality.<sup>12</sup> The ordinance only prohibited exhibition of movies containing nudity, ignoring films that contained other offensive material.<sup>13</sup> The Court also found the scope of the ordinance improperly overbroad.<sup>14</sup> Because it prohibited harmless forms of nudity,<sup>15</sup> the ordinance could not be justified by the city's interest protecting children.

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

*Id.* at 24.

8. *Cohen v. California*, 402 U.S. 15 (1971).

9. *Times Film Corp. v. Chicago*, 365 U.S. 43, 47 (1961).

10. 422 U.S. 205 (1974).

11. *Id.* at 206-07.

12. *Id.* at 211. Under the rule of content neutrality a government may not regulate the content of protected speech. *Id.* at 215. Restrictions on the time, place and manner are permissible if upheld as reasonable and neutral as to the content of the speech restricted. *Police Dep't. v. Mosley*, 408 U.S. 92, 99 (1972). See Note, *Second Class Speech: The Court's Refinement of Content Regulation*, 61 NEB. L. REV. 361 (1982). If the rule of content neutrality did not exist, "government officials [would] have the power to suppress the publication of information they would rather conceal and of points of view with which they disagree." Gerard, *First Amendment Aspects of Control of Outdoor Advertising*, 145 RESEARCH RESULTS DIG., NAT'L COOPERATIVE HIGHWAY RESEARCH PROGRAM, 3, 4 (July 1985).

13. *Erznoznik*, 422 U.S. at 208. For example, acts of violence could be considered just as offensive, or even more offensive, to a passerby than some forms of nudity. *Id.* at 214-15.

14. *Id.* at 212-15.

15. *Id.* at 212-14. Such harmless forms of nudity included a baby's buttocks, the nude body of a war victim and scenes of a culture in which nudity is the norm. *Id.* at 213.

Similarly, the ordinance was underinclusive with respect to the city's interest in traffic safety, as almost any scene on the screen could distract a passing motorist.<sup>16</sup>

A subsequent Supreme Court case, *Young v. American Mini Theaters*,<sup>17</sup> involved the first amendment and regulation of adult establishments. *Young* concerned Detroit's anti-skid row ordinance,<sup>18</sup> which prohibited an "adult" establishment<sup>19</sup> from locating within 1000 feet of any two other regulated uses,<sup>20</sup> or within 500 feet of a residential area.<sup>21</sup> After the city denied two adult theater owners certificates to operate because their businesses violated these distance requirements,<sup>22</sup> the owners challenged the ordinance on first amendment grounds.<sup>23</sup>

In a plurality opinion,<sup>24</sup> the Supreme Court upheld the ordinance.<sup>25</sup> Writing for the plurality, Justice Stevens created a limited exception to

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16. *Id.* at 214-15.

17. 427 U.S. 50 (1976). For a more detailed analysis of *Young*, see generally Note, *Young v. American Mini Theaters, Inc.: The War on Neighborhood Deterioration Leaves First Amendment Casualty*, 6 ENVTL. AFF. 101 (1977); Note, *Young v. American Mini Theaters, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L.Q. 321 (1977); Note, *Zoning Adult Movie Theaters and the First Amendment: An Approach to Young v. American Mini Theaters, Inc.*, 5 HOFSTRA L. REV. 379 (1977); Comment, *Municipal Zoning Ordinance May Restrict Location of Adult Motion Picture Theaters*, 16 WASHBURN L.J. 479 (1977); Comment, *Young, American Mini Theaters, Inc.: A Limit on First Amendment Protection*, 12 NEW ENG. L. REV. 391 (1976).

18. 427 U.S. at 54. Cities enact "anti-skid row" ordinances to prevent the concentration of establishments that have adverse affects on adjacent areas. *Id.* at 55. Specifically, these ordinances are designed to prevent the deterioration of neighborhoods. *Id.* at 54 n.6 (citing DETROIT, MICH., ORDINANCE 742-G § 66.000 (1972)).

19. The Detroit ordinance defined three types of adult establishments: adult book stores, adult motion picture theaters having a capacity of 50 or more persons, and adult mini-motion picture theaters having a capacity of less than 50 persons. 427 U.S. at 53 n.5.

20. "Regulated uses" include adult movie theaters, adult bookstores, cabarets, taverns or bars, hotels or motels, pawnships, pool or billiard halls, public lodging houses, second-hand stores, shoeshine parlors and taxi dance halls. *Id.* at 52 n.3.

21. *Id.* at 52.

22. *Id.* at 55. Both of the theaters were within 1000 feet of two other regulated uses, and one was also within 500 feet of a residential area. *Id.*

23. *Id.* The owners sought a declaratory judgment that the ordinance was unconstitutional and an injunction against the ordinance's enforcement. *Id.*

24. The plurality consisted of Chief Justice Burger and Justices White, Rehnquist and Stevens. *Id.* at 52-73. Justice Powell concurred. *Id.* at 72-84. Justices Brennan, Stewart, Marshall and Blackmun dissented. *Id.* at 84-96.

