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Zoning and the First Amendment Rights of Adult Entertainment

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NOTES

ZONING AND THE FIRST AMENDMENT RIGHTS OF ADULT ENTERTAINMENT

I. INTRODUCTION

Although protected by the first amendment of the United States Constitution, adult entertainment[1] businesses, such as adult movie theaters[2] and adult bookstores,[3] have been under public and legislative attack for a number of years. Initially, state legislatures utilized public nuisance statutes[4]

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1. Adult entertainment as used in this note is limited primarily to nonobscene adult movie theaters and adult bookstores. The entertainment provided by adult movie theaters and bookstores is entertainment that may be sexually pervasive or erotic but nonobscene under the obscenity standard established in Miller v. California, 413 U.S. 15 (1973). Obscene material is a category of expression not deserving of constitutional first amendment protection. Material is considered obscene and therefore not protected by the first amendment if:

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

Id. at 24 (citation omitted).

2. See, e.g., F. STROM, ZONING CONTROL OF SEX BUSINESSES 50, app. A (1977), for an example of how the City of Detroit defined an adult movie theater.

> Adult Motion Picture Theater
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> An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas" (as described below), for observation by patrons therein.

Id.

3. See, e.g., *id.* for an example of how the City of Detroit defined an adult bookstore.

> Adult Book Store
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> An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas" (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Id.

4. Public nuisance is defined as "[a] condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property."

and stringent licensing provisions[5] in an attempt to indirectly control the distribution of adult entertainment through regulating or banning obscenity.[6] However, state and lower federal courts have been in disagreement as to the constitutionality of such provisions when the scope of a provision had the potential to extend beyond the mere prohibition of obscenity and could intrude into the realm of protected speech.[7] The adult only businesses that are the subject of this note deal with sexually oriented material that is constitutionally protected and thus not properly dealt with under traditional nuisance provisions.[8]

More recently, restrictive zoning laws have become an effective means by which to control adult entertainment within a municipality.[9] Each mu-

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BLACKS LAW DICTIONARY 1107 (5th ed. 1979). *See, e.g.*, DEL. CODE ANN. tit. 10, §§ 7201-7203 (Supp. 1986) (preventing the distribution of obscene materials as defined by the Supreme Court in *Miller*, 413 U.S. at 24).

5. *See* 3 R. ANDERSON, AMERICAN LAW OF ZONING § 17.05 (3d ed. 1986) (general discussion of licenses and special use permits in the regulation of adult entertainment).

6. *See* Roth v. United States, 354 U.S. 476, 485 (1957). The court in *Roth* held that obscenity, as a narrow category of speech, was not the type of speech deserving of constitutional protection under the first amendment. The slight social value, if any, that may be derived from obscenity is clearly outweighed by the social interests of public order and morality. *Id. See also* Note, *Pornography, Padlocks and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. REV. 1478, 1478 n.4 (1983) (for a list of statutes regulating obscenity by allowing for blanket injunctions against obscene material). For a further discussion of the application of public nuisance statutes to obscenity, see generally Houge, *Regulating Obscenity Through the Power to Define and Abate Nuisances*, 14 WAKE FOREST L. REV. 1 (1978).

7. *Roth*, 354 U.S. at 487. The Court stated that "sex and obscenity are not synonymous." *Id.* The portrayal of sex as a form of literary or artistic expression is properly within the protection of the first amendment. Obscenity, on the other hand, portrays sex in a manner only appealing to the receiver's prurient interests. *Id. See also* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 685, 690 (1968) (invalidating an overbroad licensing statute that allows for erratic administration); Superior Films, Inc. v. Department of Education of Ohio, 346 U.S. 587 (1954). For a further complete discussion of prior restraints on free speech, see Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439 (1987); Note, *Injunctions Pursuant to Public Nuisance Obscenity Statutes and the Doctrine of Prior Restraints*, 61 WASH. U.L.Q. 775, 796 (1983-84) [hereinafter *Injunctions*]; Note, *supra* note 6, at 1478-79 (the prior restraint effect on speech imposed by public nuisance laws creates an impermissible chilling effect on expression protected under the first amendment).

8. F. STROM, *supra* note 2, at 3-4, apps. B, F-J (compilation of restrictive ordinances not based on obscenity from Boston; Chicago; Dallas; Oakland; Marion County, Ind.; and Prince Georges County, Md.).

9. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (adult movie theaters limited to approximately five percent of the municipality); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding of zoning ordinance to decentralize the location of adult entertainment businesses); Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987); S & G News, Inc. v. City of Southgate, 638 F. Supp. 1060 (E.D. Mich. 1986) (adult bookstores and movie theaters restricted by zoning ordinance to only 2.3 percent of the city); SDJ v. City of Houston, 636 F. Supp. 1359 (S.D. Tex. 1986); 15192 Thirteen Mile Road, Inc. v.

nicipality has the police power authority[10] to zone its land in the manner considered best to serve the municipality's particular interests.[11] A municipality's exercise of its police power authority is valid as long as the municipality can show a rational governmental interest[12] requiring the exercise of such police power.[13] The Court has generally found a rational governmental interest present in a municipality's preservation of the "moral" or "general" welfare of its community.[14] However, when fundamental constitutional rights are involved, as was the right of privacy in *Moore v. City of East Cleveland*,[15] the normal rules of judicial deference toward zoning ordinances do not apply.[16] The standard of municipal justification is pertinent because at present, zoning ordinances are increasingly being used as a means by which adult entertainment businesses are being regulated, even to

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City of Warren, 626 F. Supp. 803 (E.D. Mich. 1985). *See also Developments in the Law — Zoning*, 91 HARV. L. REV. 1427, 1550-68 (1978) [hereinafter *Zoning*].

10. Police power authority is granted to the individual states by the tenth amendment of the United States Constitution. In turn, the individual states delegate the authority to local municipal governments. The tenth amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

11. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926) (a municipality has the right to "govern itself as it sees fit, within the limits of the organic law of its creation and the State and Federal Constitutions"). *See also generally Renton*, 475 U.S. at 52. The Supreme Court, citing from *Young*, stressed that municipalities must have a reasonable opportunity to experiment with solutions to admittedly serious problems affecting the municipalities. *Id. See infra* notes 23-47 and accompanying text.

12. *Euclid*, 272 U.S. at 395. The Court stated that the zoning ordinance at issue met the rationality test. The Court further elaborated on the components of the rationality standard by stating that "before the ordinance can be declared unconstitutional, [it must be shown] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.*

13. *See infra* notes 48-67 and accompanying text.

14. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (a more recent application of *Euclid*, holding that a zoning ordinance which prohibited more than two unrelated persons from living together served a general welfare interest of the community). *But see* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (an ordinance preventing cohabitation by persons not more closely related than first generation did not serve a valid general welfare interest of the municipality). *See also infra* notes 34-45 and accompanying text.

15. 431 U.S. 494 (1977).

16. *Moore*, 431 U.S. at 512 (fundamental constitutional right of family privacy could not be regulated by mere rationality standard). *See also* Young v. American Mini Theatres, 427 U.S. 50, 75 (1976). Justice Powell, concurring, stated that it should be clear that where protected first amendment interests are at stake, zoning regulations have no such "talismatic immunity from constitutional challenge." *Id.* at 75. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-90 (1926). *Euclid* was decided on police power grounds and thus does not control when free speech is involved in zoning. *Id. See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 528-43 (10th ed. 1980) (discussion that the "rational basis" test is sufficient when nonfundamental rights are affected, but the review standard is more stringent, when for example, first amendment rights are violated).

the point of severe restriction.[17]

This note initially discusses the historical development of municipal zoning.[18] Next, a brief overview addresses the fundamental constitutional right of freedom of speech.[19] Third, this note discusses the interaction between the judicial standards as applied to a municipality's right to zone and the first amendment rights of freedom of speech and expression of adult businesses.[20] Fourth, this note addresses the resulting unconstitutionality of the highly deferential zoning standard which is currently applied to adult entertainment operators.[21] To conclude, new judicial guidelines are suggested which would apply the "time, manner, and place" standard more stringently in order to minimize zoning's harsh effect on the availability of reasonable operating sites for adult entertainment.[22] In particular, this note emphasizes and focuses on the establishment of guidelines to determine if a municipality, when zoning adult entertainment, has allowed for reasonable alternative channels of communication.

II. HISTORY

In order to lay a foundation for the discussion which follows, a brief overview of municipal zoning[23] and first amendment speech[24] is appropriate. Both zoning and first amendment speech have well-developed historical legal precedents.[25] While both speech and zoning are protected, each is scrutinized under a different legal standard by the judiciary.

