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New Rules for Zoning Adult Uses: The Supreme Court's Renton Decision

By Alan Weinstein

This term, for the third time in 10 years, the U.S. Supreme Court considered the validity of zoning that restricts the location or operation of businesses that trade in sexually oriented books, magazines, movies, or entertainment. Restrictions on such "adult businesses" raise serious constitutional issues because the First Amendment's guarantee of freedom of speech extends to sexually oriented media so long as the material is not considered obscene. In the latest case, *City of Renton v. Playtime Theatres*, 106 S.Ct. 925 (1986), 38 ZD 258, the Court upheld a zoning ordinance that limited the location of theaters exhibiting adult movies to a 520-acre area in one corner of the city. This ruling provides new guidance to courts called on to review zoning that regulates adult businesses and marks a significant departure from the rules in the large number of such cases decided since the Supreme Court first approved adult-business zoning in its 1976 decision in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), 28 ZD 329.

Mini Theatres involved a challenge to the legality of Detroit's "anti-Skid Row" ordinance that singled out adult bookstores and theaters for special regulatory treatment. The Detroit ordinance provided, inter alia, that adult theaters and bookstores may not be located within 500 feet of a residential area or within 1,000 feet of any two other regulated uses defined as: adult bookstores, adult theaters and minitheaters, bars, cabarets, hotels and motels, pawnshops, billiard and pool halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. Detroit Ordinance 742-G (Nov. 2, 1972), amending Official Zoning Ordinance of the City of Detroit Secs. 32.007, 66.0000, 66.0101 (1962). A sharply divided Supreme Court upheld the ordinance. Justice Stevens's plurality opinion concluded that the ordinance had only a minimal and incidental effect on public access to adult entertainment, but noted that the decision might be quite different if "the ordinance had the effect of suppressing or greatly restricting access to lawful speech."¹ The Detroit scheme raised significant First Amendment issues because its distinctions were based on the content of the material exhibited or sold and because it arguably infringed on free speech rights. Justice Stevens's opinion stressed two factors that insulated the ordinance from constitutional attack. First, Detroit's effort to regulate protected forms of expression apparently was motivated by a desire to avoid the neighborhood blight caused by a concentration of adult uses and not by a distaste for the content of the speech itself. Second, the ordinance would not have the effect of restricting the market for adult entertainment.

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In the wake of the *Mini Theatres* decision, many municipalities adopted the Detroit dispersion technique to address the problems they claimed they were experiencing with the negative effects adult businesses can have on neighborhoods. While many of these ordinances were valid, court challenges to several dispersion schemes revealed that some cities either could not produce legislative findings supporting their restrictions or adopted ordinances that had the effect of banning or severely restricting access to adult entertainment. Not surprisingly, these ordinances were struck down as violative of the First Amendment. For example, in *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983), the Eighth Circuit Court of Appeals invalidated an ordinance that reduced permissible locations for adult businesses by two-thirds.

In 1981, the Supreme Court considered a different form of restriction on adult entertainment in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), 33 ZD 254. The Mount Ephraim ordinance achieved its goal of banning nude dancing by prohibiting all live entertainment in the community. A sharply divided Court held that the ordinance, by banning all live entertainment, was invalid because it intruded too far on rights protected by the First Amendment. An interesting aspect of the *Schad* case was Mount Ephraim's argument that it need not allow live entertainment generally, and nude dancing in particular, within its boundaries if such adult entertainment is readily available in nearby communities. The Court rejected this position, finding that the right to freedom of expression in any one locale may not be abridged simply because the right to the expression may be exercised in some other place.

In a previous commentary, "Regulating Pornography: Recent Legal Trends," 34 *Land Use Law & Zoning Digest*, No. 2 at 4 (1982), this author concluded that the "zoning cases involving restrictions on adult businesses with First Amendment protection—such as theaters and bookstores—show a clear pattern of judicial concern with maintaining community access to such businesses." That commentary also identified four rules that appeared to be guiding the courts' decisions: locational restrictions on adult businesses would be upheld only if the market for this commodity is essentially unrestrained; vaguely worded ordinances were unacceptable; ordinances that do not develop a factual basis for their restrictions or do not relate those restrictions directly to recognized zoning purposes will be struck down; and, ordinances that grant government officials too-broad discretionary powers to determine whether or not an adult business will be permitted to operate—for example, by provisions for special permits—will be struck down.

