

## **Chapter 6: Place Regulation - Zoning**

### **Quick Guide to Chapter 6**

**Can you completely preclude an SOB from opening in your community by not providing a zone for SOBs to operate?**

Technically no. Because these regulations are not prohibitions on speech but mere restrictions on locations for exercising speech, a complete prohibition is presumptively unconstitutional. The only possible exception might be a small bedroom community that has no commercial district whatsoever, but that case has not been brought. An argument might also be made for allowing a city to enact such an ordinance if it is surrounded by municipalities that have room for SOBs, but so far no court has accepted this justification because nothing would stop other neighboring communities from enacting a similar ordinance under the same theory. (6.1)

**Can you effectively preclude SOBs from operating by making such large buffer zones that no SOB could open without being too close to a protected use?**

No. Courts uniformly reject such ordinances. (6.1)

**What amount of land must you leave available in order to meet the constitutional requirement that there be “reasonable alternative avenues of communication”?**

There is no magic number, and courts in various jurisdictions have come to different conclusions about what is reasonable. From a percentage standpoint, as little as 1 percent of a city's acreage has been held sufficient, while other courts have ruled as much as 7 percent insufficient. Courts seem to be moving in the direction of examining available sites for SOBs, rather than acreage, and determining reasonableness by comparing available sites to the number of SOBs currently operating or interested in operating. You must review the caselaw in your jurisdiction to get a sense of what courts in your region find permissible. (6.3)

**Is land truly "available" to an SOB when it is unlikely that an SOB could survive economically at that location?**

While the Supreme Court seemed to speak clearly in holding that economic viability was not a factor in this consideration, and that cities were not required to guarantee prime business land for

SOBs, lower courts are split on whether land is truly "available" when it is tied up in long-term leases or when there are no roads or infrastructure in a location to support any business operation. (6.3)

**Must existing SOBs that are in violation of a subsequently passed ordinance be grandfathered in?**

Not necessarily. While some states do not allow amortization, many jurisdictions allow you to place a time limit (sometimes as short as three months) during which a business must come into compliance with the new ordinance by moving, changing its operation or closing down. These clauses are uniformly upheld in the SOB context. (6.4)

One of the most significant methods of regulating sexually oriented businesses -- and typically the first approach adopted by a community -- is to use zoning ordinances to restrict the location of SOBs within the boundaries of the municipality.

"Place" regulation through zoning is simultaneously one of the most effective methods of protecting communities from negative secondary effects, and also one of the most difficult areas to pin down with uniform standards that will apply in every jurisdiction.

The effectiveness of zoning SOBs is confirmed by opponents. Listen to Clyde DeWitt, an attorney who has represented pornographers for decades, in his September 1994 Adult Video News "Legal Commentary": "In the 15 years [sic] since *Young v. American Mini Theatres*, the use of zoning ordinances to stifle expression found unpleasant to local governments has expanded geometrically. Veteran adult business operators will tell anyone who will listen that the most enormous obstacle to opening a new place is zoning. It is no coincidence that the number of such businesses has dwindled; indeed, it is a direct result of what they all have learned to be the awesome power of local government.... [I]n many locales, adult businesses have become extinct, despite the ever-increasing demand for their product."

Yet zoning standards are difficult to specify in a uniform fashion because the main attack on zoning ordinances by sex business owners is that they violate the constitutional requirement that time, place and manner regulations must allow reasonable alternative avenues of communication. And, as should be apparent, what is "reasonable" to a state court judge in one jurisdiction may not be "reasonable" to a federal judge in another.<sup>1</sup> Indeed, varying court decisions on this issue are handed down in different jurisdictions on nearly a monthly basis.

It is not necessarily a bad thing that different communities fight SOBs at different levels of aggressiveness. After all, our nation is built on the notion of limited government closest to the people, and the idea that different states and communities should have the right to determine how they will live. That is at the heart of federalism. However, it is unfortunate when the Constitution is thought to mean different things in different places. Nevertheless, this is not a constitutional defect. Communities that seek to enact a comprehensive zoning ordinance simply need to be aware of what cases have come down in their state on this issue, and what rulings their federal district court and court of appeals have issued. An analysis of those decisions will help the policymakers determine how much protection they want to provide for their citizens.

An additional consideration for policymakers is this -- how aggressive does the community want to be? Some cities have made a commitment in advance to defend their ordinance in court, and are willing to restrict available acreage for sex businesses as far as they possibly can while still making a strong legal argument for constitutionality. They typically have strong community support and an aversion to sexually oriented businesses.

