

How to Regulate Adult Entertainment by Zoning

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I. INTRODUCTION

As with all regulation of land use, there must be a legitimate government interest to regulate adult entertainment. Since there is a significant body of law that deals with the treatment of adult entertainment uses under zoning, I have selected the most often-cited cases.

Young v. American Mini Theatres Inc. (427 U.S. 50.96 S. Ct. 2440.49 L. Ed 310,1976).

The U.S. Supreme Court found that Detroit's prohibition of locating an adult theater within 1000 feet of any two other "regulated uses" or within 500 feet of any residential zone did not violate the First and Fourteenth amendments. Further, the zoning ordinance was designed to combat the undesirable "**secondary effects**" of adult businesses, which Detroit had extensively shown to occur in their city. These regulations were acceptable as long as they were "content-neutral", setting standards for time, place and manner of operation.

Renton v. Playtime Theaters, Inc. (106 S. St. 925,1986)

Renton, Washington passed a zoning ordinance that prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple family dwelling church, park, or school. The court found the regulations to be content neutral with regard to the time, place, and manner of regulation "and acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication".

The ordinance was not aimed at the content of the adult films but at the "**secondary effects**" of the theaters on the surrounding community. Renton did not perform its own studies of secondary effects since it had no adult theaters in the city when it adopted the ordinance so it had no experience to draw on. It relied on studies performed by the city of Seattle aimed at preventing adverse secondary effects of locating adult theaters in residential areas of the city.

The Court held that "Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings summarized in the Washington Supreme Court's Northend Cinema opinion'"

The Court found that Renton allowed for "alternative avenues of communication" because the ordinance allowed for 520 acres of commercial and industrial land, or 5% of the city, open to use as adult theater sites.

This land was "ample, accessible real estate, acreage in all stages of **development** from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads." Further, "respondents must fend for themselves in the real estate market" even if there were not any directly available theater sites in this area.

FW/PBS, Inc v. City of Dallas, 493 U.S. 215 (1990)

In FW, the Court expanded its previous theories to deal with a licensing procedure developed by the city of Dallas to regulate adult businesses. The court found that challenges to licensing procedures may be made under the First Amendment "where the scheme vests unbridled discretion in the decision maker and where the regulation is challenged as over-broad." Two tests were created to determine if a regulation creates censorship that imposes a restraint prior to judicial review:

- a.) Any restraint prior to judicial review can be imposed only for a 'specified brief period during which time the status quo must be maintained;
- b.) Expeditious judicial review of that decision must be available, because, "like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be

suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license.

Thus "the license for a First Amendment-protected business must be issued in a reasonable period of time, and, the first two Freedman safeguards are essential". Since Dallas' ordinance failed to provide an effective time limitation on the licensing decision, and it also failed to provide an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial, its licensing requirement was unconstitutional.

Since pornography is not obscenity, and since Dallas did not argue this case as obscenity, the court found that the right to sell this material was a constitutionally protected right.

Topanga Press v. City of Los Angeles, 989 F.2d 1524 (9th Circuit, 1993)

The city intended to move adult businesses from non-conforming locations to conforming locations over a period of time. This, plus the exclusionary nature of the distance buffers resulted in the court finding that the city had excluded adult businesses by creating standards which could not be met by the "**relevant real estate market**".

Los Angeles issued a study in 1977 that documented adverse secondary effects of concentrations of adult businesses. The adoption of the initial distance requirements in 1978 seems, on its face, to follow the Renton guidelines.

In 1983 the city adopted an additional provision that each adult business was considered to be a separate business even if it operated under one roof with another similar business.

The ordinance allowed multiple adult businesses established on or after 9/78 to continue until March 1985. In March 1986 the city expanded their distance requirements (previously 500' from churches, schools, parks or 1000' of other businesses) to include a 500' separation from residential zones.

