Masthead Logo

McGeorge Law Review

Volume 18 | Issue 2

Article 4

1-1-1987

Regulation of Adult Businesses through Zoning after Renton

Ronald M. Stein
City Attorney, Lodi, California

Article

Regulation of Adult Businesses Through Zoning After *Renton*

RONALD M. STEIN*

This article analyzes the recent Supreme Court decision in *Renton v. Playtime Theatres, Inc.*[1] The purpose of the article is to show the significance of *Renton* and to give attorneys direction on how to regulate "adult businesses" effectively through locational zoning ordinances.

In *Renton*, the United States Supreme Court ruled that a city may use a "locational zoning ordinance" to regulate adult businesses. A locational zoning ordinance is one in which the particular use (adult bookstores, adult theaters, and so on) is limited to various locations within a community. For example, one city or county might choose to prohibit adult businesses within a three hundred foot radius from another adult business, or from another use, such as a church or residential neighborhood. Another city might choose to concentrate all adult businesses within a particular zone or area. The *Renton*

* B.S., 1968, Duquesne University; J.D., 1972, School of Law, Duquesne University, Cum Laude. Member, California State Bar; Member, Pennsylvania State Bar. City Attorney, Lodi, California.

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

court stated that the ordinance must, however, be a proper "content neutral" time, place, and manner regulation that a city can justify without reference to the content of the regulated speech. The city's interest in regulation of the adult businesses must be unrelated to the suppression of free expression, but can be related to the secondary effects of the adult businesses on surrounding neighborhoods. The Supreme Court found that attempting to "preserve the quality of urban life" serves this substantial governmental interest. Further, the Court found that a city may rely upon the experience of nearby cities in determining what these secondary effects are.

SIGNIFICANCE OF *RENTON V. PLAYTIME THEATRES, INC.*

The significance of the Supreme Court's decision in *Renton* is that future adult business location ordinances will be analyzed as a form of "time, place, and manner" regulation. No longer will adult business location ordinances be analyzed under the "strict scrutiny" standard set forth in *Schad v. City of Mt. Ephraim*[2] and *United States v. O'Brien*,[3] which established a presumption of constitutional invalidity that the city must overcome. Instead, adult business location ordinances will be analyzed by the "rational basis" standard, which raises a presumption of validity as set forth in *Heffron v. International Society of Krishna Consciousness, Inc.*,[4] *Lee Optical v. Williamson*,[5] and *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*[6] The Supreme Court in *Renton* swayed from its earlier reliance on the four-prong test of *United States v. O'Brien*[7]

---

2. 452 U.S. 61, 77 (1981) (Blackmun, J., concurring).

3. 391 U.S. 367, 377 (1968). Once the Court determines that the ordinance was in fact content-neutral, then the presumption of statutory validity would again have signifcant force. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 n.35 (1976), discussing the distinction between the Detroit ordinance of *Young v. American Mini Theatres, Inc.* and the ordinance in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). The Court in *Young* observed: "The Court's opinion in *Erznoznik* presaged our holding today noting that the presumption of statutory validity 'has less force when a classification turns on the subject matter of expression.' " *Young*, 427 U.S. at 71-72 n.35.

4. 452 U.S. 640 (1981).

5. 348 U.S. 483 (1955).

6. 425 U.S. 748 (1976).

7. Under that test the governmental regulation is sufficiently justified, despite its incidental impact upon a First Amendment interest, (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to a suppression of free expression; and (4) if the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of an interest. *O'Brien*, 391 U.S. 367, 377 (1968).

to judge regulations that affect first amendment activity. In place of this test, the court adopted a time, place, and manner analysis, a test that the court set forth in *Clark v. Community for Creative Non-Violence*[8] and *Heffron v. International Society of Krishna Consciousness, Inc.*.[9]

This article will discuss the problem which has faced various courts over the past ten years in the regulation of adult businesses. The article will also discuss the seminal case *Young v. American Mini Theatres, Inc.*,[10] the significance of *Renton v. Playtime Theatres, Inc.*[11] as it relates to the *Young* case, cases subsequent to *Young*, and intervening cases from *Young* to *Renton*, and the different analyses that have been used by the courts to review locational zoning ordinances. Finally, this article will discuss the Supreme Court's analysis in *Renton v. Playtime Theatres, Inc.*, and the implications of *Renton* as it relates to the regulation of adult businesses.

The Problem

Judge H. Lee Sarokin, United States District Judge for the District of New Jersey, defined the problem in particularly sharp terms in *E-Bru, Inc. v. Graves*[12] when he observed:

> Voltaire did not write: "I disapprove of what you say, but will defend to the death your right to say it, *unless the subject is sex.*" Nor did the framers of the United States Constitution. So-called adult book stores are established to sell merchandise intended to arouse sexual passions. They also seem to arouse passions of an entirely different sort. If a merchant announced his intention to open a store dedicated to murder mysteries, no matter how violent or bloody, nary a picket or protester would appear. But should one announce that sex is to be the main theme, then organized opposition is inevitable . . .[13]

---

8. 104 S. Ct. 3065 (1984).
9. 452 U.S. 640, 647-48 (1980).
10. 427 U.S. 50 (1976) (Powell, J., concurring).
11. 106 S. Ct. 925 (1986).
12. 566 F. Supp. 1476 (D.N.J. 1983).
13. The quote ends with the following verbage:
> The public permits books, movies and television to inundate us with murder by gun or knife, strangling, rape, beatings and mayhem, all of which are illegal. But the depiction of sexual acts, most of which are legal, are condemned with a furor. We will tolerate without a murmur a movie showing the most brutal murder, but display a couple in the act of love and the outcry is deafening. This is not meant to be a defense of sleazy movies in adult bookstores which pander to the bizarre and to the deviant, but is a plea for perspective in deciding whether such material genuinely warrants an intrusion into the rights guaranteed by the First Amendment.

Id. at 1477-78.