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<sup>1</sup> One federal appeals court wrote about the "simple, yet slippery, test of reasonableness" when considering the constitutionality of an SOB ordinance. *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1530 (9th Cir. 1993), cert. denied 114 S.Ct. 1537 (1994).

Other cities -- and this is the clear majority -- have no desire to engage in litigation over their ordinance. Their goal is to find the most restrictive ordinance that is clearly constitutional. Of course they recognize, given the financial resources and potential profits available to owners of sexually oriented businesses, that a legal challenge is always a distinct possibility. But they also know that possibility is slightly reduced by enacting an ordinance that has no teeth in it. However, city attorneys and policymakers often get into trouble with their constituents by attempting to pass off drafting a weak ordinance as a constitutional necessity, when in fact it is a policy choice made with the hope of avoiding litigation. And even weak ordinances, if they impose new costs on SOBs, may be challenged.

In this chapter, we will discuss the various zoning options available to communities through a survey of important cases.

## **6.1 – *Young and Renton***

*Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976), was a 5-4 decision in which the majority agreed that the right of communities to protect themselves from the effects of sexually oriented businesses outweighed the less vital interest of the businesses in disseminating sexually explicit speech. The Court approved an "anti-skid row" type ordinance that scattered "adult" uses from other regulated uses and from other "adult" uses.

Significant to the Court in *Young* was the fact that no evidence was presented that the ordinance would totally suppress the type of communication regulated:

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that the distributors or exhibitors of adult films are denied access to the market, or conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

427 U.S. at 62. Justice John Paul Stevens, author of the plurality opinion, noted that what was "ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited ...", 427 U.S. at 71, adding in a footnote that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. at 71, n.35. Then Justice Stevens quoted the district court's conclusion that there are "myriad locations" in the City available to sex businesses, and that the "burden on First Amendment rights is slight." *Id.*

Also significant in *Young* is the fact that Detroit used linear footage "setback" requirements in conjunction with zoning "adult" uses into commercial districts, thus establishing the validity of ordinances that impose footage requirements within the specified district or districts within which SOBs are allowed.

Following *Young*, a number of jurisdictions enacted similar ordinances but with mixed success. Keego Harbor, Michigan, enacted an ordinance with footage requirements that effectively precluded any "adult" businesses from locating there. An existing establishment challenged the ordinance, but lost in district court, where the court ruled that "there is nothing in the law that ... requires each and every hamlet, no matter how small, [to] provide space for explicit sex films ...." *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 96 (6th Cir. 1981). The U.S. Court of Appeals for the Sixth Circuit reversed, holding that a complete restriction of "adult" businesses was not the "incidental" impact on First Amendment speech anticipated in *Young*, and also that the city did not provide an adequate factual basis to support a need for the ordinance. 657 F.2d at 98. However, the Sixth Circuit also said "[w]e do not hold that every unit of government, however small, must provide an area in which adult fare is allowed." *Id.* at 99, citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75 n.18. Similarly, the Sixth Circuit rejected a Wyoming, Michigan, ordinance after the community failed to lay a factual foundation to prove a need for the ordinance. *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983).

In 1981, the Supreme Court again faced the issue of local ordinances regulating sexual speech (nude dancing) with the case of *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). Unfortunately, a fractured court produced lots of opinions and very little guidance for local communities. The plurality opinion represented three Justices; there were three concurring opinions of four Justices representing three different viewpoints and a dissenting opinion of two Justices. The result was that the Court struck down a local ordinance that had been authoritatively construed to prohibit all live entertainment in the borough, on the grounds that the ordinance was not justified by the legislative record and that the complete prohibition on live entertainment was overbroad.

But in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41(1986), the Supreme Court resolved a number of the issues that were unclear after *Young* and *Schad*. The Court in *Renton* approved an ordinance that prohibited "adult motion picture theaters" from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school. Employing the *O'Brien* test, the Court concluded that the ordinance was justified by the city's reliance on studies of negative secondary effects in other communities from "adult" uses, and that the ordinance allowed reasonable alternative avenues of communication.

The Court concluded that reasonable alternative avenues were available because "the ordinance leaves some 520 acres, or more than five percent of the entire land of *Renton*, open to use as adult theater sites." 475 U.S. at 53.