The *Renton* case makes significant changes in two of these rules, allowing local governments more freedom when they regulate adult businesses. *Renton* is silent on other rules, however, and the ultimate effect of the case depends in large part on how lower courts apply the new rulings to specific cases. The remainder of this commentary discusses the *Renton* case and explores the implications it holds for adult-business zoning in light of other recent state and federal court decisions.

THE RENTON DECISION

The controversy that gave rise to the *Renton* case began in May 1980, when the mayor of Renton, a Seattle suburb, requested that the city council consider enacting adult-business legislation. At the time, there were no adult businesses in that

1. 427 U.S. 50, 71.

city of 32,000. The city council referred the matter to the city's Planning and Development Committee, which held public hearings, reviewed the experience of Seattle and other cities, and sought the advice of the city attorney. The city council also enacted a moratorium on the licensing of adult businesses, explaining its action on the grounds that such businesses "would have a severe impact upon surrounding businesses and residences."²

In April 1981, the city council enacted an ordinance based on the committee's recommendation. The ordinance originally prohibited adult theaters from locating within 1,000 feet of any residential zone or dwelling, any church, synagogue, or other religious institution, or any park, and also from locating within one mile of any public or private school. It was later amended to reduce the locational restriction regarding schools from one mile to 1,000 feet. In effect, the ordinance restricted the location of adult theaters to a 520-acre area. At the time, there were no theaters located in the 520-acre area, and none of the theaters outside that area were exhibiting adult films. In January 1982, Playtime Theatres acquired two movie theaters in Renton with the intention of exhibiting adult films at one of them. Playtime then sued in federal district court, challenging the ordinance.

On January 11, 1983, the district court judge adopted a federal magistrate's findings that: the ordinance "for all practical purposes excludes adult theaters from the city"; Renton had not established a factual basis for the adoption of the ordinance; and, the motivation behind the ordinance reflected "simple distaste for adult theaters because of the content of the films shown."

Playtime was granted a preliminary injunction barring enforcement of the ordinance and, as a result, began to exhibit adult movies. But in February, the district court vacated the preliminary injunction and denied Playtime a permanent injunction, thus reinstating the ordinance. The court, departing from the magistrate's findings, found that 520 acres were available for the location of adult theaters and that the ordinance did not impermissibly restrict Playtime's First Amendment rights. The court also found no improper motive behind enactment of the ordinance and ruled that Renton could rely on the experiences of other cities in its legislative findings supporting the ordinance. Renton appealed.

The Ninth Circuit Court of Appeals reversed the district court in a 1984 decision, *Playtime Theatres v. City of Renton*, 748 F.2d 527 (9th Cir. 1984), 37 ZD 115. Although the appeals court accepted the district court's finding that 520 acres remained outside the ordinance's locational restrictions, it did not agree that the land was "available" for adult theaters. Noting that a substantial part of the 520 acres was occupied by a sewage treatment plant, a horseracing track, an industrial park, warehouse and manufacturing facilities, an oil tank farm, and a fully developed shopping center, the Ninth Circuit found that limiting adult theaters to these areas was a substantial restriction on speech. Thus, the Renton ordinance stood on a different footing from the Detroit ordinance approved in *Mini Theatres*, which did not have the effect of restricting the number of adult theaters.

The appeals court examined the Renton ordinance under the four-part test developed in *United States v. O'Brien*, 391 U.S. 367 (1968), to determine the validity of a regulation that affects freedom of expression. Under this test, a regulation is

constitutional only if: it is within the constitutional power of the government; it furthers an important or substantial governmental interest; the governmental interest is unrelated to the suppression of speech; and the incidental restriction on First Amendment freedom is no greater than essential to further that interest. Applying these factors to the challenged ordinance, the court found two problems: Renton had not demonstrated a substantial governmental interest and had not proved that the ordinance was unrelated to the suppression of speech. The Ninth Circuit noted that both the federal magistrate and the district court recognized that many of the reasons Renton offered for its ordinance "were no more than expressions of dislike for the subject matter."³ On these facts, the Ninth Circuit remanded the case to the district court to determine whether Renton could prove that suppression of speech was not a motivating factor in its adoption of the ordinance.

The Supreme Court overruled the Ninth Circuit in a decision that saw only Justices Brennan and Marshall dissenting. Justice Rehnquist's majority opinion found this case essentially similar to *Mini Theatres* as a form of content-neutral time, place, and manner regulation.⁴ While the ordinance singled out adult theaters for separate zoning treatment, Rehnquist argued that the ordinance was aimed "not at the content of the films shown, but at the secondary effects of such theaters on the surrounding community." Thus, he found that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'" This line of reasoning brought the case squarely within the precedent created in *Mini Theatres*.