Normally, when confronted with the opening of an adult book store, a city council will converge on the city attorney's office and ask: "What can be done to get that smut out of town?" After the 1976 Supreme Court decision in *Young v. American Mini Theatres, Inc.*,[14] many municipal attorneys would have suggested a locational zoning ordinance to solve the problem. That type of ordinance prohibits placement of adult businesses at various locations of a city. However, a city attorney could not guarantee that a court would uphold the city's locational zoning ordinance. Between 1976, when *Young* came down, and the 1986 *Renton* decision, the federal courts, except in one instance,[15] have overturned locational zoning ordinances aimed at regulating adult businesses.[16]

Why were the courts so reluctant to sustain these ordinances? First, it is important to understand that when a city decides to regulate the location of an adult business through zoning, the city must balance two conflicting but important interests:

(1) The first amendment of the Constitution of the United States; and

(2) The city's need to legislate for legitimate governmental interests.

Justice Powell reminded us of these conflicting interests in *Young v. American Mini Theatres, Inc.*[17] when he opined:

> This is the first case in this Court in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinances . . . The unique situation presented by the ordinance calls, as cases in this area so often do, for a careful inquiry into competing concerns of State and the interests protected by the guarantee of free expression.[18]

---

14. 427 U.S. 50 (1976).

15. Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) (affirmed part of zoning ordinance requiring adult business to be separated from each other by 500 feet).

16. Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983); Kuznich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982); Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982); Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981); Keego Harbor v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981); Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981); Entertainment Concepts, Inc. v. Maciejawski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); Alexander v. City of Minneapolis, 531 F. Supp. 1162 (D. Minn. 1982), *aff'd*, 698 F.2d 936 (8th Cir. 1983); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981); E & B Enterprises v. City of University Park, 449 F. Supp. 695 (N.D. Tex. 1977).

17. 427 U.S. 50 (1976).

18. *Young*, 427 U.S. at 76.

The interests protected by the first amendment[19] must be balanced with the need of cities to protect legitimate government interests by legislation which avoids the "secondary effects" of adult businesses. Increased crime, lowering of property values, and harmful effects on children[20] are all legitimate and significant interests which cities are permitted to address by the use of their zoning power. As the Supreme Court has noted, the exercise of reserve police powers by a city "is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air makes the area a sanctuary for people."[21] As early as 1926, the Supreme Court in *Euclid v. Ambler Realty Co.*,[22] sustained municipalities' zoning ability "to meet effectively the increasing encroachment of urbanization upon the quality of life of their citizens."

Over the past ten years, cities and counties have struggled with the conflict between the first amendment and governmental interests. Any discussion of this ten-year conflict must begin with a discussion of the seminal case dealing with locational zoning ordinances: *Young v. American Mini Theatres, Inc.*[23]

THE *YOUNG* DECISION

The respondent in *Young v. American Mini Theatres, Inc.*[24] operated two adult picture theaters. American Mini Theatres brought an action for injunctive and declaratory relief, challenging the constitutionality of a 1972 Detroit zoning ordinance and an amended anti-skid row ordinance[25] adopted ten years earlier. The 1972 ordinance provided that unless an adult theater receives a special waiver, it may not be located within one-thousand feet of any other "regulated use" or within five-hundred feet of a residential area. The five-

19. The first amendment of the United States Constitution provides that "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of people peacefully to assemble, and to petition the government for redress of grievances." U.S. CONST. amend. I.

20. *See generally Young*, 427 U.S. at 73.

21. Village of Belle Terre v. Borass, 416 U.S. 1, 9 (1973). This language was also cited by Justice Powell in his concurring opinion in *Young*, 427 U.S. at 74.

22. 272 U.S. 365 (1926).

23. 427 U.S. 50 (1976).

24. *Id.*

25. *Young*, 427 U.S. at 52. The ordinance in question dispersed adult theaters rather than concentrating the theaters in limited areas. Specifically, an adult theater was not allowed to be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area.

hundred foot restriction was declared invalid by the district court.[26]

In delivering the plurality decision of the Supreme Court, Justice Stevens, joined by Justices Burger, White, and Rehnquist, looked first at the original 1962 ordinance and the findings which the Detroit Common Council made regarding the anti-skid row or "deconcentration ordinance." Under the deconcentration ordinance, the adult businesses were required to be spaced certain distances from each other and from other uses. For example, no adult use would be permitted within three-hundred feet of another adult use, or within three-hundred to five-hundred feet of an area zoned as residential, or within three-hundred feet of a church or school. The Council had found that some uses of property are especially injurious to a neighborhood when they are concentrated in a limited area. The trial record contained evidence from urban planners and real estate experts that the location of several adult businesses in the same neighborhood tends to attract an undesirable quantity of transients, to affect property values adversely, to cause an increase in crime, especially prostitution, and to encourage residents and businesses to move elsewhere.[27]

Addressing the argument that deconcentration ordinances act as a prior restraint on free speech, the plurality decision concluded that:

> The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the City of Detroit. There was no claim that the distributors or exhibitors of adult films are denied access to the market or conversely that the viewing public is unable to satisfy its appetite for

---

26. In Nortown Theater, Inc. v. Gibb, 373 F. Supp. at 363, 369-70 (1974), the companion case to Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the federal district court, while upholding the 1,000 foot rule dealing with the distance between two adult theaters under the Detroit ordinance, was unable to sustain the section of the ordinance which prohibited an adult theater within 500 feet of any single dwelling or rooming unit. The Court held:

> [N]o arguments are advanced by defendant as to how the prohibition of the regulated uses within 500 feet of a single dwelling or rooming unit furthered the legitimate interest the city has in preserving a residential area or neighborhood. Indeed, where only a single dwelling or rooming unit is involved, we fail to see how the prohibition of the ordinance affords any protection whatsoever to the neighborhood or residential areas . . . No area of the city is specifically set aside or designated for the regulated uses. There are few if any locations other than industrial areas in the downtown commercial area of Detroit where there is not a single dwelling or living unit within 500 feet. Thus the effect of the restriction is almost total ban on uses conceded by the defendants to be lawful . . . We conclude the 500 foot restriction is not necessary to promote any expressed compelling state interest and is therefore invalid under the equal protection clause.