25. *Id.* at 73.

the general rule that content based regulations are impermissible.<sup>26</sup> His exception permits regulations restricting speech content, provided such regulations do not depend on the government's approval or disapproval of the speech involved.<sup>27</sup> Therefore, cities enacting regulations that restrict protected speech must do so for reasons other than suppressing that speech.<sup>28</sup> Applying the exception, the plurality found no evidence that the city otherwise disapproved of adult establishments;<sup>29</sup> the city adopted the ordinance in order to diminish urban blight.<sup>30</sup> The plurality warned, however, that had the ordinance served to suppress or greatly restrict access to lawful speech, it would be invalid.<sup>31</sup> The dissent<sup>32</sup> argued that time, place and manner<sup>33</sup> regulations that affect protected expressions must be content neutral.<sup>34</sup>

Read together, *Young* and *Erznoznik* appear in conflict. *Erznoznik* requires complete content neutrality in an ordinance.<sup>35</sup> *Young*, however, creates a limited exception that permits content regulation, provided the government does not approve or disapprove of the speech involved.<sup>36</sup> Because *Young* is a plurality opinion,<sup>37</sup> and the members

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26. *Id.* at 67-68.

27. *Id.*

28. *Id.*

29. *Id.* at 71-72 nn. 34-35.

30. *Id.* at 54 n.6.

31. *Id.* at 71 n.35. This footnote has received significant attention from many courts. Subsequent interpretation of this footnote by lower courts seems to indicate that if the *effect*, as opposed to *intent*, of the ordinance serves to suppress or greatly restrict access to adult establishments, then the ordinance is unconstitutional. See *infra* notes 68-85 and accompanying text.

Justice Powell wrote separately to analyze the challenged ordinance under the test set out in *United States v. O'Brien*, 391 U.S. 367 (1968). That test sustains regulation of speech "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. Justice Powell found all four prongs met in *Young*.

32. Justice Stewart based his dissent on content neutrality. 427 U.S. at 84-88. See *supra* note 12. Justice Blackmun filed a separate dissent based on the ordinance's vagueness. 427 U.S. at 88-94.

33. See *Erznoznik*, 422 U.S. at 209. The Court stated: "A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content."

34. 427 U.S. at 84-85.

35. See *supra* notes 12-13 and accompanying text.

36. See *supra* notes 27-28 and accompanying text.

of the plurality either distinguished<sup>38</sup> or continued to accept<sup>39</sup> *Erznoznik*, *Young's* affect on *Erznoznik* is unclear. In addition, neither the *Young* plurality nor concurrence explained *Young's* impact upon *Erznoznik's* "content neutrality" rationale.<sup>40</sup>

The most recent Supreme Court case in the area of municipal regulation of adult establishments is *Schad v. Borough of Mount Ephraim*.<sup>41</sup> In *Schad* a local zoning ordinance<sup>42</sup> prohibited live entertainment, including nude dancing, in any establishment within the borough.<sup>43</sup> The owner of an adult bookstore, who installed glass booths through which customers could observe nude dancers challenged the ordinance.<sup>44</sup> The Supreme Court, finding the ordinance unconstitutional, declared that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest."<sup>45</sup> The ordinance failed to satisfy either requirement. First,

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37. See *supra* note 24.

38. The plurality found the two ideas slightly different, because the secondary effect of the ordinance in *Young* was the amelioration of neighborhood deterioration and crime, while *Erznoznik's* secondary effect was the suppression of protected speech. 427 U.S. at 71 n.34. The concurrence distinguished the two cases by noting that *Young* involved a zoning ordinance, while *Erznoznik* dealt with an ordinance attempting to eliminate a public nuisance. *Id.* at 83.

39. The dissent felt *Erznoznik's* requirement of content neutrality should directly control the *Young* decision. *Id.* at 87-88.

40. In *People v. Valley Cinemas, Inc.*, 194 Cal. Rpt. 859 (Ct. App. 1983), the California Appellate Court found that *Erznoznik* directly controlled the outcome. *Id.* at 862. See *infra* notes 122-29 and accompanying text. *Valley Cinemas* demonstrates that at least some courts still recognize *Erznoznik's* primary authority in spite of the *Young* decision.

41. 452 U.S. 61 (1981). For a more detailed analysis of *Schad*, see generally Note, *Municipalities May Not Exclude Live Entertainment From Areas Zoned for Commercial Uses: Schad v. Borough of Mount Ephraim*, 86 DICK. L. REV. 91 (1982); Note, *Schad v. Borough of Mount Ephraim: A Pyrrhic Victory for Freedom of Expression?*, 15 LOY. L.A.L. REV. 321 (1982); Note, *The Police Power: An Effective Means of Limiting First Amendment Guarantees?*, 2 MISS C.L. REV. 361 (1982); Note, *Second Class Speech: The Court's Refinement of Content Regulation*, 61 NEB. L. REV. 361 (1982); Note, *Zoning Prohibition Which Impinges Upon First Amendment Activity Must be Adequately Justified by Municipality*, 21 SETON HALL 311 (1982).