The test for such an ordinance, according to the majority, has two parts: Does the ordinance serve a substantial governmental interest, and does it allow for reasonable alternative means of communication? The major issue in the first prong of this inquiry was whether the city of Renton was justified in relying on the experiences of other cities in finding that adult theaters pose a serious threat of urban deterioration. The Ninth Circuit had ruled that, because the ordinance was enacted without the benefit of studies specifically relating to the "particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." The majority rejected this approach as imposing "an unnecessarily rigid burden of proof." Noting that Renton had considered the "detailed findings" regarding the effects of adult theaters in neighboring Seattle, the majority held that "Renton was entitled to rely on the experiences of Seattle and other cities." The majority also provided guidance for other municipalities seeking to rely on the experience of other cities: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."⁵

3. 748 F.2d at 537-538.

4. In general, government may place reasonable restrictions on the time, place, or manner in which speech takes place so long as the restrictions are not related to the content of the speech.

5. 106 S.Ct. at 931. Renton had relied extensively on the summary of the "detailed findings" of Seattle's study of the effects of adult movie theaters that appeared in the Washington Supreme Court's opinion in *Northend Cinema v. Seattle*, 585 P.2d 1153 (1978), 31 ZD 179.

2. *City of Renton v. Playtime Theatres*, 106 S.Ct. 925, 927 (1986), 38 ZD 258.

After dismissing claims that the Renton ordinance was flawed because it chose to concentrate the location of theaters, rather than disperse them as had Detroit, and was underinclusive because it chose to regulate only adult theaters and not the other kinds of adult businesses that are likely to produce secondary effects, the majority addressed the second prong of its test: whether the Renton ordinance allows for reasonable alternative avenues of communication. There was no question that the ordinance permitted adult theaters to locate within a 520-acre portion of the city, but there was a dispute over whether there were "commercially viable" sites available for adult theaters within this restricted area. The Ninth Circuit had found there were none and thus held that the Renton ordinance "would result in a substantial restriction on speech."

The majority rejected the Ninth Circuit's conclusion, relying instead on the district court's finding that the 520 acres of land consist of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is crisscrossed by freeways, highways, and roads." Since land and buildings were "ample" and "accessible," the majority argued that Renton had not effectively denied the adult-theater operators "a reasonable opportunity to open and operate an adult theater within the city."

Adult-theater operators, the majority said, "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. . . . [W]e 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 majority thus concluded that the Renton ordinance represents a valid governmental response to the serious problems created by adult theaters and that the city had not used the "power to zone as a pretext for suppressing expression."

Justice Brennan's dissent, joined by Justice Marshall, labeled the majority's analysis "misguided." Brennan attacked the argument that the Renton ordinance was aimed at the secondary effects of the adult theaters and not at the content of the films shown there. For Brennan, the fact that the ordinance imposed "special restrictions on certain kinds of speech on the basis of content" belied Renton's claim that the ordinance was not designed to suppress the content of adult movies. Not only did the ordinance discriminate on its face against adult theaters, but, Brennan claimed, the circumstances surrounding the adoption and amendment of the ordinance strongly suggested that the ordinance was designed to suppress expression. Among these circumstances were that: the "findings" that support the ordinance were adopted only after the commencement of this lawsuit; the "findings" were based primarily on the experiences of other cities; the city council conducted no studies and heard no expert testimony on how the community would be affected by the presence of an adult movie theater; and a number of these "findings" did not relate to legitimate land use concerns, but were no more than expressions of dislike for the subject matter shown at adult theaters.⁶

6. Brennan cited the following findings of the city council as examples of "expressions of dislike for the subject matter":

Location of adult entertainment land uses on the main commercial thoroughfares of the city gives an impression of legitimacy to, and causes a loss of sensitivity to, the adverse effect of pornography upon children, established family relations,

Based on the above, Brennan concluded that the Renton ordinance was designed to suppress expression and thus was not to be analyzed as a content-neutral time, place, and manner restriction. Viewed as a content-based restriction on speech, the ordinance is constitutional, he argued, only if the city can show that the ordinance is a precisely drawn means of serving a compelling governmental interest. Applying this standard to the facts of this case, Brennan found the ordinance unconstitutional because Renton had not shown that locating adult theaters near its churches, schools, and homes would necessarily result in undesirable "secondary effects" or that these problems could not be effectively addressed by less intrusive restrictions.