Nortown Theater, Inc., 373 F. Supp. at 369-70.

27. *Young*, 427 U.S. at 55.

> sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.[28]

The Court then pointed out that the city's general zoning law requires all motion picture theaters to satisfy certain locational criteria. Because the zoning ordinance applied even-handedly to all types of theaters, the Court reasoned:

> [W]e have no doubt that the municipality can control the location of theaters as well as the location of other commercial establishments, either by confining them to a certain specialized commercial zone or requiring that they be dispersed throughout the city. *The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating these ordinances.*[29]
>
> [T]he 1000 foot restriction does not in itself create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purpose is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinance treats adult theaters differently from other theaters and the content of material shown in the respective theaters, the regulation of the place where such film may be exhibited does not offend the First Amendment.[30]

The Court then considered whether the classification was consistent with the Equal Protection Clause of the United States Constitution.[31] The theater owners argued that the regulation violated the equal protection clause because it treated them differently than other movie theaters, and that this different treatment was based on the content of the film. The court responded: "Even though the First Amendment protects communications in this area (sexually explicit activities) from total suppression, we hold the state may legitimately use the content of these materials as a basis for placing them in a different classification from other motion pictures."[32]

Having determined that a city may draw zoning lines based on the content of theater offerings, the Court was confronted with the question of whether the lines drawn by the ordinances justified the city's interest in preserving the character of the neighborhood. Ex-

---

28. *Id.* at 62.
29. *Id.* (emphasis added).
30. *Id.* at 62-63.
31. *Id.*
32. *Id.* at 70, 71.

amining the district court's record, the Court held that the evidence disclosed a "factual basis" for the common council's conclusion that the locational restriction would have a desired effect. Accordingly the Court, finding that the ordinance did not violate the equal protection clause, opined:

> It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be *separated rather than concentrated in the same areas. . . .*
>
> Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits the characterizations turns on the nature of its content, we conclude the city's interest in the present and future character of its neighborhood adequately supports its classification of motion pictures.[33]

In upholding the ordinance, the Supreme Court was careful to note that the situation would be different if the ordinance had the effect of "suppressing or greatly restricting access to"[34] lawful speech. An important test by which later ordinances' constitutionality were judged is set forth in a footnote:

> [T]he District Court specifically found that "[t]he Ordinances do not affect the operation of *existing* establishments but only the location of new ones. There are *myriad* locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight."[35]

This test would require later courts to determine from the record whether there were other locations in which adult businesses could open.

Justice Powell's concurring opinion emphasized that the case presented an example of "innovative land use regulations" implicating first amendment concerns only incidentally and to a limited extent.[36] Justice Powell found it significant that over half a century before, the Court in *Euclid v. Ambler Realty Co.*[37] had "broadly sustained the power of local municipalities to utilize the then relatively novel concept of land use regulation in order to meet effectively the increased encroachment of urbanization upon the quality of life of their citizens." Like the majority, Justice Powell dealt directly with

---

33. *Id.* at 71-72.
34. *Id.* at 71 n.35.
35. *Id.* (emphasis added).
36. *Id.* at 73.
37. 272 U.S. 365 (1926).

the relationship between zoning and first amendment rights. He agreed that opportunity for expression and access to that expression is the critical issue:

> The primary concern of the free speech guarantee is that there be full opportunity for expression and all of its varied forms convey a desired method. Vital to this concern is the corollary that there be a full opportunity for everyone to receive the message . . . [T]he central First Amendment concern remains the need to maintain free access of the public to the expression.[38]

Applying this principle to Detroit's anti-skid row ordinance, Justice Powell felt that the ordinance did not suppress the production of, or access to, adult movies to any significant degree. Justice Powell reasoned:

> Nortown concededly will not be able to exhibit adult movies at its *present* location, and the ordinance limits the potential location of the proposed Pussycat. The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation . . . The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries:
>
> (1) Does the ordinance impose any content limitation on the creator of adult movies or the ability to make them available to whom they desire; and
>
> (2) Does it restrict in any significant way the viewing of movies by those who desire to see them? On the record in this case these inquiries must be answered in the negative. At most, the impact the ordinance has on these interests is incidental and minimal.[39]

With this background in mind, Justice Powell applied the four-part test originally set forth in *United States v. O'Brien*.[40] He summarized that test as follows:

> Under that test, the governmental regulation is sufficiently justified, it must be within the constitutional power of the government; further a substantial governmental interest—unrelated to the suppression of free expression; and its incidental restriction on First Amendment rights must be no greater than essential to further the interest.[41]

---

38. *Young*, 427 U.S. at 76-78.
39. *Id.* at 77-78.
40. 391 U.S. 367 (1968).
41. *Young*, 427 U.S. at 79.

Applying this standard, Justice Powell found that the Detroit ordinance easily passed constitutional muster:

> (1) The ordinance was within the power of the Detroit common council to enact;
>
> (2) The interest furthered by the ordinances are important and substantial. Without stable neighborhoods with residential and commercial large sections, a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values;
>
> (3) Since Detroit had the ordinance in effect for ten years, there are no facts to sustain an argument that Detroit embarked upon an effective suppression of free expression; and
>
> (4) That the evidence presented indicated that the urban deterioration was threatened not by the concentration of all movie theaters within other regulated uses, but only by concentration of those that elected to specialize in adult movies.[42]

INTERVENING CASES

To understand the significance of *Renton v. Playtime Theatres, Inc.*, it will be helpful to review some of the intervening cases which use the "*O'Brien* Analysis" and "Time, Place, and Manner" analysis.

A. Cases Using the O'Brien *Analysis*

During the period between *Young* and *Renton*, most of the federal cases addressing the validity of locational zoning ordinances considered ordinances that were analytically indistinguishable from the ordinance upheld in *Young*. However, the courts consistently invalidated these zoning enactments, using the *O'Brien* four-prong analysis.[43] For example, in *Basiardanes v. City of Galveston*,[44] the Fifth Circuit Court of Appeals invalidated an ordinance which eliminated an adult theater located across from a new opera house, and further relegated all adult businesses to heavy industrial zones. The court determined from the trial record that the city had not shown substantial governmental interest in preventing "blighting" of a neighborhood by the adult theater in existence. Applying the second prong

42. *Id.* at 80-82.