A. Zoning as a Means to Regulate Land Use

The increasing complexities of modern life have had a dramatic effect on the relationship between the government and private property owners. Traditionally, a land owner had sole possession and control over the use of his land.[26] But as conflicting property uses have expanded between land

17. *See* cases cited *supra* note 9.
18. *See infra* notes 26-67 and accompanying text.
19. *See infra* notes 68-104 and accompanying text.
20. *See infra* notes 105-12 and accompanying text.
21. *See infra* notes 118-56 and accompanying text.
22. *See infra* text accompanying notes 157-203.
23. *See infra* text accompanying notes 29-47.
24. *See infra* text accompanying notes 68-78.
25. *See infra* notes 26-47, 68-104 and accompanying text.
26. United States v. Causby, 328 U.S. 256 (1946). The ancient doctrine at common law was that ownership of one's land extended to the periphery of the universe — *Cujus est solum ejus est usque ad coelum. Id.* at 260-61. *See, e.g.*, 2 W. BLACKSTONE, COMMENTARIES *2. Blackstone described property rights as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." *Id.*

owners, the government has become actively involved in regulating land use for particular social ends.[27]

1. History of the Power to Zone

Zoning has been the predominant means of governmental regulation of private property.[28] The importance of zoning as a useful police power was first recognized by the Supreme Court in 1926 in *Village of Euclid v. Ambler Realty Co.*[29] With *Euclid*, the Court initiated a change in attitude toward expanding the scope of state and local police powers.[30] The village of Euclid enacted a comprehensive zoning plan that restricted the location of industrial development.[31] The Court held that the village's state-granted police power authority was sufficient to sustain the overall zoning scheme for industrial uses.[32] After *Euclid*, zoning became so well-rooted in police power authority that the Supreme Court has avoided invalidating any zoning ordinance by holding that the ordinance exceeded the police powers on which it was founded.[33]

Most zoning acts are based on the language of the *Euclid* era[34] and permit zoning for the purpose of promoting the health, safety, morals, or general welfare of the community which enacted the zoning ordinance.[35]

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27. *See, e.g.*, Village of Euclid v. Ambler Realty, 272 U.S. 365, 386-87 (1926) (precedent set allowing municipal ability to zone for the general welfare of the community).

28. Zoning authority is founded in the police powers granted to the states by the United States Constitution. The states' police power is then usually expressly delegated to local municipalities through state legislation. Typically, zoning is comprehensive with districts affecting an overall plan of the municipality, and the districts are then often cumulative in nature. For example, an area zoned into districts will start out with light zoning which allows only residential building, and gradually get heavier throughout the remaining districts to allow more commercial and industrial uses. *See* 2 R. ANDERSON, *supra* note 5, § 9.14.

29. 272 U.S. 365 (1926).

30. *Euclid*, 272 U.S. at 386-87. The Court acknowledged that constitutional guarantees never vary, however, the scope of their application must dynamically vary with the prevailing conditions. What may have been rightfully rejected many years ago may be presently reasonable and necessary. *Id. See, e.g.*, HAW. REV. STAT. §§ 205-1 to -2 (1985 & Supp. 1987); OR. REV. STAT. §§ 197.005-.855 (1986 & Supp. 1987). For a further view of state police power delegation to local governments, see Cunningham, *Land-Use Control — The State and Local Programs*, 50 IOWA L. REV. 367, 369 n.3 (1965) (collecting the enabling acts of the 50 states). *See Zoning*, *supra* note 9. Municipal zoning is granted under the states' legislative delegation of their police power. *Id.* at 1429, 1443, 1444.

31. *Euclid*, 272 U.S. at 379-80.

32. *Id.* at 387-88.

33. *See Zoning*, *supra* note 9, at 1443.

34. The Euclidean zoning language refers to a particular type of land use control characterized by a "cookie cutter" pattern of rigid, rectangular districts which was upheld by the United State Supreme Court in Village of Euclid v. Ambler Realty, 262 U.S. 365 (1926).

35. *See, e.g.*, STANDARD STATE ZONING ENABLING ACT § 1 (1926). For a summary of zoning purposes that have received judicial approbation since *Euclid*, see D. HAGMAN, URBAN

The village of Euclid was divided into six classes of use districts, with each district cumulatively defining more narrowly the type of uses allowed in that district.[36] The central concern in *Euclid* was whether the creation of residential districts that excluded all industrial uses was valid.[37] The Court held that the community's health and safety would be promoted by separating the dwellings, diminishing traffic flow of vehicles, and reducing the influx of strange persons into the residential neighborhoods.[38] Therefore, under the *Euclid* reasoning, although an intangible, the quality of life is an interest that a community can attempt to control through zoning regulations.[39]

Several years after *Euclid*, the Supreme Court again acknowledged in *Berman v. Parker*[40] that land regulation could promote intangible community values that are spiritual, physical, and aesthetic, as well as monetary in nature.[41] In *Berman*, the District of Columbia authorized a redevelopment agency to plan the redevelopment of certain areas of the district in such a manner as to reduce or eliminate the blight with which such areas were afflicted. The Court held that redevelopment to promote an area's quality of life constituted a valid purpose for zoning.[42] Again in *Village of Belle Terre v. Boraas*,[43] the Court held that the legitimate concerns of zoning were met in an ordinance which prohibited not more than two unrelated persons from residing in the same house.[44] Traditional family values would be served by

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PLANNING AND LAND DEVELOPMENT CONTROL LAW 86-89 (1971). *See Zoning*, *supra* note 9, at 1444. The United States Department of Commerce drafted the model act as a guide for state adoption. The intent behind the Act was based on the zoning principles set out in *Euclid*. *Zoning*, *supra* note 9, at 1444.

36. *Euclid*, 272 U.S. at 380, 379-83 (ordinance which affected the regulation of all buildings as to size and location requirements). The ordinance construed in *Euclid* was an example of cumulative or "hierarchy zoning." The most restrictive zone was the U-1 zone, which permitted only single family residences, agricultural uses, and related activities. In all other zones the uses were cumulative, meaning that the uses permitted in a more restricted zone were also permitted in a less restricted zone. *Id.* at 381.

37. *Id.* at 390.

38. *Id.* at 391. *See also Zoning*, *supra* note 9, at 1450.

39. *See Zoning*, *supra* note 9, at 1451 nn.65-67 (compiling cases that have expressly endorsed the use of zoning to obtain an overall use goal of a municipality). *See generally* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 70-75 (2d ed. 1985). For a further discussion of the development of zoning strategies, see 1 R. ANDERSON, *supra* note 5, § 1.14.

40. 348 U.S. 26 (1954).

41. *Id.* at 33 (supporting the broad scope of police powers in the area of land control).

42. *Id.* The ordinance had the effect of prohibiting students near a university from "piling" into houses, and thus, destroying the present community's family atmosphere. *Id.*

43. 416 U.S. 26 (1974).

44. *Id.* at 29. *But see* Moore v. City of Cleveland, 431 U.S. 494 (1977). The Court held unconstitutional a zoning ordinance which infringed on the fundamental right of privacy. Thus, although similar to *Village of Belle Terre*, the *Moore* ordinance infringed on a family's fundamental right of privacy. The statute therefore was not entitled to the traditional judicial

the zoning regulation's effect of promoting spacious and quiet neighborhoods.[45] Under these cases, municipalities have the means through zoning to enhance and preserve the quality of community life for their residents.

Once zoning was recognized as a means to promote a community's intangible interests in its residents' quality of life, safeguards became necessary to prevent unnecessary governmental infringement on private lands. Most municipal zoning power is granted by state zoning enabling acts.[46] However, in construing zoning enabling acts, the judiciary has tended to interpret the acts with an expansive view of the broad police powers from which the acts are derived.[47] Police powers, however, must serve a rational governmental interest in order to pass judicial scrutiny.

2. Standard of Review for Zoning

A municipality's exercise of its zoning powers is valid if the regulation serves a rational interest of the local government.[48] In *Euclid*, the Court stated that the segregation of residential areas rationally served the community's goals of promoting the health, safety, and general welfare of the village.[49] This landmark case established not only that zoning of private property was acceptable, but also that zoning was acceptable for any rationally conceived governmental interest.

Several years after *Euclid*, the Court further developed the rationality standard in *Zahn v. Board of Public Works*.[50] In *Zahn*, the city of Los Angeles established five zoning districts and classified the type of building allowed in each district.[51] A private property land owner brought suit and

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deference allowed to zoning. *Moore*, 431 U.S. at 507, 508.

45. *Moore*, 431 U.S. at 507-08. A village zoning ordinance restricted the occupancy of one-family dwellings to traditional families or groups of not more than two unrelated persons. The ordinance was held to bear a "rational relationship" to the village's interest in promoting a quiet place, with wide yards and few people. In general, wholesome traditional family values were sought to be protected by the zoning ordinance. *Id.*

46. An example of a model act was drafted in 1926 by the United States Department of Commerce and was called the STANDARD STATE ZONING ENABLING ACT. See 3 R. ANDERSON, *supra* note 5, § 32.01 for the text to the Act. *See also* Cunningham, *supra* note 30; N. WILLIAMS, AMERICAN PLANNING LAW § 18.01, at 355 (1975). The Standard Act has been adopted at one time or another by all 50 states and is still generally in effect in most of the states. *Id.*

47. *See, e.g.*, National Used Cars, Inc. v. City of Kalamazoo, 61 Mich. App. 520, 523-24, 233 N.W.2d 64, 66-67 (1975); Oregon City v. Hartke, 240 Or. 35, 46-47, 400 P.2d 255, 261-62 (1965) (en banc); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 267, 270, 69 N.W.2d 217, 220, 222, *cert. denied*, 350 U.S. 841 (1955).

48. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926).

49. *Id.* at 391.

50. 274 U.S. 325 (1927).

51. *Id.* at 327.

alleged that the zoning ordinance violated his constitutional due process and equal protection rights.[52] The Court announced that where zoning enactments were fairly debatable as to their validity, deference should be given to legislative discretion;[53] the legislature balances the interests of the private land owner against the government's interest, and in close cases, the legislature should not be second-guessed.[54] As a result, after *Euclid* and *Zahn*, zoning ordinances enjoy a presumption of rationality and must be upheld unless it can be shown that the ordinance is clearly arbitrary and unreasonable.

Since the rationality standard requires minimal judicial scrutiny, municipal zoning ordinances are virtually immune from judicial interference.[55] First, with its broad scope of police powers, a municipality has great authority to enact restrictive zoning regulations.[56] Second, the "rational basis test" merely requires a minimal showing of any legitimate governmental interest in order to be held valid by the judiciary.[57] Last, any moral or general welfare concern of a municipality qualifies as a rational governmental interest.[58] As a result, municipal zoning has enjoyed great flexibility with minimal judicial interference.

Furthermore, a rational, comprehensive zoning plan is valid as a whole even if it infringes upon an individual's property rights. Zoning ordinance provisions are usually stated in general terms[59] which exclude classes of uses.[60] As such, landowners within the class affected by a zoning ordinance will be deprived of the unlimited use of their property. The effect of zoning, however, is to create reciprocal benefits for property owners;[61] for example,

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52. *Id.*

53. *Id.* at 328.

54. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). In zoning cases, the traditional attitude of courts, particularly federal courts, has been to defer to the local officials' assessment of facts. *Id. See Zoning, supra* note 9, at 1445, 1559. Also, most municipal zoning is legislative in nature and the:

> Legislative facts are normally generalizations concerning a policy or state of affairs, City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971), and are not obtained in a formal orderly fashion. No Due Process claims are present because legislative acts usually affect a large number of persons, therefore normally ensuring that the government will not act unreasonably against the populace.

Zoning, supra note 9, at 1559-60.

55. *See Zoning, supra* note 9, at 1443-45.

56. *See supra* notes 28-33, 48-49 and accompanying text.

57. *See supra* notes 46-54 and accompanying text.

58. *See supra* notes 34-45 and accompanying text.

59. *See, e.g.*, Zaher v. Board of Public Works, 274 U.S. 325, 327 (1927).

60. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 380 (1926). The Village of Euclid had six zoning districts, each district level progressively excluded a greater number of classes of uses allowed. For example, the lightest district would prohibit commercial and industrial, and school uses, thus, constituting a purely residential area. *Id.*

61. *See* Nollan v. California Costal Comm'n, 107 S. Ct. 3141 (1987) (government must

a homeowner in a residential area cannot build a factory on his property, but he is also assured that neither can any of his neighbors.

The Supreme Court has stated that zoning ordinances affecting the good of the community are valid when they impose only reasonable limitations on the uses that may be made of a landowner's property.[62] Moreover, zoning cases reveal that unless a regulation destroys all viable use of the property affected, no taking by the government will have occurred.[63] Under the Court's rationale in *Zahn*, any zoning infringement imposed on a landowner fades into the overall rational purpose of the government so that the general community's gain bars a claim for any individual losses.[64]

The normal rules of judicial deference do not apply, however, when fundamental constitutional rights are also involved.[65] The United States Constitution guarantees the fundamental right of free speech to all individuals.[66] As a result, speech may not be regulated by the government unless a valid content-neutral restriction is utilized. If a restriction is content based, its review requires "strict scrutiny" — a compelling governmental interest that cannot be satisfied through less drastic means.[67] If noncontent based, such a restriction can reasonably regulate only the time, manner, and place of such lawful speech. Regulations which infringe on free speech, therefore, demand more than the mere rationality standard which is otherwise sufficient for zoning.

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compensate owner for property taken for the benefit of the public good); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 134-35 (1978) (rejecting the notion that the complaining party had not in some manner benefited by the increased quality of life in the city that was promoted by the zoning regulation).

62. *Euclid*, 272 U.S. at 388-89.

63. *See, e.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (landmark zoning regulation prevented landowner from erecting any major structure, thus greatly restricting the viable use of the property). *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning law caused 75% diminution in value of property and no taking found); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87½% diminution in property value).

64. *Euclid*, 272 U.S. at 389.

65. *See* Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977). In striking down East Cleveland's zoning ordinance, the plurality opinion stated that the Constitution prevents a city from narrowly defining fundamental family patterns through zoning regulations.

66. U.S. CONST. amend. I. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech." *Id.*

67. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 102 (1972) (ordinance based on content of speech failed to pass the strict scrutiny test); J. NOWAK, R. ROTUNDA & J. NELSON, CONSTITUTIONAL LAW § 14.40 (3d ed. 1986) (discussion of the strict scrutiny test which requires a compelling governmental interest). *See also* Note, *City of Renton v. Playtime Theatres, Inc.: Court-Approved Censorship Through Zoning*, 7 PACE L. REV. 251, 253-57 (1986) (discussion of strict scrutiny test).

B. First Amendment Free Speech Protection

1. The Right to Free Speech

Freedom of speech is a fundamental right protected under the first amendment of the United States Constitution.[68] The framers of the Constitution explicitly allowed for freedom of speech in order to promote an informed arena for ideological public debate.[69] The right of free expression may not be penalized simply because the view expressed invites dispute or creates dissatisfaction with the sovereign.[70] The Supreme Court has adopted the following statement made by Voltaire to summarize its zealous adherence to first amendment principles: "I [may] disapprove of what you say, but I will defend to the death your right to say it."[71] Thus, protecting the right to free speech is a very important aspect of the first amendment.

Freedom of speech also protects the public's right to receive informa-

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68. U.S. CONST. amend. I. The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or of the right of the people to peaceably assemble and to petition the Government for redress of grievance." *Id. See also* U.S. CONST. amend. XIV, § 1 (the principles inherent in the first amendment also apply to state and local governments through the application of the fourteenth amendment).

69. *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). Karst agrees with Thomas Emerson in believing that the principle of freedom of expression carries beyond the purely political realm and embodies freedom of expression in the whole culture of society. Thus, freedom of expression is meant to include freedom of religion, literature, art, science, and all other areas of human knowledge and expression. *Id.* (referring to T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970)).

70. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 79 (1981) (quoting Terminiello v. Chicago, 337 U.S. 894, 895-96 (1949)). "[T]he court must remain attentive to the guarantees of the First Amendment, and in particular to the protection they afford to minorities against the 'standardization of ideas . . . by . . . dominate political or community groups.'" *Id. Accord* Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1217-18 (N.D. Ga. 1981) (stating that simply because expression is sexually orientated does not affect its first amendment protection rights); Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (5th Cir. 1982).

71. Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) (citing S. TALLENTRYE, THE FRIENDS OF VOLTAIRE 199 (1907)). *See also* E-Bru, Inc. v. Graves, 566 F. Supp. 1476 (D.N.J. 1983). Judge Sarokin elaborated on Voltaire's statement while ruling on a zoning ordinance in Patterson, New Jersey:

> 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 bookstores are established to sell merchandise intended to arouse sexual passions. They also seem to arouse passions of an entirely different sort. . . . [T]he 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 the sleazy movies and adult bookstores which pander to the bizarre and deviant, but it is a plea for perspective in deciding whether such materials genuinely warrant an intrusion into the rights guaranteed by the first amendment.

Id. at 1477-78.

tion.[72] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[73] a pharmacist sought to advertise to the public concerning his fees for goods and services.[74] The state sought to prohibit the flow of information between the pharmacist and the public. The state urged that purely economic price advertising would diminish professionalism among the pharmaceutical profession to the public's detriment.[75] Although the communication in dispute was purely economic, the Supreme Court held that the consumer's interest in commercial information may be as important, if not more important, than the current ideological information in the marketplace of ideas.[76] The general right to a free flow of information is indispensable for a well-informed public regardless of whether the information is commercial or political in nature.[77]

Although the public has a right to free speech, the government may reasonably control the dissemination of information,[78] provided that the government complies with certain constitutional requirements. The judiciary has assumed the task of reviewing governmental regulations for compliance with the Constitution.

2. Free Speech: The Standard of Review for Legislation Which Infringes on First Amendment Rights

a. The Regulations Must be Content Neutral

The Supreme Court has recognized that first amendment speech may not constitutionally be regulated on the basis of its content.[79] The Court has

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72. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (the right of the public to receive commercial speech).

73. 425 U.S. 748 (1976).

74. *Id.* at 750-51.

75. *Id.* at 766-68 (the state was concerned that price wars would break out amongst the pharmacists and that in order to achieve lower prices the quality of service would necessarily decrease).

76. *Id.* at 763.

77. *Id.* at 765. Free speech is important in many aspects of a person's life. For example, commercial enterprises play a substantial role in the United States. Such large scale operations affect the public dramatically by affecting the economic world we live in, and as a result, the public has a right to receive commercial as well as the traditional political dissemination of speech. *Id.*

78. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (a municipality has the right to control speech through a reasonable time, manner, and place regulation); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 645-46 (1981) (the State of Minnesota could reasonably regulate the where, when, and how of speech dissemination on its fairgrounds).