Brennan also found the ordinance unconstitutional even assuming that it should be analyzed as a content-neutral time, place, and manner restriction. Applying the majority's two-prong test, Brennan found that the record justifying the city's asserted interest was insufficient to support that interest and that the ordinance did not provide for reasonable alternative avenues of communication. In particular, he claimed that the majority's argument that the ordinance did nothing more than require adult theater operators to participate in the real estate market like anyone else was mistaken, pointing out that adult theater operators were not being treated the same as others, since they were required to conduct business under severe restrictions not imposed on others. In short, while other businesses seeking to locate in the 520-acre area could likely go elsewhere if economics demanded, the adult-theater operators could not.

RENTON'S SIGNIFICANCE

Renton is an important decision for a number of reasons. Primarily, it shows that a clear majority of the Supreme Court now accepts the plurality's argument in *Mini Theatres* that zoning ordinances may single out adult businesses for regulatory treatment different from that accorded other types of businesses, despite the fact that adult businesses are protected by the First Amendment. Justice Rehnquist's opinion found that the Renton ordinance was a valid content-neutral time, place, and manner restriction because the ordinance was aimed "not at the content of the films shown, but at the secondary effects of such theaters on the surrounding community." By placing adult-business zoning squarely in the category of time, place, and manner regulation, the majority directs courts to apply *Renton's* relatively lenient standard of review to judge the validity of such ordinances, rather than the more demanding *O'Brien* test. The opinion also makes clear that both dispersion and concentration are constitutionally valid strategies for addressing the problems of adult businesses. Since *Mini Theatres* dealt only with a dispersion ordinance, this is the first Supreme Court pronouncement on concentration of adult uses, a technique used in Boston and Seattle, among other cities. Local governments may now safely adopt either a concentration or dispersion approach to regulating adult businesses.

To explore the likely effects of the *Renton* decision in more detail, it will be helpful to refer again to the four "rules" that

respect for the marital relationship and for the sanctity of marriage relations of others, and the concept of nonaggressive, consensual sexual relations.

Location of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standards of morality. Pornographic material has a degrading effect upon the relationship between spouses. 106 S.Ct. at 935, n. 3.

appeared to guide the courts in the years after the *Mini Theatres* opinion. The *Renton* case addresses two of these directly: the effect of zoning on the number of adult businesses and the development of findings of fact to support the ordinances.

Availability of Locations

Mini Theatres required that the market for adult entertainment remain "essentially unrestrained" after the enactment of adult-business zoning. The Detroit ordinance passed this test because the Court found that the dispersion scheme, while prohibiting adult businesses from certain locations, would not have the effect of diminishing the number of adult businesses that could operate in the city. When other cities attempted to use the dispersion technique to severely restrict or effectively ban adult businesses, however, the lower courts were not hesitant to invalidate the offending ordinances.

In *Basiardnes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982), 35 ZD 66, for example, a federal appeals court overturned an adult-business ordinance because the locational restrictions were so severe that adult businesses could operate only under "oppressive" conditions. The court found that adult businesses were banned in 85 to 90 percent of the city, while the remaining areas where adult businesses could locate were unsuited for such uses. Adult businesses were permitted only in industrial zones that were distant from other shopping and entertainment areas and that contained only warehouses, shipyards, undeveloped areas, and swamps. These areas had few roads and were "poorly lit, barren of structures suitable for showing films, and perhaps unsafe." Based on these findings, the court concluded that the areas were available for adult businesses only in theory, "but in fact they were completely unsuited to this use."⁷ Since the ordinance's locational restrictions could readily have the effect of reducing the number of adult businesses, the court struck it down.

In another case, *Purple Onion v. Jackson*, 511 F.Supp. 1207 (N.D. Ga. 1981), 34 ZD 7, a federal court struck down Atlanta's adult business ordinance after determining that the locational restrictions of the ordinance were so severe that they would significantly reduce, and possibly eliminate altogether, public access to adult entertainment. The Atlanta ordinance was based on the dispersion scheme used in Detroit, but extended it by restricting all new adult businesses to three zoning districts and including an amortization provision requiring that certain existing adult businesses cease operating at their current locations. The city contended that there were enough sites available in the three zoning districts to ensure that access to adult businesses would not be restricted. The court refused to defer to the city's assessment and, after carefully reviewing all the maps, documentary evidence, photographs, and testimony regarding site availability, found that no more than three or four sites in the restricted area would be considered by a "reasonably prudent investor" as a possible site for an adult business. Based on these findings, the court ruled that the restrictions would reduce public access to adult businesses and struck down the ordinance.