43. Kuznich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982); Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982); Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981). *See supra* note 41 and accompanying text.

44. 682 F.2d 1203 (5th Cir. 1982).

of *O'Brien*—whether the ordinance furthered an important governmental interest—the court held that the ordinance was under-inclusive because it did not take into account other blighting influences, such as bars or pool halls. The court questioned how the city could claim a substantial governmental interest in the elimination of blight when the city only regulated the adult theaters, and did not regulate other aforementioned blighting influences present in the neighborhood. The court looked at the effect of the ordinance on all the present businesses in the area, and declared that the city had the burden to prove on the record that its stated substantial governmental interest in removing and preventing blight would actually be effective when the only blight-producing businesses the ordinance regulated were adult theaters.[45] Addressing the ordinance's regulation of adult businesses to industrial zones, the court felt that the city had failed to meet the fourth prong of the *O'Brien* analysis—that the restriction be no greater than is essential to further the governmental interest. The court held that the record contained no evidence that the ordinance did not restrict first amendment rights to a greater degree than was necessary.

In *Purple Onion v. Jackson*[46] the District Court for the Northern District of Georgia discussed the difficulty that lower courts faced in interpreting *Young*. The court explained:

> No single equal protection analysis is garnered in the majority of *Young v. American Mini Theatres, Inc.*, although five Justices agreed that the Detroit ordinance did not violate the equal protection clause. While the four justice plurality did not indicate how much protection sexually explicit expression should be given, it did conclude that, in the absence of repression or significant restriction of public access to this expression, the city's interest in preserving the quality of its urban life adequately supported the classifications in the ordinance. Thus, there was no violation of the Equal Protection Clause of the Fourteenth Amendment. On the other hand, Justice Powell after determining that the ordinance did not suppress the production of, or significantly restrict public access to, adult movies, applied the four part equal protection test of *United States v. O'Brien*. Perhaps because of the lack of a clearly articulated standard in Stevens' plurality decision, Justice Powell's analysis has been most widely followed by federal courts in the wake of *Young v. American Mini Theatres, Inc.*.[47]

45. Basiardanes v. City of Galveston, 682 F.2d 1203, 1215, 1216 (1982).
46. 511 F. Supp. 1207 (D.C. Ga. 1981).
47. Purple Onion v. Jackson, 511 F. Supp. 1206, 1226 (D.C. Ga. 1981) (citations omitted).

The ordinance in *Purple Onion* did not contain a clause, known as a grandfather clause, which would permit businesses in existence at the time the ordinance was put into effect to remain in existence. When the court reviewed the evidence relating to sites available to adult businesses, the court found that over 200 adult businesses would have to find space in approximately 81 sites. The court applied the *O'Brien* analysis to this factual situation and found that although the ordinance satisfied the first three prongs of the test, it did not meet the fourth prong. The lack of available alternative sites for adult businesses showed a greater restriction on first amendment rights than was necessary to further the stated governmental interest.[48]

In *Avalon Cinema Corp. v. Thompson*[49] the challenged ordinance prohibited the showing of "sexually explicit" material within one-hundred yards of specified areas. At the time the ordinance was adopted, there was one theater within the City of North Little Rock. However, no evidence in the record suggested that a neighborhood would decline because of the presence of this single adult theater within one hundred yards of that area. The court of appeal agreed with the City's argument that it may rely on the findings and experience of another legislative body. Nonetheless, the court held that some empirical basis should exist to support a finding that the presence of a *single* theater in existence within one hundred yards of a specified area will have a deleterious effect.[50] The court also stressed that the ordinance contained no grandfather clause and would have required relocation of the one theater in town at the time of the adoption of the ordinance.

As did the court in *Purple Onion v. Jackson*, the court in *Avalon Cinema Corp.* discussed the two analyses in *Young*. Interestingly, the court concluded that the ordinance would have to pass muster on *both* tests:

> There was no opinion of the Supreme Court covering all of the issues in *Young*. That is, although there were five votes to uphold the Detroit ordinance, the five Justices in the majority could not agree on a common rationale. Thus, if *Young* is used as authority to sustain the North Little Rock ordinance, the ordinance must satisfy not only the criteria of the plurality opinion in *Young* [Time, Place, and Manner], but also those of Mr. Justice Powell's concurrence. [The *O'Brien* Test].[51]

---

48. *Id.* at 1227.
49. 667 F.2d 659 (8th Cir. 1981).
50. Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 661 (8th Cir. 1981).
51. *Id.* at 662.

The court concluded that the ordinance failed the third prong of the *O'Brien* test, which requires that the governmental interest be unrelated to suppression of free expression. Evidence in the record at the legislative hearing showed that the city council enacted the ordinance only after being informed of the impending opening of the theater. Thus, the ordinance violated *O'Brien* because it was intended to suppress first amendment speech.

Two years later, the Ninth Circuit Court of Appeals faced a similar issue in *Ebel v. City of Corona*.[52] The court, using the third prong of the *O'Brien* analysis, sustained a preliminary injunction against the City's ordinance. As in *Avalon Cinema Corp.*, the court found evidence that the city had enacted an emergency ordinance at the time that an adult theater opened, and that the intent of the ordinance was to affect that one particular theater.[53] Although the city pointed to contrary evidence that the purpose of the ordinance was to eliminate blight, the court found the evidence tainted, and held that the "real purpose" of the ordinance was to suppress content.[54] *Ebel* thus demonstrated that when applying the third prong of the *O'Brien* test, a court would look to the record to determine if the "real purpose" of a regulation was a suppression of first amendment rights.