42. MOUNT EPHRAIM, N.J., ORDINANCE § 99-15B (1975). This ordinance provided a list of specific uses for land located in the borough. *Id.* It further provided that "[a]ll uses not expressly permitted in this chapter are prohibited." *Id.* at § 99-4.

43. 452 U.S. at 65. Nude dancing, in some forms, is entitled to first amendment protection. *Id.* at 66.

44. *Id.* at 64. The owner made his challenge after the city imposed fines on him for violating the ordinance. *Id.*

45. *Id.* at 68.

the ordinance was too broad. In addition to prohibiting nude dancing, the ordinance banned dancing in musical and dramatic works,<sup>46</sup> as well as all other forms of live entertainment.<sup>47</sup> Second, the city's rationale for enacting the ordinance did not constitute a substantial government interest.<sup>48</sup> The borough contended that live entertainment would take up commercial space necessary to meet the immediate needs of their residents.<sup>49</sup> The Court rejected this argument, finding that virtually every item of service was available to Mt. Ephraim residents except live entertainment.<sup>50</sup> The borough also claimed that a ban on live entertainment would help solve problems such as parking, trash, police protection and medical care.<sup>51</sup> The borough did not, however, present any evidence that live entertainment presented more significant problems of this nature than other business enterprises.<sup>52</sup>

Although *Young* upheld a zoning ordinance and *Schad* struck one down, the two cases do not conflict. The *Schad* Court invalidated a statute totally banning a protected first amendment right,<sup>53</sup> while *Young* merely upheld an ordinance restricting the areas where adult establishments may locate to exercise a first amendment freedom.<sup>54</sup> The two cases, however, identified different factors for courts to use when evaluating an ordinance's constitutionality. *Young* stressed that the reason for the ordinance must not be to suppress protected speech,<sup>55</sup> and that the ordinance may not severely restrict access to protected speech.<sup>56</sup> *Schad* established that an ordinance may not be so overly broad as to prohibit protected speech,<sup>57</sup> and must further a sub-

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46. *Id.* at 65. Although the Court did not determine that nude dancing, such as that prohibited by Mount Ephraim's ordinance, was entitled to constitutional protection, the Court held that other prohibited activities, such as dancing in musical and dramatic works were protected by the first amendment. *Id.* at 65-66.

47. The ordinance did not prohibit noncommercial live entertainment. *Id.* at 66 n.5. Therefore, a high school could enact a play if it did not charge admission nor perform in a commercial theater. *Id.*

48. *Id.* at 72.

49. *Id.* at 72-73.

50. *Id.*

51. *Id.* at 73-74.

52. *Id.*

53. *Id.* at 65-66.

54. 427 U.S. at 52. See *supra* notes 19-21 and accompanying text.

55. See *supra* notes 27-28 and accompanying text.

56. See *supra* note 31 and accompanying text.

57. See *supra* notes 45-47 and accompanying text.

stantial government interest.<sup>58</sup>

### III. RECENT DEVELOPMENTS

Although the *Young* plurality permits limited regulation of adult establishments,<sup>59</sup> lower courts have not readily approved such regulations—even if<sup>60</sup> an ordinance is similar to the *Young* ordinance.<sup>61</sup> Courts generally look beyond the wording of the ordinance and examine the various factors set forth in *Young*,<sup>62</sup> *Schad*<sup>63</sup> and *Erznoznik*.<sup>64</sup> The factors upon which courts concentrate are the effects of,<sup>65</sup> and purposes behind,<sup>66</sup> the ordinance.

#### A. *The Primary Factors Examined*

##### 1. Restricting Access to Protected Speech

Ordinances that severely restrict the number of adult establishments in a municipality may pose constitutional problems. In *Alexander v. City of Minneapolis*<sup>67</sup> the Eighth Circuit declared unconstitutional<sup>68</sup> an ordinance<sup>69</sup> similar to the ordinance in *Young*.<sup>70</sup> The effect of the *Alexander* ordinance was a reduction in the number of adult establish-

58. See *supra* notes 45, 48 and accompanying text.

59. The usual presumption of constitutionality for most land use regulations is inapplicable when the case involves exclusionary zoning. Mandelker, *The Free Speech Revolution In Land Use Control*, 60 CHI.-[ ]KENT L. REV. 51, 51-52 (1982).

60. See, e.g., *infra* notes 67-144 and accompanying text.

61. See, e.g., *infra* notes 67-85 and accompanying text.

62. See *supra* notes 26-31 and accompanying text.

63. See *supra* notes 45-48 and accompanying text.

64. See *supra* notes 12-16 and accompanying text.

65. See *infra* notes 67-85 and accompanying text.

66. See *infra* notes 86-104 and accompanying text.

67. 698 F.2d 936 (8th Cir. 1983).