The court found sites unacceptable for a number of reasons: the size and shape of lots precluded construction of a building; there was no road access; surrounding noxious uses, such as oil storage tanks and a sewage treatment plant, were incompatible; and the present ownership or use of the site made its

sale or lease for use as an adult business unlikely. In making these findings, however, the court did not consider either the price of the land or whether the land was presently for sale.

The majority opinion in *Renton* rejects the approach seen in *Basiardnes* and *Purple Onion*. In *Renton*, there was a conflicting factual record on the effect of the restrictions on site availability. The federal magistrate's finding that the ordinance effectively excluded adult businesses was ultimately rejected by the district court. On appeal, however, the Ninth Circuit found that a substantial part of the 520 acres was occupied by uses incompatible with adult theaters—including a sewage treatment plant, an oil tank farm, a racetrack, and a fully developed shopping center—and concluded that this seriously limited the sites available for adult theaters. Justice Rehnquist argued that, since land and buildings were "ample" and "accessible," the ordinance was not overly restrictive: "The First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city." Adult theaters have to compete in the real estate market like anyone else, Rehnquist stated, and the Court has "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."⁸ Justice Brennan's dissent challenged this line of reasoning, arguing that adult theaters were clearly not able to compete in the real estate market on equal footing with the others because they alone were restricted to sites in the 520-acre area reserved for adult businesses.

The majority opinion means that cities may restrict the location of adult businesses providing the restrictions allow such businesses a "reasonable opportunity" to operate. While such language can be read as granting courts a great deal of leeway in deciding individual cases—reasonableness, after all, is not a term subject to precise definition—the tone of the opinion calls for less stringent judicial review of the probable effect of restrictions on adult businesses. Based on the facts in *Renton*, for example, such factors as incompatible neighboring uses, lack of existing suitable structures, and distance from established retail and commercial districts are irrelevant so long as the restricted area contains sufficient vacant or developed land, is accessible by road, and presumably is eligible for utility services.

At minimum, *Renton* places the burden of proof on those challenging an adult-business ordinance to prove that its locational restrictions preclude a "reasonable opportunity" to operate in that community. If a party challenging an ordinance can make a strong, uncontradicted factual showing that the restrictions severely restrict or effectively prohibit adult businesses from operating, the *Renton* decision clearly empowers a court to invalidate the ordinance. What is troubling about the decision, however, is that it may encourage cities to play a game of "chicken" with the courts to see how far adult businesses may be restricted before a court objects. Unfortunately, the goal is to use zoning impermissibly as a technique for eliminating adult businesses, and, because reasonableness is such an elusive term, the *Renton* decision has made that easier.

Studies from Other Communities

Mini Theatres also sought to guard against ordinances that are

7. 682 F.2d at 1214.

8. 106 S.Ct. at 932.

motivated by a distaste for constitutionally protected forms of expression by requiring that communities demonstrate the adverse effects on neighborhoods associated with adult businesses and narrowly tailor their restrictions to further the specific governmental interests endangered by the presence of such businesses. In a number of subsequent cases, courts struck down ordinances in part because the city had not developed an adequate factual record or had relied on the findings of other communities rather than conducting its own studies. For example, in *CLR Corp. v. Henline*, 520 F.Supp. 760 (W.D. Mich. 1981), 34 ZD 59, aff'd 702 F.2d 637 (6th Cir. 1983), the federal trial court invalidated an adult-use ordinance partially on the absence of any legislative history or factual background for the ordinance, in spite of the city's claim that it could rely on the experience of Detroit and other cities.