The court in *Tovar v. Billmeyer*[55] went even further than the *Ebel* court in applying the third prong of the *O'Brien* analysis. The *Tovar* court held that if the record contained any evidence that a "motivating factor" in the regulation of the business was the suppression of content of the theaters, the ordinance could not be sustained.[56] The analysis in *Tovar* and *Ebel* is significant in that, when applying the *O'Brien* four prong analysis, the court will place the burden of proof on the city to show that the ordinance was not "motivated" by an intent to suppress expression. Stated another way, once the adult business owner puts evidence in the record of some "motivating factor" to suppress, the city bears the burden of proving that the ordinance does not, in fact, fail to meet the third prong of *O'Brien*. This burden left the cities in the untenable position of having to "purify the testimony" before the legislative body for fear that if someone made a comment about the content of the film, a reviewing court would view that comment as evidence that the legislative body

52. 698 F.2d 390 (9th Cir. 1983).
53. Ebel v. City of Corona, 698 F.2d 390, 393 (9th Cir. 1983).
54. *Id.* at 393.
55. 721 F.2d 1260 (9th Cir. 1983).
56. *Id.* at 1266.

was "motivated" with an intent to suppress. The quandary for the cities was how to protect citizens' first amendment right to appear and testify at a hearing, while also avoiding this evidence of "motivating factor."

B. Cases Using Time, Place, and Manner Analysis

To show the significant difference between the time, place, and manner analysis of an ordinance as compared to the *O'Brien* analysis, one can look at a number of pre-*Renton* decisions in which the court used the time, place, and manner analysis. However, in reviewing these decisions, the reader should keep in mind that even under the time, place, and manner analysis, a court will still scrutinize the legislative hearing for two purposes: (1) to determine if adequate findings support the legislative decision to regulate, and (2) to ascertain whether adequate evidence supports these findings.

In other words, under either test espoused in *Young*, a court reviewing an ordinance regulating first amendment activities will still require certain findings.[57] This requirement is contrary to the normal review by a court of a legislative decision, in which no findings are necessary. However, unlike the *O'Brien* analysis, a court utilizing time, place, and manner analysis normally will not second guess the findings or the remedy of the legislative body as to the substantial governmental interest, and the remedy chosen by the legislative body to effectuate that substantial governmental interest. There was a presumption of validity to the ordinance. For example, in *Clark v. Community for Creative Non-Violence*[58] the Supreme Court upheld the validity of written restrictions on the use of a national park as a campground. Writing for the majority, Justice White found that the regulations were justified without reference to the content of the regulated speech, were narrowly tailored to serve a significant governmental interest in preserving the aesthetics of the national park, and left open ample channels for communication.[59] Once the court accepted as valid the National Park Service's evidence that the purpose of the ordinance was to protect the aesthetics of the national parks, the court would not invalidate it because of its effect on the particular first amendment activities. The *Clark* case involved a sleep-in demonstration alleged to be symbolic speech. The Court did not

57. *Young*, 427 U.S. at 76, 77.
58. 104 S. Ct. 3065 (1984).
59. *Clark*, 104 S. Ct. at 3069.

concern itself with the effect of the regulation on the particular demonstration at hand, as the *O'Brien* analysis would have required. Instead, the regulation was not judged "as applied":

> Surely the regulation is not unconstitutional on its face. None of its provisions appears unrelated to the ends that it was designed to serve. Nor is it any less valid when applied to prevent camping in Memorial-core parks by those who wish to demonstrate and deliver a message to the public and the central government.[60]

The *Clark* decision was a precursor to *Renton*. Once the Court determined that the governmental enactment was a reasonable time, place, and manner regulation, serving a substantial governmental interest unrelated to first amendment activities, the court declined to apply the *O'Brien* analysis to determine the effect of the ordinance on the particular first amendment activities. The court explicitly declared this choice:

> Reasonable time, place, and manner restrictions are valid even though they directly limit oral or written expression. It would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech. Thus, if the time, place, and manner restriction on expressive sleeping . . . sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion of First Amendment concerns, or that there is an inadequate nexus between the regulation and the interest sought to be served. We note that only recently, in a case dealing with the regulations of signs, the Court framed the issue under *O'Brien* and then based a crucial part of its analysis on the time, place, and manner case.[61]

Further, unlike lower courts that had used the *O'Brien* analysis, the *Clark* court refused to second guess the National Park Service as to what would be a "less intrusive manner" of regulation:

> We do not believe, however, that either the *United States v. O'Brien* or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.[62]

---

60. *Id.* at 3071.
61. *Id.* at 3071-72 n.8 (citing City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984)).
62. *Id.*

Finally, in *Heffron v. International Society of Krishna Consciousness, Inc.*,[63] members of a religious sect challenged a Minnesota regulation that allowed solicitations at a fairground only from an assigned booth. The stated governmental justification was the need to maintain orderly movement of the crowd, given the large number of exhibitors.[64] The Minnesota Supreme Court invalidated the regulation under the fourth prong of the *O'Brien* analysis, which requires that the restriction on first amendment freedom be no greater than is essential for the furtherance of a governmental interest. The Minnesota Supreme Court found that the crowd control could have been served by less intrusive means and that the religious organization should have been granted an exemption from having to solicit from assigned booths only.

The United States Supreme Court, in refusing to use this "as applied" standard, found that the state supreme court took too narrow a view of the State's interest. The Supreme Court stated that although the campground could have granted an exemption to ISKCON from its rule of soliciting only from an assigned booth, this would not justify an invalidation of the governmental interest in maintaining orderly movement in a crowd, thereby requiring the court to invalidate the rule.[65] The United States Supreme Court, in relying on the time, place, and manner analysis, refused to "second guess" the Minnesota legislature's rationale merely because the Minnesota Court believed the legislature could have used a less restrictive method of regulation.