68. 698 F.2d at 939.

69. MINNEAPOLIS, MINN., CODE § 540.410 (1977). This ordinance established two restrictions. It stated that an adults-only facility may not operate within 500 feet of a residentially zoned district, an office-residence district, a church, or day care or educational facilities. *Id.* at § 540.410(c). Second, the facility may not operate within 500 feet of another adults-only facility. *Id.* at § 540.410(d).

70. 698 F.2d at 937 n.4. Although similar to *Young*, the Minneapolis ordinance had a different purpose. The Detroit City Council designed the *Young* ordinance to stop the rapid deterioration of neighborhoods. 427 U.S. at 50. Minneapolis created the *Alexander* ordinance to prevent neighborhood deterioration from ever beginning. 698 F.2 at 937.



ments in Minneapolis from over thirty to a maximum of twelve, prohibiting new businesses to open.<sup>71</sup> Given these facts, the court found that the ordinance clearly could not satisfy either the plurality<sup>72</sup> or concurrence<sup>73</sup> in *Young*,<sup>74</sup> due to the significant restriction on access to constitutionally protected speech.<sup>75</sup>

The Sixth Circuit made a similar finding in *CLR Corp. v. Henline*.<sup>76</sup> In *Henline* a Wyoming, Michigan, zoning ordinance<sup>77</sup> limited adult establishments to a 2500 foot road frontage that could only accommodate two to four establishments.<sup>78</sup> The court distinguished *Young*, because the *Young* ordinance provided a “myriad of locations” at which adult establishments could permissibly locate.<sup>79</sup> In contrast, the *Henline* court found that the Wyoming ordinance severely restricted access to adult entertainment establishments.<sup>80</sup>

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71. *Id.* at 938.

72. *Id.* See *supra* notes 26-27 and accompanying text.

73. 698 F.2d at 939. See *supra* note 31. Due to the severe restriction of access to adult establishments, the Minneapolis ordinance could not satisfy the fourth prong of the *O'Brien* test relied on by Justice Powell's concurrence. 427 U.S. at 79-80. The fourth prong provides that a restriction on first amendment rights is not valid unless “the incidental restriction on . . . First Amendment freedom is no greater than is essential to furtherance of that interest.” *Id.* at 80 (Powell, concurring) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

74. The dissent in *Young* clearly would have found the Minneapolis ordinance invalid because it, like the ordinance in *Young*, was not content neutral. See *supra* notes 32-34 and accompanying text.

75. 698 F.2d at 938.

76. 702 F.2d 637 (6th Cir. 1983).

77. WYOMING, MICH., CITY CODE § 60.75. This ordinance provides that adult establishments must locate in designated areas; must be 500 feet from any church, school or residence; and be 1000 feet from any other restricted use. *Id.*

78. 702 F.2d at 639.

79. *Id.*

80. *Id.* For examples of other cases finding ordinances unconstitutional because of severe restrictions on locations available for adult establishments, see *Basiardanes v. Galveston*, 682 F.2d 1203 (5th Cir. 1982) (ordinance totally banned adult establishments in much of the city, and severely restricted permissible locations in remainder); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981) (effect of ordinance was no lawful locations for adult establishments); *E. & B. Enter. v. City of University Park*, 449 F. Supp. 695 (N.D. Tex. 1977) (effect of ordinance provided only two lawful locations for an adult establishment, one owned by the city and the other already commercial occupied); cf. *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981) (ordinance stating that “land which is equivalent in area to a combination of many city blocks” for locating adult establishments does not severely restrict access).

Ordinances may invalidly restrict access not only by limiting the permissible number of adult establishments, but also by confining adult establishments to undesirable locations. In *North Street Book Shop v. Village of Endicott*,<sup>81</sup> a local ordinance<sup>82</sup> created only two areas within the village where adult establishments lawfully could operate.<sup>83</sup> One area contained no available buildings, and the only available building in the second area required extensive remodeling.<sup>84</sup> A federal district court in New York found that, due to the commercial undesirability of the available locations, the ordinance restricted access to sexually oriented material and significantly burdened the freedom of expression of owners of adult establishments.<sup>85</sup>

## 2. Demonstrating a Substantial Government Interest

An ordinance regulating adult establishments must be narrowly drawn to further a substantial government interest.<sup>86</sup> In *Endicott*,<sup>87</sup> the district court felt that the government failed to assert a substantial interest.<sup>88</sup> Endicott enacted its ordinance<sup>89</sup> because, it contended, adult establishments cause deterioration of neighborhoods where they locate.<sup>90</sup> Although this interest was identical to the interest asserted in *Young*,<sup>91</sup> the court found it unsubstantiated.<sup>92</sup> Relying on *Schad*,<sup>93</sup> the

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81. 582 F. Supp. 1428 (N.D.N.Y. 1984).

82. ENDICOTT VILLAGE, N.Y., CODE §§ 20-220 to 20-224 (1982). This ordinance prohibited any adult entertainment business from locating within 500 feet of any residence, or within 1000 feet of another adult entertainment business, church, school, park, playground or amusement arcade. *Id.* at § 20-221 B.