In *Renton*, the city relied on the factual findings and experience of Seattle and Detroit, rather than making any findings of its own. The Ninth Circuit had ruled that, because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." Renton had presented a very thin record to support its enactment of the ordinance. To uphold the substantiality of Renton's governmental interest, the district court had to rely on Renton's recitation of the experience of other cities, particularly Detroit and Seattle. The Ninth Circuit found this reliance misplaced, ruling that Renton had not studied the effects of adult theaters and applied those findings to the specific problems of Renton. In particular, the Detroit experience, involving the problems raised by a concentration of adult uses, was irrelevant to Renton's stated interest in isolating adult theaters from residential districts and certain other uses. The appeals court stopped short of ruling that Renton could not use the experiences of other cities as part of its findings in support of the ordinance, but found that "in this case those experiences simply are not sufficient to sustain Renton's burden of showing a significant governmental interest."⁹ The majority rejected this argument, claiming that it imposed an "unnecessarily rigid burden of proof" on the city, and held that Renton was justified in relying on the experience of other cities. To guide courts in the future on this issue, the majority stated: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."

This "reasonable belief" standard for adopting another city's experience with adult businesses suffers from the same shortcomings as the "reasonable opportunity" standard discussed previously. The majority opinion provides only minimal guidance on how to administer the standard. Justice Rehnquist noted that, in this case, Seattle had shared Renton's concern with preventing the secondary effects caused by the presence of even one adult theater in a given neighborhood, that Renton had relied heavily on the "detailed findings" developed by Seattle, and that it was irrelevant that Renton ultimately chose a different method of adult theater zoning than that chosen by Seattle. This suggests that cities may safely rely on the experience of other communities if the problems

addressed in the two cities are similar and there are "detailed findings" about the effects of adult businesses. Courts will probably also require a city relying on another community's experience to offer some reasonable justification for doing so. This does not mean that a city is totally free to forego its own fact-finding, however. For example, a court would have little trouble in striking down an ordinance that justified its regulation of a single adult bookstore by relying on the experience of Detroit with the negative effects of a concentration of adult businesses.

Taken together, the two "reasonableness" standards for judging adult-business ordinances would seem to make it quite simple for many communities to make the operation of adult businesses difficult, if not impossible, even though they are purportedly protected by the First Amendment. Consider the following scenario. Centreville, a hypothetical small city of 32,000, has no adult businesses. When city officials learn that one of the two theaters in the community may begin exhibiting adult movies, the city council enacts an adult-business ordinance. The ordinance recites the experience of Seattle with the negative effects that the presence of a single adult theater can have on a neighborhood and, based on a statement that city officials "reasonably believe" that experience relates to their situation, restricts the location of adult theaters to an isolated corner of the community. The ordinance further recites that 520 acres are available for the location of adult theaters in the area, that the area is well-served by roads, and that both vacant land and developed buildings are "ample" and "available" there. The ordinance concludes that a "reasonable opportunity" exists in the area for the operation of an adult theater.

This, of course, is the *Renton* case. What some may find troubling about this scenario is that it permits a city to treat two theater operators totally differently, depending entirely on the content of the movies they intend to exhibit. The *Mini Theatres* opinion granted communities the right to prevent the neighborhood blight caused by a concentration of adult businesses if they could show the problem existed in their community and if the restrictions they imposed did not lessen access to this form of protected speech. *Renton* now effectively grants communities the power to ban the use of any existing theater for the exhibition of adult movies without any justification based on the conditions in that community and without any assurance that a new location would be commercially viable. The decision is a boon to those opposed to adult business and a disaster for those concerned with unjustified government intrusion upon rights guaranteed by the First Amendment.

OTHER ISSUES

Although not an issue in the *Renton* case, amortization provisions warrant discussion at this point, since the courts' treatment of such provisions may be affected by the decision. Most cities that have enacted adult-business ordinances have made the restrictions prospective only, allowing existing businesses to continue to operate as nonconforming uses.¹⁰ In the vast majority of states, however, there is no constitutional bar to requiring such nonconforming uses to cease operation or to relocate within a reasonable time limit. The general rule for

10. See e.g., *Texas National Theatres v. City of Albuquerque*, 639 P.2d 509 (N.M. 1982) (general rule is that nonconforming uses in existence at the time of amendment of the zoning ordinance may be continued).