These cases demonstrate that the time, place, and manner analysis is a less stringent standard than the *O'Brien* analysis. Under time, place, and manner analysis, a court will continue to review the record of the legislative hearing during which the city adopted an ordinance. However, if the court determines that the purpose of the ordinance is not to restrict first amendment freedoms, the court will not attempt to second guess the governmental entity as to the stated governmental interest or the remedy used to effectuate this governmental interest. The Court also will not look at the record to determine whether less intrusive means are available to address the evil which the ordinance prohibits. The foregoing analysis will apply even when the ordinance

63. 452 U.S. 640 (1981).
64. Heffron v. International Society of Krishna Consciousness, Inc., 452 U.S. 640, 651 (1981).
65. *Id.* at 652.

will impinge on first amendment rights. With the comparison of the analyses in mind, we now examine the opinion of the Supreme Court in *Renton v. Playtime Theatres, Inc.*.[66]

The Supreme Court's Analysis in *Renton v. Playtime Theatres, Inc.*

In determining the validity of any zoning regulation of adult businesses, it is important to understand what the Supreme Court did and did not decide in *Renton. Renton* should not be looked upon as giving to jurisdictions carte blanche to eliminate adult businesses from their jurisdictions.

Renton is a city of approximately 32,000 people located south of Seattle. The Renton City Council decided to consider the advisability of enacting a zoning ordinance dealing with adult theaters. The stated reason for this consideration was the blighting effect that these theaters might have on the surrounding community.[67] At that time, neither adult theaters nor other adult entertainment uses, such as massage parlors or adult book stores, existed in the city.[68]

The experiences of Seattle and other cities with adult businesses were reviewed by the City Planning and Development Committee at a number of public hearings.[69] The Committee also considered the effect of a Washington Supreme Court case, *Northend Cinema, Inc. v. City of Seattle*,[70] which detailed a study in Seattle that was conducted to show on the record the "secondary effects" of adult theaters on neighborhoods. The Committee also looked at developments in other cities as they related to the secondary effects of adult theaters.

After the city adopted the locational zoning ordinance, Playtime Theatres, Inc. acquired two existing theaters with the intention of showing adult films. Playtime Theatres thereafter filed a lawsuit in the United States District Court, challenging the ordinance as violative of the first and fourteenth amendments. The plaintiff obtained a preliminary injunction in the district court, but the court later vacated that injunction.[71]

---

66. 106 S. Ct. 925 (1986).
67. Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 927 (1986).
68. *Id.* at 927.
69. *Id.*
70. 90 Wash. 2d 709, 585 P.2d 1153 (1978).
71. *Renton*, 106 S. Ct. at 927, 928.

The Ninth Circuit Court of Appeals, using the *O'Brien* analysis, reversed the district court's decision vacating the preliminary injunction. The court of appeals found:

> (1) The city had improperly relied on the experience of other cities in lieu of their own experience about the secondary effects of adult businesses;[72]
>
> (2) The city failed to establish adequately the existence of substantial government interests in support of the ordinance based on its own problems;[73]
>
> (3) The city failed to prove that the ordinance was unrelated to the suppression of expression;[74] and,
>
> (4) The study of alternative locations was inadequate in that the sites mentioned were not "presently available" for adult theaters.[75]

The Supreme Court reversed.[76] The Supreme Court determined that, because the ordinance in question did not ban adult theaters altogether, it should be analyzed as a form of time, place, and manner regulation. Accordingly, the regulation was valid unless the plaintiff could show that the city had enacted the regulation for the purpose of restraining speech based on its content.

The Court concluded that the ordinance was not aimed at the content of the film shown in adult theaters, but rather at the secondary effects of the theaters on surrounding neighborhoods.[77] The Court repudiated the *O'Brien* analysis, and refused to specifically scrutinize the record to determine if any "motivating factor" behind the enactment of the ordinance evidenced an intent to restrict Playtime Theatres' exercise of first amendment rights. In rejecting the "motivating factor" analysis originally set forth in *Tovar v. Billmeyer*,[78] the Court strongly relied on language in *O'Brien*[79] in which the court declared that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . ."[80]

The Supreme Court's acceptance of the time, place, and manner analysis set forth by Justice Stevens in *Young* also signalled the

---

72. *Id.* at 928.
73. *Id.*
74. *Id.*
75. *Id.* at 932.
76. *Id.* at 933.
77. *Id.* at 929.
78. 721 F.2d 1260 (9th Cir. 1983).
79. United States v. O'Brien, 391 U.S. 367 (1968).
80. *Renton*, 106 S. Ct. at 929 (citing United States v. O'Brien, 391 U.S. 367, 383-84 (1968)).

Court's view that the type of expression at issue did not deserve the fullest protection. The Court deemed it "manifest that society's interest in protecting this type of expression is of a wholly different and lesser magnitude than the interest and untrammled political debate."[81] Interestingly, Justice Powell joined without comment the majority of the Court in repudiating the use of the *O'Brien* four-prong analysis of the ordinance.[82]

Having accepted this analysis, the court faced the only two issues remaining: (1) the existence of a substantial governmental interest allowing the regulation, and (2) the availability of reasonable alternative avenues of communication.[83] As to the substantial governmental interest, the court permitted the city to rely on the experience and studies of other cities to demonstrate that adult businesses can have deleterious effects on the community.[84] The regulation and/or the elimination of these secondary effects constituted a governmental interest.

The Supreme Court did not require that, before enacting an ordinance, a city must conduct new studies to produce evidence of the secondary effects of adult theaters independent of evidence already generated by other cities. As long as the city relied on evidence which it reasonably believed was relevant to the problem, the city could base an ordinance on that evidence.[85] For example, if a city is concerned with the blighting of a residential neighborhood by an adult business located in the area, the study from another jurisdiction must show the casual connection between adult theaters in a residential neighborhood and consequent blight. The Supreme Court did not require that the city wait until a theater opens up within its jurisdiction before determining whether adult theaters can cause the "secondary effects."[86] Also, the Court did not require the city to study the effects that an adult business, in existence at the time the ordinance was to be adopted, had on the community.[87]

The Supreme Court further addressed the relationship between the evidence relied on by a municipality and the means of regulation chosen by that municipality. Even though a city used a study of