Next the Court addressed what has turned out to be perhaps the most frequently litigated issue in current zoning cases --whether the land was truly "available." The challengers to the ordinance, who wanted to open two SOBs in *Renton*, argued that "some of the land in question is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and that in general there are no 'commercially viable' adult theater sites within the 520 acres left open by the *Renton* ordinance." *Id.*

That argument was accepted by the court of appeals, which held that this would create a substantial restriction on speech. The Supreme Court disagreed with 'both the reasoning and the conclusion of the Court of Appeals':

That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. ...[W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters ... will be able to obtain sites at bargain prices. ("The inquiry for First Amendment purposes is not concerned with economic impact.") In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

475 U.S. at 54 (citations omitted.)

The Court concluded with a strong endorsement of using zoning to regulate this type of business:

Renton has not used "the power to zone as a pretext for suppressing expression," but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. *Id.*

An important issue in all cases applying Renton is the determination of what land is truly available to be used by sexually oriented businesses. It is therefore instructive to note that, of the 520 acres the Supreme Court counted as available to SOBs in the City of Renton, part of it was occupied by a sewage treatment facility, a horse racing facility, an industrial building park, warehouse and manufacturing facilities, an oil tank farm, and a fully developed shopping center.

*Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984), *rev'd* 475 U.S. 41(1986). The importance of those facts has been debated by courts ever since.

## 6.2 – Threshold Issues

Obviously, a community must zone SOBs within the context of existing zoning regulations. The first issue is whether to scatter "adult" uses as in *Young* and most recent cases, or concentrate them, as the Renton ordinance would have done. The experience of many communities with "red light districts"<sup>2</sup> -- and the exacerbation of negative secondary effects through such concentration

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<sup>2</sup> The creation in 1974 of Boston's "combat zone," which once contained 36 sex businesses in one neighborhood, is a prime example. After years of crime and decay, the final two of Boston's "combat zone" sex businesses were demolished in 1995.

-- has led virtually all communities to enact ordinances that scatter SOBs.

The municipality must then decide what other regulated uses to separate SOBs from. The standard areas and establishments protected by distancing from SOBs include: residential areas, churches and other places of worship, parks, schools and day care centers, and bars or other establishments holding liquor licenses.

Next the city must decide how many feet to require between SOBs and other regulated uses, and between separate SOBs. These decisions, of course, will ultimately determine how much acreage or sites are made available for SOBs. It is often necessary to plot out how much land will be available under several different scenarios, involving different footage setback requirements or different other regulated uses, or both. Most ordinances measure the footage in a straight line from the property line of the proposed SOB to the property line of the nearest regulated business. See e.g., *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1258 (11<sup>th</sup> Cir. 1999); *SDL Inc. v. City of Houston*, 636 F.Supp. 1359, 1369 (S.D.Tex. 1986), *aff'd* 841 F.2d 107 (5th Cir. 1988); *Cupid's Video Boutique, Inc. v. Roth*, 610 N.Y.S.2d 24 (Sup. Ct. 1994).

When setting footage requirements for dispersing SOBs from each other and separating them from other regulated uses, it is important to remember that linear footage requirements for setbacks and disbursement in a particular ordinance will vary according to the size and configuration of the designated commercial or industrial district. For example, see *Renton*, 475 U.S. at 44 (1,000 feet from any "residential zone, single- or multiple-family dwelling, church, or park" and one mile from any school); *Young*, 427 U.S. at 52 (1,000 feet from any 2 regulated uses and 500 feet from any residential area); *LLEH, Inc v. Wichita County, Tex*, 289 F.3d 358, 363 (5th Cir. 2002) (1,500 feet "from any child care facility, school, dwelling, hospital, public building, public park, or church or place of religious worship" and 1 mile "from a penal institution"); *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 860 (8th Cir. 1994) (750 feet); *Woodall v. City of El Paso*, 950 F.2d 255, 257 (5th Cir. 1992) (1,000 feet); *Alexander v. City of Minneapolis*, 928 F.2d 278, 280 (8th Cir. 1991) (1,000 and 500 feet); *Thames Entertainment, Inc. v. City of St. Louis*, 851 F.2d 199, 200 (8th Cir. 1988) (1,000 and 500 feet); *International Food & Beverage Systems v. Ft. Lauderdale*, 794 F.2d 1520, 1523 (11th Cir. 1986) (750 feet); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1077 (5th Cir. 1986) (1600, 1000, 500, and 100 feet); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 96 (6th Cir. 1981) (500 and 250 feet); *BBI Enterprises, Inc. v. City of Chicago*, 874 F.Supp. 890, 893 (N.D. Ill.1995) (1,000 feet); *K. Hope Inc. v. Onslow County*, 911 F.Supp. 948, 950 (E.D.N.C. 1995) (1,000 feet); *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1066 (N.D. Tex. 1986), *aff'd* 837 F.2d 1298 (5th Cir. 1988) (1,000 feet); *SDL Inc. v. City of Houston*, 636 F.Supp.1359, 1364 (S.D. Tex. 1986), *aff'd* 841 F.2d 107 (5th Cir. 1988) (1,000 and 750 feet); *Pringle v. City of Covina*, 171 Cal.Rptr. 251, 252 (Cal. Dist. Ct. App. 1981) (500 feet); *Town of Islip v. Caviglia*, 540 N.E.2d 215, 225-226 (N.Y. 1989) (500 feet and 1/2 mile); *PA N.W. Distrib. v. Zoning Hearing Bd.*, 555 A.2d 1368, 1369 (Pa. Cmwlth. 1989) (1000 feet and 500 feet).