83. 582 F. Supp. at 1431.

84. *Id.* at 1431-32.

85. *Id.* at 1432. Other courts have also invalidated ordinances because of restrictions requiring adult establishments to operate only in undesirable areas. See *Baardanes v. Galveston*, 682 F.2d 1203 (5th Cir. 1982) (available locations for adult establishments were only in industrial zones far from other consumer oriented establishments); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981) (adult establishments confined to undesirable industrial areas).

86. See *supra* note 45 and accompanying text.

87. See *supra* notes 82-84 and accompanying text.

88. 582 F. Supp. at 1436.

89. See *supra* note 82.

90. 582 F. Supp. at 1433.

91. See *supra* notes 18-19 and accompanying text.

92. 582 F. Supp. at 1433-35.

93. See *supra* notes 41-52 and accompanying text.

court found that it is insufficient merely to state an interest.<sup>94</sup> Endicott must support its interest by showing a reasonable and significant need for the zoning regulation.<sup>95</sup> In *Young*, the City of Detroit presented evidence of a relationship between concentrated areas of adult establishments and neighborhood deterioration.<sup>96</sup> The Village of Endicott, on the other hand, merely expressed an interest in preventing deterioration without supplying any supporting evidence.<sup>97</sup> As a result, the ordinance could not withstand constitutional scrutiny.<sup>98</sup>

A Michigan district court followed a different approach in *15192 Thirteen Mile Road v. City of Warren*.<sup>99</sup> Although the City of Warren

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94. 582 F. Supp. at 1434. *Schad* had noted that an important factor in *Young* was that the Detroit Common Council studied the effects of concentrating adult establishments in limited areas. 452 U.S. at 71-72. The study demonstrated that Detroit had reason to believe that regulating the locations of adult establishments would help prevent city blight. *Id.* But cf. *15192 Thirteen Mile Rd. v. Warren*, 593 F. Supp. 147 (E.D. Mich. 1984) (city council's reliance on the Detroit experience is sufficient factual justification); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) (city need not demonstrate a past history of congregated adult uses causing neighborhood deterioration in order to rely on such experience to justify legislative action).

95. 582 F. Supp. at 1434.

96. *Young*, 427 U.S. at 71.

97. 582 F. Supp. at 1434.

98. *Id.* at 1435. For examples of other cases holding that a locality must demonstrate a substantial government interest in order for courts to uphold the constitutionality of an adult use regulation, see *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (without a showing of available relocation sites, the court cannot determine whether the city's true purpose in passing the ordinance was to further the government interests they expressed); *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983) (city failed to make factual findings that the ordinance would prevent urban blight, nor could the city demonstrate a rational relationship between the asserted purpose and effect of the ordinance); *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983) (court granted preliminary injunction to restrain enforcement of ordinance because the city could point to no specific harm from the existence of adult entertainment establishments); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982) (legislature needed to demonstrate how concentration of adult enterprise has a different impact on traffic and littering than other businesses); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981) (city needed to show empirical evidence that a single theater within 100 yards of a specific area will have deleterious effects on the surrounding neighborhood); *Amico v. New Castle County*, 571 F. Supp. 160 (D. Del. 1983) (city failed to establish a rational relationship between its implementation of an adult use ordinance and the goals of preserving neighborhoods and protecting children); *Borrage v. City of Louisville*, 456 F. Supp. 30 (W.D. Ken. 1978) (city's empirical evidence that adult establishments near family oriented facilities causes detrimental effects adequately supports a substantial government interest).

99. 593 F. Supp. 147 (E.D. Mich. 1984).

passed an ordinance<sup>100</sup> that regulated the location of adult bookstores, it had made no studies that demonstrated the benefit of dispersing adult establishments, nor did it include a statement of purpose in the ordinance's text.<sup>101</sup> The court, however, upheld the ordinance; it considered two facts significant. First, no evidence existed which indicated that "the Warren City Council enacted the ordinance in response to the proposed opening of an adult entertainment facility."<sup>102</sup> Second, the City Council had held the ordinance under advisement until the Supreme Court decided *Young*.<sup>103</sup> The district court felt it unnecessary for cities to conduct their own research; they could rely upon the "experience and findings of other legislative bodies" to justify a substantial government interest.<sup>104</sup>

### B. Methods Used by Municipalities To Subvent the Primary Factors

Before an individual may operate an adult establishment, he must not only meet location requirements, such as those set forth in *Young*,<sup>105</sup> but often he must receive administrative board<sup>106</sup> approval of the facility's intended use.<sup>107</sup> In *Warren*,<sup>108</sup> an ordinance's special

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100. WARREN, MICH., ZONING ORD. 14.02. This ordinance prohibited adult establishments within 500 feet of a residential area, or within 100 feet of another adult establishment, school or church. See 593 F. Supp. at 147. A city land use provision also required that an owner obtain special use approval from both the City Planning Commission and the Board of Zoning Appeals. *Id.* These agencies would approve a use only if it did not harm the zoning district and nearby areas, and was not contrary to "the spirit and purpose of the ordinances." 593 F. Supp. at 147 (quoting WARREN, MICH., ZONING ORDINANCE 14.02.