The 1986 ordinance also provided for the extinction of adult businesses by March 1988 within 500' of a residential zone, with the allowance for continuation of adult businesses within 500' of a residential zone after 3/88 whenever "a site consistent with 12.70C is not reasonably available elsewhere in the City for the establishment or relocation of the subject adult establishment business".

A business existing in 3/86 could continue to operate until 3/91 if the business could establish undue financial hardship based on investment or the existence of a written lease extending past 3/88.

The constitutionality of the zoning ordinance was challenged. The court cited Renton as determinative in finding whether adult businesses' First Amendment rights are threatened and whether a local government had effectively denied a reasonable opportunity to open and operate. This case redefines the "reasonable opportunity" clause.

The court may determine whether a site is "part of a relevant real estate market" in deciding whether the local government had provided reasonable opportunities for local adult business to locate. In so doing, there are two tests that must be met:

1. Whether relocation sites provided to adult businesses may be considered part of an actual business real estate market.
2. Whether, after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing adult businesses.

In Renton, 5% of the city's land area, or 520 acres was available for adult businesses (although there was an oil tank farm, a sewage treatment plant and a horse race track already there). Subsequent to Renton, in Alexander v. City of Minneapolis, 928 F 2d 278, 283 (8th Cir., 1991) that court considered the availability of commercial land. In

Basiardanes v. Galveston, 682 F.2d 1203, 1214 (5th Cir. 1982) held that areas located among warehouses, shipyards, undeveloped areas and swamps did not provide adult businesses reasonable opportunity to relocate.

Accordingly, in Topanga the court made the following test for what constitutes a relevant real estate market:

- 1.) Property is not potentially available when it is unreasonable to believe that it would ever become available to any commercial enterprise.
- 2.) Relocation sites that are reasonably accessible to the general public may also be part of the market.
- 3.) Areas in manufacturing zones, which have a proper infrastructure such as sidewalks, roads and lighting may be included in the market.
- 4.) Potential sites for relocation of adult businesses must be reasonable sites for some commercial business. A warehouse, swamp, or sewage treatment plant site are not examples of reasonable commercial sites.
- 5.) Sites that are commercially zoned are part of the relevant market.

With regard to the relevant real estate market, the court found that of 11,600 "allegedly available" acres for adult business relocation, there was not much truly available. Thousands of acres were beneath the Pacific ocean; some of the land was used as landing strips at Los Angeles Airport; 200 acres were used as a landfill; 600 acres were used as the Van Nuys airport; 4,400 acres were used as oil refineries or by the Port of Los Angeles; 230 acres were used for petroleum gas storage; additional land was used for a Defense plant, a General Motors plant, a portion of a children's hospital.

Out of 11,613 acres "definitionally" available, only 7440 were realistically available, and only .18% of that land was zoned commercial.

There were 102 adult businesses affected, 95-100 of which needed to be relocated. The city noted 120 sites they believed were practically available. However, they did not take into account the 500' buffer analysis from residential zones!

Once the 1000' distance requirement between adult businesses was enforced, it was clear that the first handful of adult businesses to legally relocate would prevent any others from moving into the relevant areas available around them, since every 1000' radius condemned 72 acres around it to no other adult business use

To relocate 100 adult businesses would thus require 7200 acres of land as buffer zones or over 11 square miles of territory, with the center of that territory having to be available for adult businesses under the five point test.

It was an impossible criterion to meet. As a result the court concluded that the city " may not have provided the adult businesses with reasonable avenues of expression. The court considers zoning ordinance cases such as this to present complex constitutional problems".

II. GENERAL ISSUES FOR REGULATING ADULT ENTERTAINMENT

The fall 1994 American Planning Association PLANNING AND LAW Newsletter contained an article by Alan C. Weinstein, professor of law and planning at Cleveland State University's Cleveland-Marshall College of Law. Professor Weinstein's guidelines for regulating adult businesses are:

- ❖ "First, and most critically, officials must recognize that the only permissible goal of adult business regulation is the reduction of their undesirable 'secondary effects', and that the courts will not hesitate to

invalidate zoning restrictions and other forms of regulation--including restrictions on nude erotic dancing-- when they are merely a pretext for eliminating or unduly restricting adult businesses.