### 6.3 – The Magic Number – How Much Available Land is Enough?

Because *Renton*, *Keego Harbor* and other cases seem to indicate that municipalities may not "zone SOBs out of existence,"<sup>3</sup> the most frequently asked question by city planners and city attorneys who are including SOBs in zoning ordinances for the first time becomes: "What percentage of our land do we have to set aside for potential sex businesses?" Or a more recent variation -- "How many potential sites do we need to make available to sex businesses in our community?"

There is no easy answer to that question, as discussed above, because the history, current circumstances, and configuration of zoning districts and uses are different in each community, and because judicial determinations of "reasonableness" vary from jurisdiction to jurisdiction. What may be "reasonable" in a major metropolitan area with a greater demand for sexually explicit fare may be "unreasonable" for a smaller, rural community that is more conservative.<sup>4</sup>

The second-most asked question is "How much and what types of land will courts consider to be truly 'available' to SOBs?" For both of these questions, we will set forth in this section some general guidelines and considerations based on lower court caselaw that builds on the *Renton* decision.

The Fifth Circuit has been wrestling with this issue for several years in reviewing an El Paso ordinance that imposes typical distancing requirements on sexually oriented businesses. *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995) ("Woodall III"); 959 F.2d 1305 (5<sup>th</sup> Cir. 1992) ("Woodall II"), amending 950 F.2d 255 (5<sup>th</sup> Cir. 1992) ("Woodall I").

In *Woodall I*, the court reversed a jury judgment in favor of the city. At trial, the city's best evidence showed that less than 1 percent of the city's total acreage was available, and the effect of the ordinance would have been to force all 39 existing SOBs to move. After receiving an instruction straight from *Renton*, the jury found for the city. The Fifth Circuit reversed, holding

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<sup>3</sup> In *Local Regulation of Adult Businesses*, author Jules B. Gerard argues that current caselaw does not answer the question of whether some communities can totally ban "adult" uses: 'A community may be so small that the only effective way it can protect itself against the secondary effects of adult uses is to ban them entirely. Or the community may be relatively large, but still be essentially residential, and may wish to exclude not only adult uses, but also almost all other commercial uses. The number of conceivable combinations of size and nature is virtually infinite.' Gerard at 162. Gerard contends that in *Schad* five Justices expressly said, or necessarily held, that some communities are entitled to exclude adult uses completely. *Renton* did not address the issue, but Gerard believes such a regulation would be permissible for a small, primarily residential community where citizens have nearby access, perhaps in a neighboring city, to SOBs.

<sup>4</sup> There is no "bright line rule for determining whether or not a city has provided 'a reasonable opportunity to open and operate an adult [business] within the city,' or whether adequate alternative sites exist... Rather, it appears from case law that a court must look to the facts of each case to determine the answer to this question." *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F.Supp. 1257 (C.D.Cal. 1995)(citations omitted).

that the jury should have received an instruction including the statement that "land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there." 950 F.2d at 263.

On rehearing, the court withdrew a good segment of its discussion from *Woodall I* regarding what land was unavailable, holding that it was unnecessary to the resolution of the case, and that the court "did not endorse appellants' formulation that land is not available for use by the adult businesses if it would be 'unreasonable' to expect adult businesses to relocate there." *Woodall II*, 959 F.2d at 1306.