101. 593 F. Supp. at 151.

102. *Id.* at 155. The court, however, apparently ignored the fact that a city councilman had suggested that the City Attorney's Office "research the possibility of a regulatory scheme to keep various types of 'adult' activities out of Warren." *Id.* at 151.

103. *Id.* at 155.

104. *Id.* The district court upheld the distance requirements of the ordinance, but found the special land use provision of the ordinance unconstitutional. *Id.* at 156. See *infra* notes 109-12 and accompanying text. See also *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980) (a city need not demonstrate that congregated adult uses have actually caused neighborhood deterioration, and may rely on the experiences of other cities to justify its actions).

105. See *supra* notes 19-21 and accompanying text.

106. "Administrative board" refers to city planning commissions, local zoning boards, city councils and other authorities with similar duties.

107. In *15192 Mile Rd.*, the City Planning Commission and Board of Zoning Appeals had to approve the bookstore's location. See also *Entertainment Concepts, Inc.*

use provision<sup>109</sup> authorized the City Planning Commission to deny an adult establishment owner a permit to operate. Despite an owner's compliance with the ordinance's location requirements, the Commission could withhold a permit if it determined that the business would have a "deleterious effect on the surrounding area."<sup>110</sup> Given this indefinite language and lack of guidelines, the court feared that the city could prohibit any adult establishment from locating in the community.<sup>111</sup> As a result, the court declared the special land use provision of the city ordinance unconstitutional.<sup>112</sup>

Another method municipalities use to regulate adult establishments is to pass ordinances controlling the type of activity permissible on a business premise. In *County of King ex rel. Sowers v. Chisman*,<sup>113</sup> a county ordinance<sup>114</sup> prohibited nude dancing in public establishments except on a stage at least six feet from the nearest patron.<sup>115</sup> The owner of a topless dancing establishment challenged<sup>116</sup> the ordinance's constitutionality.<sup>117</sup> The Washington State Appellate Court upheld the ordinance because it did not prohibit nude dancing,<sup>118</sup> but merely

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III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980) (ordinance requiring prior authorization by city before issuance of business license for adult theaters although not requiring prior authorization for regular movie theaters, is impermissible prior restraint on protected speech); *East Side News, Inc. v. City of Geneva*, 538 F. Supp. 484 (N.D. Ohio 1981) (refusal of city council to issue business permit to adult bookstore strictly because of content of merchandise to be sold is unconstitutional).

108. 593 F. Supp. 147.

109. *See supra* note 100 (explaining the ordinance).

110. 593 F. Supp. at 151.

111. *Id.* at 156.

112. *Id.* *See also* *Wendling v. City of Duluth*, 495 F. Supp. 1380 (D. Minn. 1980) (ordinance giving government officials unfettered discretion to decide whether to issue adult bookstore a license is unconstitutional); *San Juan Liquors v. Consolidated City of Jacksonville*, 480 F. Supp. 151 (M.D. Fla. 1979) (governments may not enforce an overbroad statute in a discriminatory manner).

113. 33 Wash. App. 809, 658 P.2d 1256 (1983).

114. KING COUNTY, WASH., CODE 6.08.

115. *Id.* at 6.08.027(A)(6).

116. The county obtained a preliminary injunction ordering the owner to stop all topless dancing in his establishment. 33 Wash. App. at 810, 658 P.2d at 1257. The owner later challenged the statute after a court found him in contempt for violating the preliminary injunction. *Id.*

117. *Id.* at 811, 658 P.2d at 1258.

118. By finding the ordinance a valid time, place and manner regulation, the court avoided the issue of whether the particular type of nude dancing involved in this case deserved constitutional protection. *Id.* at 814, 658 P.2d at 1259.

imposed a reasonable time, place and manner<sup>119</sup> restriction.<sup>120</sup> The court distinguished *Schad* in which the ordinance prohibited all dancing, nude or not, and therefore, clearly infringed on constitutionally protected activities.<sup>121</sup>

Governments often insulate ordinances from constitutional scrutiny by arguing that the ordinances merely impose reasonable time, place and manner restrictions. *People v. Valley Cinemas, Inc.*<sup>122</sup> concerned an ordinance<sup>123</sup> that prohibited exhibition of films containing specified sex acts when the films could be viewed beyond the property line by children, neighbors or passing motorists.<sup>124</sup> San Joaquin County admitted that the ordinance infringed on constitutionally protected activity,<sup>125</sup> but argued that it was a valid reasonable time, place and manner restriction.<sup>126</sup> Because the ordinance lacked content neutrality,<sup>127</sup> the court found the ordinance in direct conflict with *Erznoznik*,<sup>128</sup> and therefore unconstitutional.<sup>129</sup>

*American Booksellers Association, Inc. v. Hudnut*,<sup>130</sup> dealt with a unique attempt to regulate adult establishments. In *Hudnut*, the Indianapolis City Council passed an ordinance that made trafficking<sup>131</sup> in pornography<sup>132</sup> an unlawful discriminatory practice.<sup>133</sup> As a result of the ordinance, production, distribution or sale of pornographic mate-

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119. See *id.*; *supra* note 33 and accompanying text.