79. Carey v. Brown, 447 U.S. 455 (1980) (dealing with state restrictions on residential picketing); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (government regulations affecting speech cannot be based on the content of materials protected under the first amend-

consistently recognized that a sovereign may not suppress ideas by impeding the free flow of protected speech.[80] The first amendment requires the judiciary to remain attentive to the protection of minority interests.[81] In *Police Department of Chicago v. Mosley*,[82] a city ordinance prohibited picketing within 150 feet of a school unless the picketing involved a labor dispute against the individual school to be picketed.[83] The Supreme Court held that the ordinance impermissibly prohibited speech on the basis of its content and reaffirmed the unconstitutionality of subject matter restrictions by citing a long line of historical precedent.[84] When based on content, a municipality's ordinance is subject to the utmost strict scrutiny by the judiciary. Under *Mosley*, therefore, regulations affecting first amendment free speech can generally be upheld only if the regulations are content neutral.[85]

b. Substantial Governmental Interest Unrelated to Speech

To determine if the government is acting in a neutral manner and is not seeking to suppress ideas, the Constitution has been interpreted to require that three criteria be met.[86] First, the government must show that it has a substantial governmental interest that is unrelated to the suppression of ideas.[87] Second, the means utilized to promote the substantial govern-

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ment); *Heffron*, 452 U.S. at 648-49 (safety regulation to maintain an orderly crowd flow at a state fair was unrelated to suppression of speech); United States v. O'Brien, 391 U.S. 367 (1968) (regulation of physical actions were not related to suppression of ideas). *See also Zoning*, *supra* note 9, at 1550.

80. *Mosley*, 408 U.S. at 95 (citing Cohen v. California, 403 U.S. 15, 24 (1971) (conviction for wearing jacket bearing the words "Fuck the Draft" held violative of first and fourteenth amendments)); Street v. New York, 394 U.S. 576 (1969) (conviction for uttering defamatory words about American flag held unconstitutional); New York Times v. Sullivan, 376 U.S. 254 (1964) (showing of malice is required to recover in defamation action); NAACP v. Button, 371 U.S. 415 (1963) (striking down Virginia statute that forbade attorneys to accept compensation from organizations with no pecuniary right in case; statute held invalid as an undue restriction on free speech); Wood v. Georgia, 370 U.S. 375 (1962) (punishing persons for speaking out on public issues currently before a grand jury, when such speech does not constitute a "clear and present danger," is violative of the first amendment); Terminiello v. Chicago, 337 U.S. 1 (1949) (ordinance barring speech which "invites" dispute held violative of the first amendment); DeJonge v. Oregon, 299 U.S. 353 (1937) (meeting held by advocate of violence was held within the protection of the fourteenth amendment).

81. *Terminiello*, 337 U.S. at 4-5. The Supreme Court must remain attentive to the guarantees of the first amendment and in particular to the protection they afford to minorities against the "standardization of ideas . . . by . . . dominate political or community groups." *Id.* at 4-5.

82. 408 U.S. 92 (1972).

83. *Id.* at 92-93 (the ordinance was to prevent noisy disturbances from interrupting schools while in session).

84. *See* cases cited *supra* note 80.

85. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972).

86. *See infra* text accompanying notes 87-89.

87. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640,

mental interest must be narrowly tailored.[88] And third, reasonable alternative channels of communication must remain open for dissemination of the speech affected.[89]

An illustration of a neutral substantial governmental interest is depicted in *United States v. O'Brien*.[90] In *O'Brien*, the United States government asserted that a law providing for "in tact" draft cards was necessary to promote the smooth, efficient functioning of the government in the organization of the armed forces.[91] O'Brien had destroyed his draft card in violation of the law as a means of symbolically expressing his dissatisfaction with the Vietnam conflict. The Supreme Court held that the government had a substantial interest in promoting the smooth operation of the military, especially during times of war or conflict.[92] Therefore, O'Brien's conduct was subject to regulation even though his display of dissatisfaction was intended to convey a message and indeed was perceived as a message by observers.[93] When the primary motive, then, is not suppression of ideas, the first prong of the time, manner, and place test is met.

In a more recent case, *Heffron v. International Society for Krishna Consciousness, Inc.*,[94] the State of Minnesota maintained a substantial interest, which had no relation to the content of the Krishna's speech, in regulating the orderly movement of a crowd at a very large state fairground.[95] The sheer volume of the crowd and the particular nature of the temporary forum created a substantial safety concern for the State. The significance of the promoted governmental interest, the Supreme Court held, must be assessed in light of the characteristic function of the forum involved.[96] As a result, what constitutes a substantial governmental interest will vary depending on the factual situation, and, in *Heffron*, the large crowd in a temporary forum constituted a substantial governmental interest.

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648 (1981) (safety regulation for orderly flow of people in a congested high traffic area). *But see Mosley*, 408 U.S. at 95-96 (picketing ordinance was unconstitutionally content based). *See also* Karst, *supra* note 69, at 28-35 (stating that *Mosley* adopted the principle of equal liberty of expression).

88. *See infra* notes 97-102 and accompanying text.

89. *See infra* notes 103-04 and accompanying text.

90. 391 U.S. 367 (1968).

91. *Id.* at 78-81 (substantial interest was in the ability of the government to locate and identify people for national defense purposes).

92. *Id.* at 380, 382.

93. When speech and nonspeech are combined in the same course of conduct, a significantly important governmental interest in the regulation of nonspeech can justify incidental limitations on first amendment freedoms. *O'Brien*, 391 U.S. at 376.

94. 452 U.S. 640 (1981).

95. *Id.* at 650-51.

96. *Id.*

c. Narrowly Tailored

Secondly, even assuming that the governmental regulation promotes a substantial governmental interest, the means employed must be narrowly tailored to fulfill the governmental interest sought to be served.[97] A Jacksonville zoning ordinance in *Erznoznik v. City of Jacksonville*,[98] prohibited all nudity from being displayed on outdoor movie theater screens that were visible from any public place.[99] The city had enacted the ordinance in an attempt to eliminate purportedly objectionable films from the view of the general public.[100] The Supreme Court struck down the ordinance as vague because the ordinance failed to take into account that nudity such as a baby's bottom or a nude war victim was not obscene and was therefore within the realm of protected expression.[101] The second prong of the time, manner, and place restriction, therefore, requires that when a substantial governmental interest is to be promoted, the means of regulation must be narrowly drawn to guard against the abrogation of fundamental constitutional rights.[102]

d. Reasonable Alternative Channels for Communication

Lastly, in addition to showing that the means employed to promote a substantial interest are narrowly tailored, reasonable alternative channels of communication must remain open for dissemination of speech in order for a time, manner, and place restriction to be valid.[103] The first amendment requires that the public have open access to information and that the government imposes no restrictions which cut off the public's "reasonable access"

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97. *Heffron*, 452 U.S. 640; Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (ban on all means of live entertainment failed as being not narrowly tailored). *See* Note, *Municipal Zoning Restrictions on Adult Entertainment:* Young, *Its Progeny, and Indianapolis' Special Exception Ordinance*, 58 IND. L.J. 505, 511 (1983). Mayo, *Land Use Control*, 33 SYRACUSE L.J. 401 (1982); *Zoning*, *supra* note 9, at 1550.

98. 422 U.S. 205 (1975).

99. *Id.* at 206-07.

100. *See, e.g.*, JACKSONVILLE, FLA., CODE § 330.313 (1972).

101. *Erznoznik*, 422 U.S. at 213. The ordinance unnecessarily encompassed nudity that was not indecent in nature. All portrayal of skin, regardless of the artistic or social acceptability was banned. *Id.*

102. *Id.* at 214.

103. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972) (third prong of the time, manner, and place standard calling for reasonable alternative channels of communication). *See* Superior Films v. Department of Education of Ohio, 346 U.S. 587, 589 (1954) (Douglas, J., concurring, stated that "[I]n this nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor"). *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957) (central concern of first amendment is the need to maintain free access of the public to the expression); Smith v. California, 361 U.S. 147, 150, 153-54 (1959); Interstate Circuit v. Dallas, 390 U.S. 676, 683-84 (1968).

to information. Thus, the government may only impose restrictions on the free flow of expression to the extent that the public maintains reasonable access to the expression.[104] As a result, the distributor of speech must retain adequate communication channels to permit the public's unobstructed access.

Admittedly, the government has the power to zone and to enact reasonable time, manner, and place restrictions. A problem arises, however, when apparently reasonable zoning regulations come into conflict with the first amendment protection of adult entertainment.

C. *Zoning Interaction with the First Amendment*

It was not until the mid 1970s that zoning of adult businesses became a serious concept for municipal legislative contemplation.[105] In 1976, the Supreme Court in *Young v. American Mini Theatres, Inc.*,[106] upheld a Detroit anti-skid row ordinance[107] against claims of interference with the first amendment rights of adult movie theaters.[108] The Detroit ordinance was the beginning of the use of a novel concept to regulate the placement and operation of adult businesses partly on the basis of their "content."[109] The regulations are content based at least to the extent of singling out adult bookstores and adult movie theaters on the basis of what they sell.[110] However, more recently the majority of the Court has stated that the secondary effects of adult entertainment are the focus of the regulation rather than the content of these regulated businesses.[111]

At present, the Court is purporting to utilize the reasonable time, man-

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104. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (the protection of the first amendment is afforded both to the source and the recipient of free speech).