---

81. *Id.* at 929-30 n.2 (citing *American Mini Theatres*, 427 U.S. at 70 (plurality opinion)).
82. *Id.* at 926. *See supra* notes 40-41 and accompanying text.
83. *Id.*
84. *Id.*
85. *Id.* at 930, 931.
86. *Id.* at 931.
87. *Id.*

another jurisdiction to determine that adult theaters can cause "secondary effects," the Court did not require the city to use the same remedy used by the other jurisdiction to combat the "secondary effects."[88] If the city conducting the study had used a disbursement ordinance,[89] the city relying on that study could enact a disbursement ordinance, a concentration ordinance,[90] or other remedy to combat the secondary effects of adult businesses. The court stressed that "the city must be allowed a reasonable opportunity to experiment with solutions."[91]

The Supreme Court was not convinced by the argument of Playtime Theatres that the Renton ordinance was underinclusive, and therefore discriminatory, in that the ordinance failed to regulate other adult businesses likely to produce secondary effects similar to those produced by adult theaters. The Court reasoned that even though there was no evidence of other adult businesses on the record at the legislative hearing, the City of Renton might amend its ordinance to include some other type of adult business that had been shown to cause the same kind of secondary effects.[92]

In dissent, Justice Brennan, joined by Justice Marshall, vigorously disputed this point. They argued that the ordinance *did* discriminate on its face against certain forms of speech based on content. The two justices were concerned that the ordinance singled out motion pictures and did not regulate other forms of adult entertainment, such as bars or massage parlors, regardless of whether the businesses were in existence or not.[93] The dissent apparently would take the approach that if a city's concern is the effect of adult businesses on neighborhoods, then all adult businesses should be included in the ordinance to avoid a challenge of discrimination through "underinclusiveness."[94]

---

88. *Id.* at 931.
89. *Id.* at 931 (citing *American Mini Theatres*, 427 U.S. at 71).
90. A dispersement ordinance disperses the adult uses throughout the city by means of limiting the location of one adult business in proximity to another adult business, such as allowing no adult business to be within 500 feet of another adult business. This is the type of ordinance in Renton v. Playtime Theatres, Inc., 106 S. Ct. 926 (1986). A concentration ordinance exists when all adult businesses are concentrated either in a particular zone (such as a commercial zone), or within a specific zone on a particular street or streets. Such an ordinance is in effect in the City of Boston, Massachusetts, which contains a "combat zone" where all adult businesses are located.
91. *Renton*, 106 S. Ct. 925, 931 (1986).
92. *Id.* at 932.
93. *Id.* at 934.
94. *Id.*

Finally, the majority turned its attention to the question of whether the ordinance allowed for "reasonable alternative avenues of communication."[95] They noted that the ordinance left 520 acres, or more than 5%, of the entire City of Renton to adult theaters.[96] In response, Playtime Theatres argued that some of the land in question was already occupied by existing businesses and was not truly available. However, the Supreme Court disagreed:

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting accesss to lawful speech," *American Mini Theatres*, we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices . . . ("The inquiry for First Amendment purposes is not concerned with economic impact.") In our view, the First Amendment requires only that Renton refrain from effectively denying a respondent a reasonable opportunity to open and operate an adult theater within the city.[97]

If the evidence in the record reveals that there is no place within the jurisdiction where the adult business could open, then the ordinance would be subject to being stricken.[98] If the state does allow an amortization period, the jurisdiction must also be concerned about whether reasonable alternative sites for relocation are available.[99]

Implications of *Renton* Related to the Regulation of Adult Businesses

Renton has left a number of unanswered questions which must be evaluated:

> 1. Would the result in *Renton* have been different if the stated governmental interest was the prevention of blight in a commercial zone where bars, pool halls, and so on were present in the area in

---

95. *Id.* at 932.
96. *Id.*
97. *Id.* (citations omitted).
98. *Id. See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Ebel v. City of Corona, 767 F.2d 635 (9th Cir. 1985).
99. *Ebel*, 767 F.2d 635 (9th Cir. 1985). In *Ebel* the court of appeal struck down an adult business ordinance because Ebel had put evidence on the record that there was no other site at which it could relocate. *Id.* at 639.

addition to adult theaters, but the city chooses to regulate only the location of adult theaters?[100]

2. What effect will the *Renton* decision have on those circumstances where all adult businesses are relegated to a heavy industrial zone?[101] The issue here is whether this relegation leaves open reasonable alternative avenues of communication. One might argue, citing *Renton*, that since the owners are not effectively denied a reasonable opportunity to open and operate somewhere in the city, the regulation is not invalid. The argument would be that, under *Renton*, adult theaters are not entitled to operate in a commercial zone.

3. How would an ordinance adopted after *Renton* affect businesses that are already established when the ordinance is adopted? To regulate existing businesses, a city would need a legal determination that the state permits the amortization of nonconforming uses.[102] Further, the city would have to produce evidence in the record that there were reasonable alternative sites where existing businesses could locate were available.[103] Lastly, the amortization period as applied must be reasonable.[104] When analyzing an amortization period, the courts have used a balancing test to determine whether the harm to the user outweighs the benefits to the public gained from termination of the use from its present location.[105]

Prior to *Renton*, the federal courts used the third prong of the *O'Brien* analysis, which requires that the ordinance cannot be enacted

100. *See* Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982).

101. *See id.* at 1214. In *Basiardanes*, all adult theaters, via locational zoning ordinances, were relegated to areas around warehouses, shipyards, undeveloped areas, and swamps. The locations were poorly lit, barren of structures suitable for showing films, and probably unsafe. In theory, the locations were available to adult movie proprietors and patrons, but they were completely unsuited to such a use.

102. When a city adopts a zoning ordinance which will affect a business in existence by requiring that business to move after a period of time, or under certain conditions (such as destruction of 50% of the business), it becomes known as a "nonconforming use," which means that it is not conforming with the zoning ordinance in effect. A number of states have failed to adopt or have repudiated amortization periods. These states—Ohio, Missouri, Arkansas—view the amortization of a nonconforming use as no different than a taking of a vested right. *See generally* People Tags, Inc. v. Jackson County Legislature, No. 85-0028-CU-W-9 (W.D. Mo. June 3, 1986) (applying Missouri law). California does have an amortization period. *See* Caster v. City of Oakland, 129 Cal. App. 3d 98, 180 Cal. Rptr. 682 (1982); Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

103. Caster v. City of Oakland, 129 Cal. App. 3d 95, 180 Cal. Rptr. 682 (1982); Ebel v. City of Corona, 767 F.2d 635, 639 (9th Cir. 1985).