9. 748 F.2d at 537.

determining the reasonableness of an amortization period is whether the probable benefit to the community from closing the business outweighs the hardship incurred by the operator from such a closing. Thus, for example, in *Northend Cinema v. City of Seattle*, 585 P.2d 1153 (Wash. 1978), 31 ZD 179, the Supreme Court of Washington upheld a Seattle adult-business zoning ordinance that had the effect of requiring the concentration of adult uses and that included a provision terminating any nonconforming adult business within 90 days. The court found the 90-day amortization period reasonable as applied to a number of adult theaters because none of the theaters was bound by its lease to exhibit adult films nor were the theaters bound to remain at their existing locations. Accordingly, the court concluded that the public benefit from the termination of these uses outweighed the merely speculative harm asserted by the theater operators. Other courts have upheld amortization provisions of varying lengths.¹¹

In cases where amortization provisions have been combined with severe locational restrictions on adult businesses, however, the ordinances have been struck down. In *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983), for example, the court invalidated an ordinance that provided a three-month amortization period for adult businesses. The court found that over 30 adult businesses would have to be terminated by the end of the amortization period, but, because of the severe locational restrictions in the ordinance, there were only a limited number of available sites left in the city to which these businesses could relocate. On these facts, the court found that the ordinance was an excessive restriction on constitutionally protected speech and invalidated it.¹²

These cases suggest that the courts may treat ordinances embodying locational restrictions modeled on the *Renton* case more harshly if they contain amortization provisions rather than allowing nonconforming uses to remain in operation. Courts may find it valid to restrict future adult businesses to areas where they have a "reasonable opportunity" to operate, but may well draw the line if, in addition, existing businesses are required to terminate their operation at existing sites. The greater the number of existing businesses affected by the ordinance, the more likely that it will be invalidated, despite the Supreme Court's decision in *Renton*.

The *Renton* case left undisturbed the two remaining rules that could be derived from *Mini Theatres* and subsequent cases. First, courts have not hesitated to strike down ordinances that were vague or overbroad. Adult-business ordinances must show great precision in their language, particularly in the text of definitions and standards for deter-

mining what is and what is not regulated. Ordinances that leave the subjects of regulation unclear or that use definitions so broad that uses other than adult businesses come within the regulations will be routinely invalidated. For example, in the *Purple Onion* case, the Atlanta ordinance defined "adult bookstore" and "adult movie theater" so loosely that, in the view of the court, the definitions could include the federal courthouse, a large number of private homes and apartments, and downtown hotels that offered adult movies on cable television in guest rooms.¹³ The court ruled that the definitions were constitutionally impermissible because they were substantially overbroad.

Renton also was silent on the issue of ordinances that create an unconstitutional prior restraint on freedom of expression. The prior restraint problem arises when ordinances grant government officials discretionary powers to determine whether an adult business will be permitted to operate. Typically, such ordinances use special permits or business-licensing requirements that allow officials to grant or deny an adult business permission to open. The courts have generally been quite hostile to such provisions. In *County of Cook v. World Wide News Agency*, 424 N.E.2d 1173 (Ill. 1981), 34 ZD 10, for example, an amendment to the Cook County zoning ordinance made adult businesses special uses that required the issuance of a special use permit. The court struck down the ordinance as a prior restraint on freedom of expression, noting that the county board had unbridled discretion to grant or deny the permit.

SUMMARY

The majority opinion in *Renton* directs courts to give more deference to the "reasonable" decisions of government officials when they place restrictions on adult businesses. Cities now have no need to conduct their own studies on the effects of adult businesses in their community, but may rely on the experiences of other cities that are reasonably related to their own conditions. Cities may also preclude adult businesses, particularly adult theaters, from using existing facilities and restrict their location to outlying areas, so long as the restricted area is reasonably capable of being developed for adult-business use. *Renton* thus appears to signal a major change in the courts' treatment of adult-business ordinances. We should now expect to see far less judicial hostility toward ordinances that place significant restrictions on such businesses, although the courts do remain free to strike down ordinances that are vague, create a system of prior restraints on speech, or restrict adult businesses to such an extent that it cannot reasonably be said that this form of expression has not been effectively banned.

13. The basic problem with the definitions was that they failed to distinguish between the commercial display and sale of sexually oriented material in adult businesses and the presence of such materials in dwellings, offices, or institutions. See *Purple Onion v. Jackson*, 511 F.Supp. 1207 (N.D. Ga. 1981), 34 ZD 7.

11. See e.g., *Hurt Bookstores v. Edmisten*, 612 F.2d 821 (4th Cir. 1979) (six months); *Castner v. City of Oakland*, 180 Cal.Rptr. 682 (Cal. App. 1982), 34 ZD 172, (one-year amortization period for nonconforming uses that fail to obtain a conditional use permit, with additional one-year grace period for adult businesses that demonstrate economic hardship).

12. See also *Purple Onion v. Jackson*, 511 F.Supp. 1207 (N.D. Ga. 1981), 34 ZD 7.

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