105. *Id.* at 62-63. The Supreme Court through a plurality opinion upheld for the first time a zoning restriction which the dissent and many commentators felt was based on the content of expression.

106. 427 U.S. 50 (1976).

107. DETROIT, MICH., ORDINANCE 742-G §§ 66.0000-.0103 (Nov. 2, 1972).

108. Young v. American Mini Theatres, Inc., 427 U.S. 50, 73-74 (1976) (Powell, J., concurring) (recognizing Detroit's ordinance as a unique content neutral time, manner, and place restriction).

109. *See generally* FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978) (Stevens, J.) (acknowledging that the *Young* Court had failed to hold a statutory classification unconstitutional because it was based on the content of communication protected by the first amendment).

110. This is evidenced by the fact that not all bookstores and theaters were contained in the Detroit Ordinance. Rather only adult businesses were the subject of the restrictive regulation. *See supra* notes 2-3.

111. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (seven Justices stated that adult entertainment businesses are regulated on the basis of their negative secondary effects, such as crime and littering and not on the basis of their content).

ner, and place first amendment standard. However, the misapplication of the standard's third prong generates the practical effect of neglecting truly reasonable alternatives for dissemination of adult entertainment. The weakened application of the time, manner, and place test causes adult entertainment businesses to be zoned by what one commentator has compared to the mere rationality standard used in ordinary zoning cases.[112]

In *Schad v. Borough of Mount Ephraim*,[113] Justice Stevens recognized two starting points from which to view the regulation of adult entertainment through zoning. One way is to presume that all municipal zoning is constitutionally valid.[114] To rebut this presumption, the burden is on the party trying to exercise expression in violation of the ordinance. The second approach begins with the view that the party challenging the zoning ordinance has his claim rooted in the first amendment.[115] The burden would then lie on the local government to overcome a presumption of invalidity and to show that a valid time, manner, and place restriction is present.[116] Under the time, manner, and place analysis, the path most appropriately utilized is the second approach expressed in *Schad* by Justice Stevens.[117]

III. Problems Created by the Application of the Current Standard

A. *The Existing Standard Applied*

The current highly deferential application of the time, manner, and place standard does not adequately protect adult entertainment freedom of speech rights since the Court allows cities to greatly restrict the number of reasonable sites available for adult business operation.[118] The Supreme

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112. *See* Stein, *Regulation of Adult Businesses Through Zoning after* Renton, 18 Pac. L.J. 351, 352 (1987). Stein advances the opinion that adult business location ordinances after *Renton* will no longer be subject to the "strict scrutiny" standard of *Schad* and *O'Brien*. Now municipal zoning ordinances for adult businesses will be analyzed by a mere "rational basis" standard.

113. 452 U.S. 61 (1981).

114. *Id.* at 79-80 (Powell, J., concurring).

115. *Id.* at 80.

116. *Id.*

117. *See* Thomas v. Collins, 323 U.S. 516, 529-30 (1945). "Accordingly, a municipality is subject to a standard of judicial review determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Id. See also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68, 77 (citing Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (zoning powers "must be exercised within constitutional limits")). *See also*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 71-72 (1976).

118. *See* Friedman, *Zoning "Adult" Movies: The Potential Impact of* Young v. American Mini Theaters, 28 Hastings L.J. 1293, 1295 (1976-77). Friedman anticipated that *Young* would be the creation of a "censorial nightmare" for the entire motion picture industry be-

Court recently decided *City of Renton v. Playtime Theaters, Inc.*,[119] in which two adult movie theater owners were denied the use of their property for displaying adult movies. The theater owners were denied permission to show pornographic movies because their property was located in restrictively zoned areas.[120] The areas were zoned to regulate the dissemination of statutorily defined "adult materials"; particularly, only adult movie theaters were prohibited.[121]

Under a relaxed time, manner, and place rationale, the Court concluded that other reasonable alternative sites which met the zoning requirements existed from which movie theater owners could supply the public with adult movies.[122] The appellate court had recognized, however, that of the 520 acres that were non-restricted, a substantial part was occupied, not for sale, or otherwise commercially unavailable to an adult movie theater operator.[123] On appeal, the Supreme Court reversed the appellate court and held that the mere showing that the 520 acres of non-restricted land existed was sufficient to uphold the validity of the zoning regulation.[124] In light of the appellate court's observation, that there were virtually no practical operating sites, the prospect of obtaining a viable operating site is doubtful after the Supreme Court's *Renton* holding. Thus, the Supreme Court is improperly starting from the presumption of zoning validity rather than from the presumption of first amendment validity that requires the city to bear the burden of showing that a substantial interest is being promoted through legitimate means.[125]

The time, manner, and place standard utilized by the Court is, on its face, protective of adult entertainment. However, in application, protection is inadequate. The Court states that it is utilizing the appropriate judicial

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cause of the severe burdens imposed concerning what constitutes adult material and the limited locations from which dissemination could be made.

119. 475 U.S. 41 (1986).

120. *Id.* at 44-45 (adult theater too close to residential area).

121. RENTON, WASH., ORDINANCE NO. 3526 (1981).

122. *See Renton*, 475 U.S. at 53-54 (520 acres, or about 5 percent, "easily" met the time, manner, and place standard for reasonableness). *But see* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77 (1981) (quoting Schneider v. State, 308 U.S. 147, 163 (1939)). *See also* Note, *supra* note 67, at 269 (author notes the subtle softening of the language from the *O'Brien* standard to the standard used in *Renton*).

123. *See* Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 534 (9th Cir. 1984), also *noted in*, *Renton*, 475 U.S. at 53-54.

> A substantial part of the 520 acres is occupied by: (1) a sewage disposal site and treatment plant; (2) a horseracing track and environs; (3) a business park containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and, (6) a fully-developed shopping center.

Playtime Theaters, Inc., 748 F.2d at 534.

124. *Renton*, 475 U.S. at 53-54.

125. *See supra* text accompanying notes 113-17.

standard, but in effect, as applied, the standard yields only protection comparable to the rationality standard utilized for zoning.[126] A need exists for the Court to diligently apply all of the factors of the time, manner, and place standard *together* when reviewing a zoning ordinance which affects speech rights. Furthermore, the failure of any one of the standard's factors should render the ordinance invalid.

B. The Time, Manner, and Place Standard Applied to Adult Entertainment: A Relaxed Standard

The time, manner, and place standard utilized in adult entertainment cases is applied less stringently than in cases not involving adult entertainment. Official recognition of the time, manner, and place test in the context of adult entertainment occurred in *Renton* in 1986.[127] The standard applied in *Renton* requires a substantial governmental interest that is unrelated to speech, narrowly tailored regulations, and no unreasonable interference with alternative avenues of communication.[128] On its face this is apparently the same standard found in *Heffron*, where the State of Minnesota sought to regulate the location of speakers on the state fairgrounds.[129] Thus, the foundation of the standard utilized for adult entertainment is not new, but in fact, is a standard similar to that which is generally applied to regulations affecting other first amendment speech.

A substantial governmental interest that is unrelated to the content of speech is the first prong of judicial review encountered by municipal zoning of adult entertainment, and the governmental interest requires factual justification by the municipality.[130] The Detroit anti-skid row ordinance in

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126. *See* Stein, *supra* note 112.

127. Prior to *Renton*, only the concurring opinion of Justice Powell in *Young* voiced adoption of the time, manner, and place standard. Young v. American Mini Theatres, Inc., 427 U.S. 50, 73 (1976).

128. *See supra* notes 79-104 and accompanying text; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 67, § 16.47 (discussion of the time, manner, and place regulation). *O'Brien* has a four-part, general test, but another test used by the courts is a three-part "clarification" of the *O'Brien* standard. But both tests are sometimes considered to be the same test because they have the same underlying general principles. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 67, § 16.47(a). *But see* Stein, *supra* note 112, at 352. Stein does not agree that the three- and four-prong tests are in fact the same. The four-prong test of *Schad v. City of Mount Epharim* and *United States v. O'Brien* utilize a "strict scrutiny" standard, which establishes a presumption of constitutional invalidity that a municipality must overcome. The three-prong standard of *Heffron v. International Soc'y for Krishna Consciousness, Inc.* and *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.* rather has a "rational basis" standard, which creates a presumption of validity on behalf of the municipality. *Id. See also supra* text accompanying notes 113-17.

129. *See* Stein, *supra* note 112, at 352, 366 (discussion that the *Heffron* standard is less demanding than the narrower *O'Brien* standard).