- ❖ Local Officials must exercise caution if they choose to rely on the findings of other communities, rather than documenting the negative impacts of 'secondary effects' in their own community. Courts are now requiring officials to demonstrate that they gave a reasonable degree of consideration to such findings prior to enacting their own restrictions.
- ❖ Judges are also examining to what degree any given local adult business may differ from the businesses in the community whose documented 'secondary effects' were used by local officials to justify their own regulations.
- ❖ Local officials must expect that their locational restrictions will be reviewed under the 'relevant real estate market' standard, [so] they should insure that their regulations leave adult businesses with an adequate number of sites that are either zoned for commercial development or, if zoned otherwise, are generally suitable for some form of commercial enterprise.
- ❖ Courts will give local officials significant leeway, but not total license, when enacting regulations to address the public health concerns raised by adult businesses, such as restrictions which seek to prevent patrons from engaging in sexual activity on the premises.

III. HOW TO CONSTRUCT ZONING FOR ADULT ENTERTAINMENT

Step A. Declare the Purpose is to Avoid Adverse Secondary Effects

Use language in the purpose and adoption of the ordinance that describes the potential adverse secondary effects of adult businesses near residential districts, and the need for dispersion of such adult entertainment to avoid these adverse secondary effects.

Step B. Define Adult Entertainment in the Zoning Ordinance

Language similar to the following text should be placed in the zoning ordinance glossary.

DEFINITION OF WORDS- Except where specifically defined herein, all words used in this Zoning Resolution shall carry their customary meanings. Words used in the present tense include the future tense; the singular number includes the plural; the word structure includes the word building; the word lot includes the word plot or parcel; the term "shall" is always mandatory; the words "used" or "occupied", as applied to any land or structure shall be construed to include the words "intended, arranged or designed to be used or occupied".

Specifically defined words-The following listed words are specifically defined for use in this Zoning Resolution.

ADULT- An individual eighteen years of age or older.

ADULT BOOK STORE - Adult book store means an establishment deriving a majority of its gross income from the sale or rental of, or having a majority of its stock in trade in, books, magazines or other periodicals, films, or mechanical or non-mechanical devices, which constitute adult materials.

ADULT MATERIAL- **Adult** material means any book, magazine, newspaper, pamphlet, poster, print, picture, slide, transparency, figure, image, description, motion picture film, phonographic record or tape, other tangible thing, or any service, capable of arousing interest through sight, sound, or touch, and:

1. which material is distinguished or characterized by an emphasis on matter displaying, describing, or representing sexual activity, masturbation, sexual excitement, nudity, bestiality, or human bodily functions of elimination; or

2. which service is distinguished or characterized by an emphasis on sexual activity, masturbation, sexual excitement, nudity, bestiality, or human bodily functions of elimination.

ADULT MOTION PICTURE THEATER- Adult motion picture theater means an enclosed motion picture theater or motion picture drive-in theater used for presenting, and deriving a majority of its gross income from adult material for observation by patrons therein.

ADULTS ONLY ENTERTAINMENT ESTABLISHMENT-Adults only entertainment establishment means an establishment which features services which constitute adult material, or which features exhibitions of persons totally nude, or topless, bottomless, strippers, male or female impersonators, or similar entertainment which constitute adult material.

BOTTOMLESS- Bottomless means less than full opaque covering of male or female genitals, pubic area or buttocks.

NUDE (NUDITY)- Nude (nudity) means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than full, opaque covering of any portion thereof, or female breast(s) with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

SEXUAL ACTIVITY- Sexual activity means sexual conduct or sexual contact, or both.