On retrial, the jury returned a verdict in favor of the SOBs. Once again the Fifth Circuit reversed, this time holding that as a matter of law the city proved it provided reasonable alternative avenues of communication.

The court held that the SOBs had attempted to prove their case under the wrong legal standard -- that of economic viability, which was foreclosed by *Renton*, withdrawn in *Woodall II*, and specifically repudiated by the Fifth Circuit in *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992).<sup>5</sup>

The Adult Businesses presented extensive evidence upon which a jury could have found that none of the sites suggested by the City were commercially desirable locations for adult businesses, but scant evidence that the proposed sites were physically or legally unavailable, and virtually no relevant evidence at all about numerous alternative sites not specifically designated by the City.

*Woodall III*, 49 F.3d at 1123-24.

In attempting to flesh out the distinction between physical and legal unavailability as opposed to economic unavailability, the court provided some definitions:

Physical availability may be thought of in terms of the cost of altering or developing the area to change its physical characteristics to make it suitable for some generic commercial enterprise. The relevant consideration is whether the physical characteristics of the site present an unreasonable obstacle to opening a business; an obstacle that can be overcome without incurring unreasonable expenses does not make a site unavailable, but an obstacle that cannot be reasonably overcome renders the site unavailable.

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<sup>5</sup> In that case the Fifth Circuit upheld Jackson's ordinance because it allowed "[a]s a matter of arithmetic ... more 'reasonable' sites .. than [there were] businesses with demands for them ...." 973 F.2d at 1260. The dissenting judge noted that only 1.2 percent of the city's total land was available for SOBs. *Id.* at 1262-63.

49 F.3d at 1124. The court explained that examples of types of land that are legitimately unavailable include land under oceans, airstrips of airports, sports stadiums, and areas not readily accessible to the public. That was to be distinguished from economic unavailability:

It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even prove commercially unfeasible for an adult business. *Id.* The court also made the argument that the percentage of total acreage available was not particularly important or helpful, because a 100 acre area zoned for SOBs could potentially have anywhere from 100 available SOB sites to only 1 or 2, depending on what else was in the district. Instead, "[w]hat is important is the number of adult business locations that the acreage will support given the spacing requirements." *Id.* at 1125.

Given those factors, the court looked at the evidence presented at trial. The burden of proof is on the SOB to prove that it was denied a reasonable alternative avenue of communication, and the Fifth Circuit held that it failed to carry that burden as a matter of law because it did not disprove the city's contention that more sites were available when the ordinance was enacted and at the time of trial than there were existing SOBs. Whether the sites could not be rented or sold, or were less traveled than other more desirable sites, were not relevant to the issue of availability.

Here are the lessons of the *Woodall* trilogy. First, so long as there are more potential sites available than existing SOBs in your community -- even if the sites are occupied, and even if they are bad locations for any business -- you've got a strong argument that you're being reasonable. Second, the pornographers challenging the ordinance have the burden of proof to show that the sites your city proposes as available are actually not available in a more significant sense than that they can't get a lease or they can't make money there. These are significant factors in discouraging SOBs from coming into your community.

The U.S. Court of Appeals for the Ninth Circuit also faced the issue of economic availability, coming to a slightly different conclusion. In *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied* 114 S.Ct. 1537 (1994), the court analyzed a Los Angeles ordinance that established distancing requirements in a manner that required the relocation of a substantial number of SOBs. The court seemed to get around what was clear in *Renton*, arguing that:

[We] do not think that *Renton* forbids a court to consider economics when evaluating whether a particular relocation site is in fact part of the real estate market. For purposes of *Renton*, the distinction is between consideration of economic impact within an actual business real estate market and consideration of cost to determine whether a specific relocation site is part of the relevant market. A court may not consider the former, but it may consider the latter when determining whether a specific site is reasonably suitable for the operation of the business.

989 F.2d at 1530.

The *Topanga* court concocted this two-part test for reasonableness from its rewriting of *Renton*:

The first question is whether relocation sites provided to a business may be considered part of an actual business real estate market. The second question is whether, after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses.

*Topanga*, 989 F. 2d at 1530

The Ninth Circuit then created a series of considerations for courts when determining whether sites were legitimately available. First, is it unreasonable to believe the sites will ever be available to a commercial enterprise? Second, are they reasonably accessible to the public? Third, do they have a proper infrastructure of sidewalks, roads and lighting? Fourth, are the sites reasonable for some commercial enterprise (not necessarily for an SOB)? Fifth, if the sites are zoned commercial they are obviously part of the available market. 989 F.2d at 1531.