130. For a discussion of the importance of a municipality's factual record in zoning, see

Young was specifically developed to disburse adult entertainment and prevent the development of blighted areas in the city.[131] Detroit had studied the problem in depth and had developed a complete factual record which showed that concentrated adult uses promoted increased crime and caused a general decline in the areas surrounding them.[132] The drafters of Detroit's restrictive adult entertainment zoning regulations relied heavily on the information obtained from the factual record which showed that concentration of adult businesses promoted the secondary effects of increased crime and neighborhood decay.[133] Therefore, the Detroit ordinance promoted a substantial governmental interest that, although arguably not content-neutral,[134] was primarily neutral and was unrelated to the suppression of ideas.[135]

A municipality need not develop its own specific factual record to support its substantial governmental interest in zoning as long as reliance is made on other cities' factual records that are reasonably believed to relate to the municipality.[136] Reasonable reliance, if used in good faith by a municipality, adequately fulfills the first prong of the time, manner, and place, free speech standard.[137] However, a showing of actual reasonable reliance by an enacting municipality on another municipality's factual record is not always strictly enforced by the courts. For example, in a Sixth Circuit case, *15192 Thirteen Mile Road v. City of Warren*,[138] the City of Warren enacted a restrictive zoning ordinance which affected only adult movie theater entertainment.[139] The city had waited for the outcome of the *Young* deci-

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Zoning, *supra* note 9, at 1558-62; Stein, *supra* note 112, at 373-75. *See* Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987); Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987) (relevant evidence required by municipality to demonstrate that zoning ordinance was intended to address secondary effects of adult businesses).

131. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The Detroit ordinances which regulated adult bookstores and adult movie theaters were enacted as amendments to the Anti-Skid Row Ordinance in 1972. Experts in real estate and urban planners who promoted the regulations believed that dispersion of adult business would protect the quality of life in the city's neighborhoods. *Id.* at 53-55. *See generally* F. STROM, *supra* note 2, § 4.03[2] (discussion of whether to disperse or concentrate adult businesses).

132. *Young*, 427 U.S. at 55. Experts in the field of zoning are of the opinion that the neighborhoods with concentrated adult uses attract undesireables. *Id.*

133. *Id.*

134. Content neutrality is still highly controversial, but for purposes of this note it is assumed that the interest of regulating secondary effects is content neutral. *See* dissenting opinions from both *Young*, 427 U.S. at 84, and City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 55 (1986) (claiming that the majority's opinion is misguided).

135. *See supra* notes 86-96 and accompanying text.

136. *Renton*, 475 U.S. at 51.

137. *Id.*

138. 626 F. Supp. 803 (E.D. Mich. 1985).

139. WARREN ZONING ORDINANCE § 14.02(C) (1978), *cited in Warren*, 626 F. Supp. at 808-09.

sion and had alleged reliance on the Detroit record; however, the Warren City Council had not directly viewed or directly relied on the Detroit record. But because Warren enacted a similar ordinance to that utilized in *Young*, the Sixth Circuit held that implicit reliance on the Detroit record by Warren's City Council was sufficient factual justification for enacting the ordinance.[140] Although reasonable reliance on other cities' factual records is permitted, the danger of losing fundamental constitutional rights occurs when a municipality is not strictly required to come forth with a factual record disclosing its actual reliance.

On the chance that a substantial governmental interest is present, the second requirement of the time, manner, and place standard demands that the means employed must be narrowly tailored, imposing no greater burden on adult entertainment than is absolutely necessary to further the government's interest.[141] A restrictive zoning ordinance that excluded all forms of live entertainment was enacted by a borough in *Schad*. The substantial governmental interest the ordinance was designed to promote was the avoidance of the secondary problems that may be associated with live entertainment, such as parking, trash problems, adequacy of police protection, and medical facilities.[142] Under the scant factual record supplied by the borough, the Supreme Court held that a total ban on all live entertainment was not the least intrusive means to regulate any unusual problems that live entertainment might create.[143] The borough was required to reasonably show that a more selective approach in serving its purpose would fail to address the substantial interest of the government. Thus, the time, manner, and place standard requires zoning of adult entertainment to be selectively tailored to the problem addressed by the municipality.

Although requiring a substantial interest that employs narrowly tailored means, the adult entertainment standard fails to consider adequately that reasonable alternative channels of communication remain open for the dissemination of speech. This third prong, in application to adult entertainment expression, however, was relaxed most notably by the Court in *Renton* and has created problems as to what constitutes actual "reasonableness" of alternative channels for dissemination of first amendment expression.[144]

The potential for harm in leaving virtually no reasonable available sites for dissemination of adult entertainment is demonstrated by the result in

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140. *Warren*, 626 F. Supp. at 813.

141. *See supra* notes 97-102 and accompanying text.

142. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

143. *Id.* at 61-62.

144. *See* Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1332-33 (9th Cir. 1987); Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987); Walnut Properties v. City of Whittier, 808 F.2d 1331, 1337 (9th Cir. 1986).

Christy v. City of Ann Arbor.[145] The City of Ann Arbor, Michigan, prohibited the location of adult book stores on 99.77 percent of the property within the city. Christy wished to open and operate an adult bookstore in Ann Arbor; however, she was denied permission from the city because her property was not located within the 0.23 percent of the city in which adult entertainment was not restricted.[146] The only other manner in which Christy could disseminate adult books, movies, etc., was to open a "non-adult" store where Christy could then sell "adult" material that comprised less than twenty percent of the total merchandise sold.[147] The district court held that the Ann Arbor ordinance allowed reasonable dissemination channels, even when Christy and her proposed bookstore were excluded from over 99.77 percent of the city.[148] Thus, under the *Christy* ruling, there is the potential harm of greatly limiting the property from which adult entertainment may be disseminated.

Similar to *Christy*, the possibility of a total adult entertainment prohibition appeared in a recent Ninth Circuit ruling, *Walnut Properties, Inc. v. City of Whittier*,[149] where Whittier's zoning ordinance banned all adult operating sites within the central business district of the city.[150] In response to the opening of an adult movie theater in the city, the City of Whittier enacted a zoning ordinance prohibiting the operation of any adult movie theaters within the central city. Initially, the ordinance was struck down by the Ninth Circuit because it created an undue interference with speech by preventing any dissemination of adult entertainment.[151] However, the Supreme Court vacated the Ninth Circuit's decision and remanded the case for a rehearing.[152] The Ninth Circuit has since reviewed the Whittier ordi-

145. 824 F.2d 489 (6th Cir. 1987).

146. See Christy v. City of Ann Arbor, 625 F. Supp. 960, 963 (E.D. Mich. 1986), for more complete facts to the case.

147. *Id. But see* Alexander v. City of Minneapolis, 698 F.2d 936, 939 (8th Cir. 1983) (forty percent allowance of adult material prior to the zoning ordinance taking effect held invalid).

148. *Christy*, 625 F. Supp. at 967. The case was vacated by the Sixth Circuit and remanded for further findings of fact. *See* Christy v. City of Ann Arbor, 824 F.2d 484 (6th Cir. 1987).

149. 802 F.2d 1170 (9th Cir. 1986) (text of case recently removed from the reporter at the request of the court).

150. *Id.* at 1176. The logistical distance requirements make it physically impossible to locate in the business district of the city. This would seem to invalidate the ordinance under *Renton* because *Renton* held that adult entertainment must have a reasonable opportunity to operate a business "within" the city.

151. Walnut Properties, Inc. v. City of Whittier, 762 F.2d 1020 (9th Cir. 1985) (affirmed district court's finding of unconstitutional zoning ordinance which affected adult movie theater).

152. City of Whittier v. Walnut Properties, 475 U.S. 1042 (1986) (mem.) (vacated and remanded in light of the *Renton* holding that allowed municipalities to "severely" restrict the location of adult entertainment businesses because of their alleged detrimental secondary ef-

nance in light of the current *Renton* decision and has vacated and remanded to the district court.[153] Despite the city's near total exclusion, the remand suggests that *Renton* supports the view that the severe exclusion of available sites for adult entertainment may be possible under the highly deferential time, manner, and place regulation utilized by the Court.

At present, the Court should apply more strictly the time, manner, and place test in reviewing regulations of adult entertainment. First, factual records to justify a regulation's substantial governmental interest are a necessity, as was seen in *Schad*, in order to show, second, that a substantial governmental interest unrelated to the suppression of sexually explicit material does indeed exist.[154] The record is also pertinent in verifying that the zoning ordinance is narrowly tailored to directly serve the interest of the government.[155] Third and most important, reasonable alternative channels of communication for adequate public access to adult entertainment are necessary.[156] When the first amendment is involved, a strictly applied time, manner, and place standard is a must.

IV. Factors to be Considered by the Judiciary when Reviewing Adult Entertainment Zoning

A. A Need for Strictly Interpreting what Constitutes Reasonable Alternative Means of Communication: A Focus on the Third Prong of the Time, Manner, and Place Standard

There are several factors which must collectively determine whether alternative adult entertainment operating sites are reasonably available. First, geographic availability; second, commercial viability; and third, economic feasibility. While all of these factors are weighed collectively on judicial review, at present the failure of one or more of the categories does not cause a zoning ordinance to fail. One way to view the current adult entertainment zoning standard is to say that the Court is paying "lip service" to the free speech standard and then is utilizing, for all practical purposes, a standard analogous to the "rationality" standard developed in *Euclid*. To prevent this highly deferential standard from, in effect, applying to free speech, the judiciary needs guidelines that are specifically applicable to zon-

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fects on their surrounding communities). On remand, the Ninth Circuit considered *Walnut* on appeal for a second time, vacated the district court's order, and remanded for further consideration, again in light of *Renton*. Walnut Properties v. City of Whittier, 808 F.2d 1331 (9th Cir. 1986).