SEXUAL CONDUCT- Sexual conduct means vaginal intercourse between a male and a female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

SEXUAL CONTACT- Sexual contact means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

SEXUAL EXCITEMENT- Sexual excitement means the condition of human male or female genitals, when in a state of sexual stimulation or arousal.

TOPLESS- Topless means the showing of a female breast with less than a full opaque covering of any portion thereof below the top of the nipple.

Step C. Adopt Rules of Application

Language similar to the following text should be placed in the forward to the zoning ordinance or resolution.

**ARTICLE III
STANDARD DISTRICT REGULATIONS**

SECTION 300 ADOPTION OF THE STANDARD ZONING DISTRICT REGULATIONS AND RULES OF APPLICATION

300.01 REGULATION OF THE USE AND DEVELOPMENT OF LAND AND STRUCTURES

Regulations pertaining to the use of land and/or structures are hereby adopted or amended.

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300.02 RULES OF APPLICATION

The Standard District Regulations set forth in this ARTICLE III shall be interpreted and enforced according to the following rules:

300.021 Identification of Uses

Listed uses are to be defined by their customary name or identification, except where they are specifically defined or limited in this Zoning Resolution.

The full text of the listings in the North American Industry Classification System (NAICS), Executive Office of the President, Bureau of the Budget, 1997 edition shall be a part of the definition of the use listed in this Zoning Resolution and is hereby adopted as a part of this article.

300.022 Permitted Uses

Only a use designated as a Permitted Use shall be allowed as matter of right in a Zoning District and any use not so designated shall be prohibited except, when in character with the Zoning District, such additional use may be added to the Permitted Uses of the Zoning District by amendment of this Resolution.

300.023 Conditional Use

A use designated as a Conditional Use shall be allowed in a Zoning District when such specific conditions as are stipulated in Section 815 of this ordinance are found to be met by the Board of Zoning Appeals.

300.024 Development Standards

The Development Standards set forth shall be minimum allowed for development in a Zoning District. If the Development Standards are in conflict with the requirements of any other lawfully adopted rules, regulations or laws, the more restrictive or higher standard shall govern.

Step D. Identify Which Zones Permit Adult Entertainment

I suggest that adult entertainment be treated as a permitted use in a commercial and/or industrial district that attracts regional traffic, subject to meeting certain standards. Adult entertainment should not be placed in neighborhood commercial districts.

Note: Classifying adult entertainment as conditional uses may run afoul of the FW/PBS v. Dallas case, as conditional use hearing by the BZA may constitute an open-ended process with delays and deferrals.

The best zoning ordinances identify permitted land uses by the North American Industrial Classification System. Using such a system, a regional commercial district might appear as follows.

(Sample) General Commercial District

Permitted Uses

Retail stores, personal services, business and professional offices as listed below. Residential uses are permitted if ancillary to a permitted commercial use.

NAICS Code

44412

Paint, wallpaper, glass stores.

444130

Hardware Stores

444220		Nursery and Garden Centers	445
	Food Stores		
448		Clothing Stores	
72211		Eating and Drinking Places (except those establishments offering or featuring entertainment including totally nude, topless, bottomless, strippers, male or female impersonators, or similar entertainment or services as defined herein)	
44611		Drug Stores and Proprietary Stores	
44531		Liquor Stores	
45110		Sporting Goods	
445291		Baked Goods	
451211		Book Store (but not Adult Book stores as defined herein)	
45112		Hobby and toy shops	
421410		Camera and photo supply shops	
453110		Florists	
453991		Tobacco stores	
451212		News Dealers (except Adult Books)	
9999*		Adult entertainment- sale of adult books, magazines, videos, and adult performances (including nude dancing) provided the following standards are met and the required zoning compliance is applied for:	
		A. Such use shall not be permitted within 1000 feet of:	
		1.) Church	
		2.) School	
		3.) Park or playground	
		4.) residence or residential district	
		B. Such use shall not be permitted within 1000 feet of another adult entertainment use.	

*9999- NAICS has no code for adult entertainment, so number this was arbitrarily chosen