Whether other courts choose to follow *Topanga* or not, California municipalities and others in the Ninth Circuit must take into account the ways in which this decision changes the *Renton* analysis by making economic availability a much more significant factor.<sup>6</sup>

Of course, many other courts have followed *Renton* to the conclusion that economic factors are irrelevant. For example, in *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991), the court approved an ordinance that made available 6.6 percent of the city's total commercial acreage for SOBs: "That Alexander could not secure property meeting his economic or commercial criteria does not render [the ordinance] invalid." 928 F.2d at 284. See also *Allno Enterprises, Inc. v. Baltimore County, MD*, 10 Fed.Appx. 197, 201-202 (4th Cir. 2001) (not selected for publication in Federal Reporter) (.16 percent contains enough sites despite some physical and economic obstacles); *Ambassador Books & Videos, Inc. v. City of Little Rock*, 20 F.3d. 858, 864-65 (8th Cir. 1994) (6.75 percent was sufficient; "although Ambassador argues that the cost of relocation, to all or many of those areas would prevent relocation, the cost factor is unimportant in determining whether the ordinance satisfies the standards of the First Amendment"); *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F.Supp. 1257 (C.D. Cal. 1995) (court denied preliminary injunction against city despite fact that less than 1 percent of city was theoretically available to SOBs because of "residential nature" of community and city's

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<sup>6</sup> We should note that the Ninth Circuit's hostility to SOB zoning ordinances predates the *Topanga* case. Previously, the court struck down a Whittier, California ordinance that allowed only three sites and less than 2 percent of available acreage for SOBs, even though the city had only one existing SOB. *Walnut Properties v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988).

argument that 26 sites were available in a city of 135,000 that had only one existing SOB); *Function Junction, Inc. v. City of Daytona Beach*, 705 F.Supp. 544, 552 (M.D. Fla. 1987) (upheld ordinance, under *Renton*, where there were "twelve locations in Daytona Beach [which] potentially could accommodate plaintiff's [adult use] lounges"); *Dumas v. City of Dallas*, 648 F.Supp. 1061, at 1070-71 (N.D.Tex. 1986) ("permit[ted] location in several areas stretching from the inner city area to the north and south suburbs, accessed by such major thoroughfares. ... Eight to ten percent of the city's total area --21,000 acres -- is available."); *SDL Inc. v. City of Houston*, 636 F.Supp. 1359, 1370-73 (S.D. Tex. 1986) ("Contrary to Plaintiff's assertions, the law does not require the Defendants to confirm that the sites are economically and logistically viable, except as it relates to the restrictions in the ordinance" [750 feet from a school, church or licensed day care center; or 1,000 feet from another sexually oriented business]); *S&G News, Inc. v. City of Southgate*, 638 F.Supp. 1060 (E.D. Mich. 1986) (upholding constitutionality of ordinance, under *Renton*, establishing commercial districts comprising 2.3 percent of total land area of county as permitted use area); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F.Supp. 803 (E.D. Mich. 1985) (rejects claim that land is unavailable because it is already utilized by another business); *City of Vallejo v. Adult Books*, 167 Cal.App.3d 1169, 213 Cal.Rptr. 143 (1985) (upholding constitutionality of ordinance, under *Renton*, finding a reasonable number of available sites existed); *Cook County v. Renaissance Arcade*, 522 N.E.2d 73, 78 (Ill.1988) (allowed zoning "adult" uses into undesirable industrial zones composed of between 5.7 percent and 8.9 percent of the land in the county. The industrial zones were "ill-suited to the operation of retail or commercial businesses because they must compete with factories and industrial facilities for available space, water and sewer is inaccessible and would be costly to supply, and access to industrial zones is nonconducive to operating a consumer-oriented, small retail or commercial store."); *Pack Shack, Inc. v. Howard County*, 770 A.2d 1028, 1040 (Md. Ct. Spec. App. 2001) (rejecting *Topanga* explicitly and staying with *Renton* instead); *Town of Islip v. Caviglia*, 540 N.E.2d 215, 220 (N.Y. 1989) (upheld ordinance, under *Renton*, limiting "adult" uses to industrial zone which "contains over 6,000 acres of land ... including 85.6 miles of running frontage on open roads"); *PA N.W. Distrib. v. Zoning Hearing Bd.*, 555 A.2d 1368, 1372 (Pa. Cmwlth. 1989) (upheld ordinance, under *Renton*, even though areas of township where "adult" uses could relocate "were either already occupied or were less desirable from a commercial standpoint. The fact that the Ordinance now precludes Appellant from operating from the most commercially feasible location does not require a conclusion that the Ordinance is exclusionary").