120. 33 Wash. App. at 814, 650 P.2d at 1259.

121. *Id.*

122. 194 Cal. Rptr. 859 (Ct. App. 1983).

123. SAN JOAQUIN COUNTY, CAL., ORDINANCE 2917 (1982). For a full description of the ordinance, see 194 Cal. Rptr. at 860 n.2.

124. 194 Cal. Rptr. at 859.

125. *Id.* at 862.

126. *Id.* at 861.

127. See *supra* notes 12-13 and accompanying text.

128. See *supra* notes 10-16 and accompanying text.

129. 194 Cal. Rptr. at 862. The *Valley Cinemas* court indicated that *Young* may have altered *Erznoznik*, but never clearly explained the change. *Id.* at 863-64.

130. 598 F. Supp. 1316 (S.D. Ind. 1984).

131. The ordinance defined "trafficking" as the "production, sale, exhibition, or distribution of pornography." *Id.* at 1320 (citing INDIANAPOLIS CITY, IND., ORDINANCE § 16-15(4) (1984)).

132. The ordinance contained an extensive definition of "pornography". 598 F. Supp. 1320 (citing INDIANAPOLIS CITY, IND., ORDINANCE § 16-3(q) (1984)).

133. 598 F. Supp. at 1320. The ordinance declared that pornography was a "discriminatory practice based on sex which denies women equal opportunity in society." *Id.* (quoting INDIANAPOLIS CITY, IND., ORDINANCE § 16-1(a)(2) (1984)).

rial was nearly impossible.<sup>134</sup> An array of plaintiffs,<sup>135</sup> representing both the book<sup>136</sup> and film<sup>137</sup> industries, filed suit, contending that the ordinance was unconstitutional.<sup>138</sup> The city admitted the ordinance went beyond regulating obscenity.<sup>139</sup> They argued, however, that pornography is a form of sex-based discrimination.<sup>140</sup> Such discrimination creates a compelling state interest warranting regulation.<sup>141</sup> The District Court for the Southern District of Indiana rejected the city's argument.<sup>142</sup> Refusing to deviate from existing constitutional law,<sup>143</sup> the court held that the ordinance violated the first amendment because it regulated more than obscenity.<sup>144</sup>

#### IV. CONCLUSION

*Young* demonstrated a relaxation of first amendment rights in favor of local zoning regulations.<sup>145</sup> *Young*, however, did not initiate a judicial trend permitting excessive restrictions on adult entertainment establishments. Instead, courts are strictly applying the limiting factors set out in *Young*, *Schad* and *Erznoznik*. For example, *Alexander* and *Henline* found adult use ordinances unconstitutional because they severely limited the number of possible adult establishments.<sup>146</sup> *Endicott*

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134. *Id.* at 1327.

135. *See infra* notes 136-37. In addition to the book and film plaintiffs, one individual joined the lawsuit as a plaintiff in order to protect his right as "a reader and viewer of First Amendment protected material." 598 F. Supp. at 1319.

136. Book industry plaintiffs included booksellers, publishers, book distributors and the Freedom to Read Foundation. 598 F. Supp. at 1319.

137. Film industry plaintiffs included a satellite television transmission company and a store that rents video cassettes. *Id.*

138. *Id.* at 1327. The plaintiffs specifically sought "to preliminarily and permanently enjoin enforcement of, and to declare facially unconstitutional, void and of no effect," the ordinances involved in this litigation. *Id.*

139. *Id.* at 1332. The City of Indianapolis argued that the obscenity test in *Miller v. United States*, 413 U.S. 15 (1973), *see supra* note 7, did not create a bright line between protected and unprotected expression. 598 F. Supp. at 1332. The ordinance was not per se unconstitutional, the city argued, simply because it regulated more than obscenity, as defined by *Miller*. *Id.*

140. 598 F. Supp. at 1333-35.

141. *Id.* at 1335-37.

142. *Id.* at 1337.

143. *Id.*

144. *Id.*

145. *See supra* notes 17-34 and accompanying text.