104. *Ebel*, 767 F.2d at 639.

105. *See* Northend Cinema, Inc. v. City of Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978). *See also* Ebel v. City of Corona, 767 F.2d 635, 639 (1985). The *Ebel* court found that Ebel had the burden of proof that the amortization period was unreasonable. The *Ebel* court applied the balancing test set forth in *Northend* and held that the district court did not err in holding that the 60-day amortization period was unreasonable in light of the length of the Ebel lease and the financing investment Ebel had in her book store.

with intent to suppress first amendment protected speech, to disapprove ordinances that did not contain a grandfather clause for existing businesses.[106] The governmental agency had a heavy burden of disproving an intent to suppress speech, especially where there was no evidence that the particular theater or business in fact would cause the evil at which the ordinance was aimed.[107] For example, in *Avalon Cinema Corp. v. Thompson*,[108] the Eighth Circuit struck down a North Little Rock, Arkansas ordinance regulating adult entertainment on the grounds that the ordinance required the one theater in town to move because it was located within 100 yards of a residential neighborhood. The court questioned the substantial governmental interest and the city's motives because the city's stated interest was the evil caused by a concentration of adult businesses. Only one theater was operating in town, and the ordinance required that theater to move. After *Renton*, the courts will have to decide whether one theater can constitute a "concentration."

In answering these questions, cities should not take the *Renton* decision and analysis as giving them carte blanche to eliminate adult businesses from within a community. The jurisdiction cannot simply adopt an ordinance from another jurisdiction as its own without running the risk that a court will find that the regulation is merely an attempt to restrict first amendment rights. The jurisdiction wishing to regulate the adult business through zoning must have adequate evidence on the record to support its findings as to the evil caused by adult businesses within a community, as well as the remedy chosen to combat these evils. The following guidelines, gleaned from *Renton*, are important to consider when using zoning as a tool to regulate adult businesses:

1. The sale of books, newspapers, films, and video cassettes, and the operation of movie theaters showing adult materials are protected by the first amendment of the United States Constitution.[109] Because of these first amendment implications, any regulation of adult businesses must be supported by an adequate record of the legislative meeting, and a city must adopt findings supported by evidence on the record. The regulation cannot be viewed as a normal legislative act if there is no preparation of an adequate

106. Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981).
107. *Id.* at 661.
108. 667 F.2d 659, 661 (8th Cir. 1981).
109. *See* Cinema Arts, Inc. v. County of Clark, 722 F.2d 579 (9th Cir. 1983).

record of a legislative meeting or of findings based on the evidence in the record of that meeting.[110]

2. The courts will analyze any ordinance regulating adult businesses through zoning as a form of time, place, and manner regulation.[111] The record of the legislative hearing must contain evidence that:

(A) At the time the city adopted the ordinance, the purpose of the ordinance was content-neutral;

(B) The ordinance was aimed at the secondary effects of the adult businesses on the surrounding community, and not at the content of adult films; and

(C) The regulation serves a substantial governmental interest and does not unreasonably limit alternative avenues of communication.[112]

3. If the stated substantial governmental interest in regulating the locations of adult businesses is preserving the quality of urban life by avoiding the secondary effects caused by adult businesses, the city must have evidence on the legislative record that adult businesses cause these effects. However, the city does not have to prove that, at the time of the adoption of the ordinance, the adult businesses present in the city cause these effects. The city may instead rely on the experience and studies of other cities that have dealt with adult businesses.[113] When relying on these studies, the city must have evidence on the record that the legislative body reasonably believes that the findings of the studies are relevant to the concerns of their jurisdiction. For example, if a city is concerned with urban blight that might be caused by adult theaters, the city must have evidence on the record that the studies which they relied on show the casual connection between adult theaters and urban blight.[114]

4. If the evidence on the record of the legislative hearing reveals that the "predominant" intent of the city was to use zoning to eliminate the secondary effects of adult businesses, a reviewing court will not invalidate the ordinance on the basis of an alleged illicit legislative intent or motive.[115] In other words, even if citizens testify at the public hearing against the adult business on the basis of its content, that testimony alone will not cause the ordinance to fail.

5. Even if a city uses a study from another city to prove deleterious secondary effects caused by adult businesses, the city is

110. *See* Schad v. Borough of Mount Ephraim, 452 U.S 61 (1981).
111. *See* Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 928 (1986).
112. *Id.* at 930.
113. *Id.* at 931.
114. *Id.*
115. *Id.* at 929.

not required to use the same remedy as the other city to regulate those secondary effects.[116]

6. Adequate evidence must appear on the record of the legislative hearing that demonstrate alternative avenues of communication for adult businesses are available. This requirement does not mean the city has the burden of showing that the adult business will be able to obtain a site at a bargain price; the study of alternative sites need merely demonstrate that the business has a reasonable opportunity to open and operate within the community. The inquiry for first amendment purposes does not concern economic impact.[117] Additionally, there is no requirement that the agency conducting the study of alternative locations contact specific real estate agents, developers, and so on to determine if the business can actually "open up" in that particular location. Alternative sites must be shown to exist within the jurisdiction, but the jurisdiction need not prove that the sites are economically viable.[118]

Conclusion

For any legislative body intending to regulate adult businesses through zoning, this article should give some guidance about the review a court will follow in reviewing a locational zoning ordinance of an adult business. The 1986 United States Supreme Court decision in *Renton v. Playtime Theatres, Inc.* should not be viewed as giving legislative bodies carte blanche in the regulation of adult businesses through zoning. Even with the presumption of validity under the time, place, and manner analysis, because first amendment rights are involved, it is still imperative that an adequate record with findings be established. The findings must be based on evidence that supports the governmental reasons for regulating the businesses in question.

116. *Id.*
117. *Id.* at 932.
118. *Id.*