In *City of National City v. Weiner*, 838 P.2d 223 (Cal. 1992), the California Supreme Court upheld an ordinance that, through 1,500-and 1,000-foot distance requirements, essentially precluded any SOBs from locating in the city -- with the exception that SOBs would be allowed in enclosed shopping malls. The SOBs argued that no shopping mall would rent space to an SOB, yet the California Supreme Court held that shopping malls could be counted as available for purposes of the constitutional analysis:

Renton explicitly rejected the argument that because "practically none" of the undeveloped land [was] currently for sale or lease the ordinance "would result in a substantial restriction on speech." The record here in fact reveals that vacancies existed at all three shopping centers, and that

the evidence of landowners' unwillingness to rent consisted essentially of generalized responses by leasing agents to respondents' expert's telephone inquiry, and testimony that it is generally known among realtors that shopping centers do not usually rent to adult businesses. Nor, in this case, is any reluctance or outright refusal of private land owners to rent to adult businesses dispositive of the issue of whether the ordinance provides a reasonable opportunity for such businesses to locate within National City. While a city may not suppress protected speech, neither is it compelled to act as a broker or leasing agent for those engaged in the sale of it. We decline to hold local governments responsible for the business decisions of private individuals who act for their own economic concerns without any reference to the First Amendment. The Constitution does not saddle municipalities with the task of ensuring either the popularity or economic success of adult businesses. 838 P.2d at 233-34. (In a footnote, however, the court rejected the idea that it should look to the area surrounding National City, including the large city of San Diego, when considering reasonable alternative avenues of communication. *Id.* at 234, n.11.)

Obviously, if you put the National City ordinance through the *Topanga Press* analysis, it might not survive, because it appears the mall sites relied on by the California Supreme Court are likely to never be commercially available. And if they would never be commercially available, they wouldn't count under a *Topanga Press* analysis.

Other recent cases that take a dim view of SOBs' arguments that they are effectively precluded from opening include: *D.H.L. Associates, Inc. v. O'Gorman*, 199 F.3d 50 (1<sup>st</sup> Cir. 1999) (holding that alternative avenues of communication exist regardless of the fact that .09867% of town's land was available for SOBs), *North Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441 (7<sup>th</sup> Cir. 1996) (ruling that the fact that Chicago's ordinance leaves less land available to adult businesses, 1-5%, than other major cities is not relevant. Chicago's ordinance still leaves available enough sites for adult businesses in the city.); *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068 (5<sup>th</sup> Cir. 1994), and *BBI Enterprises, Inc. v. City of Chicago*, 874 F. Supp. 890 (N.D. Ill. 1995) (SOBs should have checked a map before opening an establishment in violation of 1,000-foot requirement), *Rothschild v. Richland County Board of Adjustment*, 420 S.E.2d 853 (S.C. 1992).

## **6.4 – Amortization Clauses**

One of the most important elements of any SOB zoning ordinance is the requirement that all nonconforming uses come into compliance with the locational restrictions of the ordinance within a fixed period of time. Although the ordinances in *Young* and *Renton* did not include amortization clauses and only applied to prospective SOBs, the use of amortization clauses with SOBs is almost uniformly upheld if reasonable.

A majority of states and the U.S. Constitution permit an ordinance to terminate pre-existing sexually oriented business uses which conflict with the locational or other provisions of a

comprehensive SOB ordinance. Over a relatively brief period of time, all "grandfathered" SOBs are eliminated from their current locations and forced to close or move to an appropriate location. Pre-existing SOB status does not guarantee a right to continue such property use when the continuation conflicts with the terms of a new SOB ordinance. Obviously, if the intent of SOB ordinances is to protect the community from negative secondary effects, and an existing establishment is in a location that creates negative secondary effects, the community should have an opportunity to require the establishment to move.