153. *Walnut*, 808 F.2d at 1337 (remanded to district court for further findings and proceedings consistent with *Renton*).

154. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 73-74. *See also* Stein, *supra* note 112, at 364.

155. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). *See supra* note 130.

156. *See supra* notes 103-04 and accompanying text.

ing regulations which affect adult entertainment.

B. Reasonable Availability of Operating Sites

1. Geographic Availability

One aspect of what constitutes reasonable alternative channels of communication in the time, manner, and place standard's third prong is whether or not, geographically, land is available for operating an adult entertainment enterprise.[157] Renton, a community with a population of approximately 32,000 people, contained no adult entertainment businesses when the city council enacted a restrictive zoning ordinance that limited adult movie theater operating sites to 520 acres, or approximately five percent of the land comprising Renton.[158] The zoning ordinance restricted the adult entertainment from locating within 1,000 feet of any school, park, church, family dwelling, or residential zone.[159] With a seven judge majority, the Court held that Renton's adult movie theater zoning ordinance allowed for "clearly reasonable" geographical operating sites by not restrictively zoning adult businesses from approximately five percent of Renton.[160] Of this remaining five percent, however, a majority of the land was either already occupied, not for sale, or otherwise unsuitable for an adult movie business.[161] But the Court reasoned that as long as "some" land is physically not restrictively zoned, no matter how minimal, that land is available as a potential operating site for adult entertainment expression.[162] Thus, under *Renton*, any geographically available land, no matter how restrictive, is a conclusive factor in determining that reasonable alternative sites are available for adult entertainment dissemination.

To constitute reasonableness in the third prong of the time, manner, and place standard, the judiciary should require a greater factual justification when the geographical allowance for adult business is severely re-

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157. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (Powell, J., concurring in *Young*).

158. *Renton*, 475 U.S. at 44, 54.

159. *Renton*, 475 U.S. at 45. The Renton ordinance called for prohibiting any adult motion picture theater from locating within one thousand feet of any residential zone, single- or multiple-family dwelling, church, park, or school. *Id.* at 44-45; RENTON, WASH., ORDINANCE NO. 3526 (amended 1982).

160. *Renton*, 475 U.S. at 54. *But see infra* note 161.

161. Playtime Theaters, Inc., v. City of Renton, 748 F.2d 527 (9th Cir. 1984). The appellate court did not dispute that 520 acres were outside of the restricted zone, however, the court recognized that much of the geographically designated land was not reasonably available. A substantial part of the 520 acres was occupied by: "(1) a sewage disposal site and treatment plant; (2) a horseracing track and environs; (3) a business park containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and, (6) a fully-developed shopping center." *Id.*

162. *Id.* at 932.

stricted. In *Young*, the Supreme Court did not make an actual determination of how much land in Detroit was not restrictively zoned for adult entertainment. Rather the Court concluded that there must be a myriad of locations that are not restrictively zoned.[163] The Court reasoned that the Detroit zoning ordinance did not affect the overall number of adult theaters nor the public's general access to such theaters.[164] While the Detroit ordinance may not have unreasonably affected adult entertainment, the general precedent of an "apparent myriad"[165] of locations is not sufficient as a guideline for judicial review of reasonable access under the current time, manner, and place standard's third prong.

Since *Renton*, the Sixth Circuit has interpreted that the third prong of the current time, manner, and place standard as applied to adult entertainment businesses merely requires that some geographical land remains available.[166] For example, in *S & G News, Inc. v. City of Southgate*,[167] Southgate, a community comprised of 30,647 people, enacted a restrictive two-part zoning ordinance.[168] This type of two-part zoning ordinance initially zones districts in which adult entertainment may operate.[169] Then secondly, within these limited districts of the city, additional locational provisions are enacted by the government to either disburse or concentrate adult businesses.[170]

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163. Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 n.35 (1976).

164. *Id.*

165. Justice Stevens used the "myriad test" in *Young*, 427 U.S. at 71 n.35. The footnote reads in part: "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." *Id.*

166. *See, e.g.*, SDJ, Inc., v. City of Houston, 636 F. Supp. 1359, 1370 (S.D. Tex. 1986). *See supra* text accompanying notes 160-62. *See* Walnut Properties, Inc., v. City of Whittier, 802 F.2d 1170, 1176 (9th Cir. 1986). No land was zoned in the central business district of the city of Whittier. Even when considering the total acreage in Whittier, only a maximum of 1.35 percent of the land was available for adult theater sites. While Renton allowed approximately five percent of its land for a population of 30,000 people, Whittier has only left possibly 1.35 percent of its city for 70,000 people. Thus, less than half the land was left for over twice as many people in Whittier. *Walnut*, 802 F.2d at 1176. *Walnut* was vacated and remanded and brought up for another appeal in which the district court order was again vacated and remanded. Walnut Properties, Inc., v. City of Whittier, 808 F.2d 1331 (9th Cir. 1986).

167. 638 F. Supp. 1060 (E.D. Mich. 1986), *aff'd*, 819 F.2d 1142 (6th Cir. 1987).

168. *Id.* at 1061, 1062 (the ordinance actually contains three parts when considering the licensing provision applied to adult business operators).

169. *Id.* at 1063. The location of an "adult bookstore" and an "adult motion picture theatre" is permitted only in a C-3 commercially zoned district. *Id. See, e.g.*, SOUTHGATE MICH. ZONING ORDINANCE §§ 5.153-5.74 (Jan. 30, 1984).

170. S & G News, Inc., v. City of Southgate, 638 F. Supp. 1061, 1063 (E.D. Mich. 1986), *aff'd*, 819 F.2d 1142 (6th Cir. 1987). In addition to the general zoning districts, adult uses must meet certain specific locational requirements. *See, e.g.*, SOUTHGATE, MICH., ZONING ORDINANCE, § 5.153 (1974):

(2) *Location Requirements*

(a) Not more than two . . . [adult] uses are permitted within one thousand (1,000)

Southgate's particular zoning ordinance initially excluded regulated adult uses from 97.77 percent of the municipality by allowing their operation only in C-3 zone districts.[171] Within this 2.23 percent of the municipality which was zoned C-3, the municipality further required that no two regulated uses could locate within one thousand feet of each other, or no one single regulated use could operate within five hundred feet of a residential dwelling unit.[172] As a result, the 2.23 percent of available land was severely diminished by the additional disbursement requirement.

In interpreting *Renton*, the Sixth Circuit held that the Southgate ordinance was valid because it allowed reasonable geographic operating sites.[173] Thus, the Sixth Circuit found that the third prong of the reasonable time, manner, and place standard was satisfied under *Renton* even though Southgate allowed for proportionately less than one-half of the geographically available land than was allowed in *Renton*.

Under the ambiguity concerning what constitutes reasonableness for adult entertainment, the standard of looking solely to geographic outlets is insufficient. The judicial recognition of a "severe restriction" test to land access by adult entertainment businesses could place a heavier affirmative burden on municipalities to come forth and prove by a preponderance that reasonable access by adult businesses is available.[174] The Sixth Circuit has not required a total ban on adult businesses, but has adopted a "severely restrictive" test which subjects regulations to the heightened analysis in

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feet of each other unless the Board of Zoning Appeals concludes that the following criteria are satisfied: That the proposed use will not be contrary to the public interest or injurious to nearby properties; proposed use will not enlarge the development of a skid row area.

(b) None of the . . . [adult] uses are permitted within five hundred (500) feet of any building containing a residential dwelling unit except that this provision may be waived if the person applying for the waiver shall file with the City Plan Commission [a] petition which indicates approval of proposed regulated use by at least 50 percent of the persons owning, residing or doing business within a radius of five hundred (500) feet of the proposed use. (Amended 1/30/74).

Id.

171. *S & G News*, 638 F. Supp. at 1064 (of the 4,400 acres of land comprising Southgate, 109 acres are zoned C-3).

172. In Southgate, the C-3 district is one of three commercially zoned districts that comprise 109 acres of land or 2.3 percent of the entire geographical terrain in Southgate. *Id.* at 1064.

173. Apparently the plaintiff did not argue the unavailability of geographical sites. *Id.* at 1066.

174. With a population of 30,000 people, *Renton* allowed a five percent geographical allowance for adult movie theaters. Moreover, *Walnut* may possibly be held reasonable with only a 0.16 to 1.35 geographical allowance for Whittier's population of 70,000 people. *Walnut* reveals the potential harm that may result in restricting the reasonable access to available sites for adult entertainment under the current judicial application of the judicial time, manner, and place standard.