146. *See supra* notes 67-80 and accompanying text.

went even further, holding that restriction of adult establishments to commercially undesirable locations unconstitutionally restricted access to adult entertainment.<sup>147</sup> In addition, courts require localities to demonstrate a substantial interest in support of adult use ordinances. Although some courts, such as *Endicott*, are more stringent<sup>148</sup> in determining what constitutes sufficient support, a municipality must indicate some purpose behind the ordinance other than to suppress protected speech. Courts also are recognizing the potential abuse of "special land use provisions" included in some adult use ordinances.<sup>149</sup> Finally, cases such as *Chisman* recognizes that restrictions on adult establishments must be reasonable,<sup>150</sup> and *Valley Cinemas* acknowledges the "content-neutral" rationale set forth in *Erznoznik*.<sup>151</sup> As this summary indicates, instead of using *Young* to place zoning laws above first amendment protections, courts are adhering strictly to requirements that protect first amendment rights.

#### ADDENDUM

As this article went to press, the Supreme Court decided *City of Renton v. Playtime Theatres, Inc.*<sup>152</sup> The City of Renton, Washington, enacted a zoning ordinance that prohibited "adult motion picture theaters from locating within 1000 feet of any residential zone, single- or multi-family dwelling, church, park, or school."<sup>153</sup> The Ninth Circuit Court of Appeals declared the ordinance unconstitutional.<sup>154</sup> In a 6-2 decision, the Supreme Court reversed the Ninth Circuit, relying primarily on *Young*.

The Court first held that the ordinance in question was a "content-neutral" time, place and manner regulation.<sup>155</sup> The ordinance was designed to protect the quality of life in the community, not to suppress

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147. See *supra* notes 81-85 and accompanying text.

148. The Court in *Endicott*, for example, appeared to require that governments demonstrate a higher degree of support for a substantial governmental interest than did the *Warren* court. See also *supra* notes 87-104 and accompanying text (discussion of a "substantial government interest").

149. See *supra* notes 108-12 and accompanying text.

150. See *supra* notes 113-21 and accompanying text.

151. See *supra* notes 122-29 and accompanying text.

152. 106 S. Ct. 925 (1986).

153. *Id.* at 927.

154. 748 F.2d 527 (1984).

155. 106 S. Ct. at 928.



unpopular views.<sup>156</sup> Therefore, the ordinance was “aimed not at the *content* of the films shown at ‘adult motion picture theatres,’ but rather at the *secondary effects* of such theaters on the surrounding community.”<sup>157</sup> Next, the Court considered whether the ordinance was created to serve a substantial governmental interest. Relying on *Young*, the Court held that preventing neighborhood deterioration was a substantial interest.<sup>158</sup>

A number of questions that *Young* did not answer were addressed by the Court. First, the Court held that a city may enact such an ordinance based on the experiences of other cities, “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses.”<sup>159</sup>

Next, the Court held constitutional those ordinances that disperse adult entertainment establishments, as in *Young*, and ordinances that concentrate them, as in *Renton*.<sup>160</sup> Because the Renton ordinance only affected those establishments “shown to produce the unwanted secondary effects,” the Court held *Renton* avoided the “overinclusiveness” problems encountered in *Schad* and *Erznoznik*.<sup>161</sup> Similarly, although the *Renton* ordinance only regulated adult “theaters,” the Court found the ordinance was not underinclusive. Because the City of Renton did not have any other adult businesses, the Court refused to assume the city would not regulate any similar establishments should the need arise.<sup>162</sup>

Finally, the Court addressed the problem of whether the ordinance left “reasonable alternative avenues of communication.” The ordinance set aside 520 acres for adult theaters, but the potential theater owners claimed there were no “commercially viable” sites available.<sup>163</sup> The Court rejected this claim, finding that “the First Amendment requires only that Renton refrain from effectively denying adult theater owners a reasonable opportunity to open and operate an adult theater within the city.”<sup>164</sup> The Court held that the first amendment is not

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156. *Id.* 929.

157. *Id.* (emphasis in original).

158. *Id.* at 930.

159. *Id.* at 931.

160. *Id.*

161. *Id.*

162. *Id.* No other adult establishments were planned.

163. *Id.* at 932.

164. *Id.*

violated simply because someone else owns better commercial real estate and it is economically unfeasible to develop the statutorily allotted land.<sup>165</sup>

The dissent<sup>166</sup> believed the Renton ordinance was not "content neutral,"<sup>167</sup> did not protect a substantial governmental interest,<sup>168</sup> and did not provide for "reasonable alternative avenues of communication."<sup>169</sup>

The *Renton* decision clarifies the standards a municipality must satisfy in order to regulate adult business. It enables a municipality to now make limited areas available for adult theaters and their patrons, and at the same time preserves the quality of life in the community by preventing such establishments from randomly locating in any area. Accordingly, it is clear that the *Renton* decision, in contradiction of many of the lower court decisions discussed in the main body of this article, effectuates a balance that is "the essence of zoning."<sup>170</sup>

*Edmund J. Postawko\**

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165. *Id.*

166. Justice Brennan wrote the dissenting opinion, joined by Justice Marshall.

167. *Id.* at 934-36 (Brennan, J., dissenting).

168. *Id.* at 937 (Brennan, J., dissenting).

169. *Id.* at 937-38 (Brennan, J., dissenting).

170. *Id.* at 932.

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