Schad.[175] With no such affirmative duty, a unique zoning ordinance in Michigan attempted to effectively ban 99.77 percent of all the land in Ann Arbor for exclusive adult entertainment dissemination.[176] In *Alexander v. City of Minneapolis*,[177] an ordinance similar to that in *Christy* was struck down by the Eighth Circuit.[178] The Eighth Circuit reasoned that it would not be practical to combine general release films and adult films in the same theater.[179] Under *Christy* and *Alexander*, a severe restriction threshold would clarify the judicial standard of reasonableness so that uniform results between the circuits would be possible.

In addition to geographic availability, another aspect which affects the reasonableness of the third prong of the time, manner, and place standard is the overall viability of sites available for adult entertainment. Viability is broken down into two overlapping branches, commercial[180] and economic viability.[181] Because commercial and economic viability can effectively ban the operating of adult entertainment businesses, the third prong of the judicial time, manner, and place review standard should scrutinize these factors.

2. Viability of Geographically Available Land

Once it is determined that land is geographically available, the need then arises to determine if a reasonable amount of the nonrestrictively

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175. *See generally* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (when fundamental constitutional rights are involved, traditional judicial deference is improper, and a city must come forward with a greater showing to justify its regulation). *See also* Christy v. City of Ann Arbor, 824 F.2d 489, 492 (6th Cir. 1987) (ordinance which does not totally ban adult businesses but which does have a severely restrictive impact is subject to the stringent judicial analysis found in *Schad*); CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983). An ordinance which severely restricted adult entertainment business was subject to showing a predominant compelling governmental interest in order to retain the ordinance. This greater burden of proof was utilized even absent a total ban. *CLR Corp.*, 702 F.2d at 639.

176. The zoning ordinance was unique because an adult use was defined as a business wishing to sell adult materials that comprised greater than twenty percent of its stock, floor space, or movie running time. Thus, the ordinance did not activate until a business met the adult use definition. As such, adult entertainment could be sold in small quantities throughout the city. However, under *Christy*, the possibility of operating exclusively an adult entertainment enterprise is virtually nil.

177. 698 F.2d 936 (8th Cir. 1983).

178. Both the Minneapolis and Ann Arbor ordinances regulated adult entertainment material by: 1) regulating what businesses would be controlled (those selling over a certain percentage of adult material); and 2) regulating, in addition, where the business that met 1) could be placed. *See* Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987); Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983).

179. *Alexander*, 698 F.2d at 939.

180. *See infra* text accompanying notes 186-94.

181. *See infra* text accompanying notes 195-203.

zoned land is commercially viable for use by adult businesses.[182] Commercial viability is determined by the overall effect of not unreasonably restricting adult entertainment speech. In *Young*, Justice Powell emphasized that the reasonable time, manner, and place standard required the Court to consider if the zoning ordinance in "any" way significantly affected the reasonable dissemination of speech.[183] Justice Stevens further stated that the result would be quite different if the ordinance had any effect of greatly restricting lawful speech.[184] The Detroit ordinance was upheld by the Court because viable land remained reasonably available for adult movie theaters.[185]

a. Commercial Viability of Sites Zoned for Adult Use

A lack of commercially viable operating sites creates the potential harm of squeezing adult entertainment out of the free speech market. In *Purple Onion, Inc. v. Jackson*,[186] Atlanta enacted a zoning ordinance that primarily restricted new adult businesses to the desolate outer fringes of the municipality. The effect of the ordinance significantly interfered with the ability of adult entertainment operators to obtain a viable operating site.[187] The court concluded that several factors affect the viability of operating sites including reasonable access to the sites, safety of the sites, whether or not landowners would sell land to operators of adult entertainment, and the general overall location of the sites.[188] Moreover, the court recognized that the practical effect of placing adult entertainment in commercially unviable locations would cause adult enterprises to go out of business.

The Fifth Circuit also invalidated a similar ordinance in *Basiardanes v. City of Galveston*,[189] for primarily the same reasons as in *Purple Onion*.[190] Since the effect of these zoning ordinances unreasonably interfered with the number of commercially viable operating sites, the ordinances failed the third prong of the free speech judicial standard. Under *Purple Onion*, when commercial viability significantly affects the locational options of adult businesses, the zoning ordinance is unreasonable since it fails to meet the third prong of the time, manner, and place judicial standard.

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182. *See supra* note 161.
183. Young v. American Mini Theatres, Inc., 427 U.S. 50, 79 (1976).
184. *Id.* at 72 n.35.
185. *Id.* at 79.
186. 511 F. Supp. 1207 (N.D. Ga. 1981).
187. *Id.* at 1215-17.
188. *Id.* at 1224-25 (consideration of such factors that would have the effect of "squeezing" adult entertainment establishments out of business).
189. 682 F.2d 1203 (5th Cir. 1982).
190. *See supra* text accompanying notes 186-88.

At present, *Renton* does not consider the commercial viability of adult operating sites as a factor for determining reasonable alternative means of communication. In *Renton*, the Court held that the first amendment is not concerned with the economic or commercial viability problems affecting adult entertainment.[191] The majority of the Court reasoned that the first amendment does not compel the government to insure access.[192] However, when a fundamental constitutional right is involved, commercial viability, while not the exclusive factor, should play a role in the overall reasonableness of the regulation. The dissent in *Renton* properly recognized that the Renton ordinance is clearly unconstitutional as unreasonably restricting access to viable sites.[193] Therefore, by not considering commercial viability, the *Renton* majority evidently applied a diminished free speech standard which failed to acknowledge the fundamental rights of adult entertainment expression guaranteed by the first amendment.[194]

b. Economic Viability

The third factor affecting reasonableness is whether land is economically available for adult entertainment businesses.[195] At present, however, even if there is sufficient geographically available land, *Renton*, which is now followed by the lower courts, established that the land need not be "economically available."[196] The reasoning is that "first amendment rights do not compel the government to ensure that adult theaters, or any other speech related business, will be able to obtain sites at bargain prices."[197] The failure to consider economics results because zoning is a common process which potentially affects every commercial enterprise in some manner.[198] Therefore, land may be physically and commercially on the market for sale, but the cost of purchasing or maintaining the land could be economically impossible for an adult business operation. Thus, the Court has refused to let economics present a successful challenge for unreasonable

191. City of Renton v. Playtime Theaters, Inc. 475 U.S. 41, 54 (1986). *See* Stein, *supra* note 112, at 375. Stein emphasizes the ease by which a municipality can restrictively zone adult businesses when no economic considerations are taken into account.

192. *Renton*, 475 U.S. at 54.

193. *Id.* at 64-65.

194. *See generally* Moore v. City of East Cleveland, 438 U.S. 494 (1977) (fundamental right of privacy not properly regulated under highly deferential zoning ordinance).

195. *Renton*, 475 U.S. at 54 (the Court was not receptive to this argument under the facts of the case).

196. *Renton*, 475 U.S. at 54-55. That respondents must fend for themselves in the real estate market, on equal footing with other prospective purchasers and lessees, does not give rise to a first amendment violation. *Id.*

197. *Id.* at 54.

198. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

interference.[199]

The tolerance of severe economic restraint may be appropriate when judging a zoning ordinance that has no effect on protected speech, but when a constitutional claim of suppression of the fundamental right of free speech is raised, a focus void of all economic impact, no matter how severe, is improper. In *Young*, Justice Powell stated that first amendment inquiry is not concerned exclusively with economics, but rather looks to the effect of a zoning ordinance on freedom of expression.[200] The Detroit ordinance regulated, but did not unreasonably restrict the overall availability of sites for adult businesses.[201] Thus, economics, while not a sole factor, should properly play a role in evaluating the general reasonableness of the third prong of the free speech standard.

In *Renton*, the Court held that adult entertainment operators must compete on an equal basis with the general public in purchasing land and that the first amendment does not require that the government afford bargain prices to adult business operators.[202] The dissent keenly notes, however, that a very restrictive zoning ordinance does not put theater operators on the same footing as the general public.[203] Thus, the economic impact is not exclusive in determining reasonable availability of sites. But the analysis is not complete until a further practical view of the effects of the ordinance is determined by the courts. Economics need not play an exclusive role in determining reasonableness, but since economics can effectively ban reasonable access, it does need to play a role in the overall view of the judicial free speech standard for adult entertainment.

V. CONCLUSION

When considering zoning ordinances that affect fundamental constitutional rights, the judiciary must view the totality of the circumstances surrounding the enactment of the regulation. When reviewing a municipality's record, the courts are obligated to use the heightened scrutiny called for in the reasonable time, manner, and place regulation. Specifically, the application of the third prong of the time, manner, and place analysis needs to consider the factors of geographic availability of land, commercial viability, and economics as all affecting the right to reasonable access. Each individual factor should not be looked at as being conclusive in and of itself. Rather, an overall balancing of the above factors is required before regula-

199. *Renton*, 475 U.S. at 54.

200. Young v. American Mini Theatres, Inc., 427 U.S. 50, 78 (1976).

201. *Id.* at 79 (outcome would be different if ordinance had the effect of severely restricting speech).

202. *Renton*, 475 U.S. at 54 (citing *Young*, 427 U.S. at 78).

203. *Renton*, 475 U.S. at 65.

tion of protected expression is allowed. As such, the Supreme Court needs to reevaluate its current views on zoning of adult entertainment and view such entertainment as fundamentally protected expression deserving of all the guarantees granted by the Constitution.

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