Many of the cases discussed in the previous section regarding reasonable alternative avenues of communication involved the successful and noncontroversial use of amortization clauses. *See e.g. Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995); *Alexander v. City of Minneapolis*, 928 F.2d 278, 280 (8th Cir. 1991). In fact, they are a standard feature of most model ordinances considered by municipalities enacting SOB regulations. They are so routinely upheld that attacks on them are becoming rare. *See e.g., Holmberg v. City of Ramsey* 12 F.3d 140 (8th Cir. 1994) (amortization clause not challenged although reasonableness of ordinance's other provisions attacked.).

Generally, when amortization clauses are challenged the arguments are based on the Fifth or Fourteenth Amendment protections of private property against takings, or under the First Amendment. In *Ambassador Books & Video v. City of Little Rock*, 20 F.3d 858, 865 (8th Cir. 1994), a federal appeals court rejected both contentions regarding a three-year amortization period:

Ambassador contends that the application of the ordinance to its existing businesses denies it due process in violation of the Fourteenth Amendment, and also violated its First Amendment rights. ... Although Ambassador is entitled to protection against arbitrary government action toward its business, it has no absolute right to continue to operate that business at the same location.

Other cases upholding various amortization periods for SOBs include: *Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 889 (8<sup>th</sup> Cir. 2002) *petition for cert. filed* (August 1, 2002) (No. 02-187) (upheld amortization clause in a 1994 ordinance with a deadline of December 31, 1996); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (upheld ordinance regulating sexually oriented businesses providing a five-year amortization period for pre-existing non-conforming uses); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979) (upheld ordinance providing a six-month amortization period for pre-existing non-conforming "adult" uses); *Ranch House, Inc. v. Amerson*, 146 F.Supp.2d 1180, 1213 (N.D. Ala. 2001) (upholding seven month amortization period); *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1171 (N.D. Tex. 1986), *aff'd* 837 F.2d 1298 (5th Cir. 1988) (upheld ordinance regulating sexually oriented businesses providing a three-year amortization period for pre-existing non-conforming "adult" uses; "Such clauses ... are uniformly upheld"); *Function Junction, Inc. v. City of Daytona Beach*, 705 F.Supp. 544 (M.D. Fla. 1987) (upheld ordinance amortizing "adult" theaters over 10-and-a-half years); *SDL Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), *aff'd* 841 F.2d 107

(5th Cir. 1988) (upheld six months amortization of "adult" uses); *Castner v. City of Oakland*, 129 Cal.App.3d 94, 180 Cal.Rptr. 682 (1982) (upheld ordinance regulating "adult" entertainment activity providing a one-year amortization period under which owner can apply for up to a two-year extension); *City of Vallejo v. Adult Books*, 167 Cal.App.3d 1169, 219 Cal.Rptr. 143 (1985) (upheld ordinance regulating "adult" bookstores and theaters providing a one-year amortization period under which owners could apply for an extra year if they could show extreme hardship); *Cook County v. Renaissance Arcade*, 522 N.E.2d 73 (Ill.1988) (upheld ordinance regulating "adult" entertainment establishments providing a six month amortization period under which an additional six months is given to any business which applies); *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215 (N.Y. 1989) (upheld amortization of "adult" uses over a period of 1 to 5 years); *PA N.W. Distrib. v. Zoning Hearing Bd.*, 555 A.2d 1368 (Pa. Cmwlth. 1989) (upheld amortization of "adult" entertainment establishments in 90 days); *Northend Cinema, Inc. v. City of Seattle*, 585 F.2d 1153 (R.I. 1978) (upheld ordinance providing a 90-day amortization period for pre-existing non-conforming "adult" theaters); *also, see* Note, "Using Constitutional Zoning to Neutralize Adult Entertainment -- Detroit to New York", 5 Fordham Urban L.J. 455, 472-74 (1977) (advocating one-year amortization period).

The argument is sometimes made that an amortization clause cannot apply to a particular "adult" use establishment absent a showing that it, in particular, causes the types of secondary effects sought to be redressed by the statute. This contention is erroneous.

There is no constitutional requirement that the legislative body produce a study or other evidence showing that the specific negative secondary effects of "adult" businesses generally apply to an "adult" use in particular. As noted previously, a council can rely on studies conducted in other cities. This is the case even if the ordinance employs an amortization requirement.

Amortization provisions contained in SOB zoning ordinances are constitutionally permissible so long as they are content neutral and satisfy the requirements of Renton and Young. They must be "reasonable" and not "arbitrary and capricious." In determining "reasonableness," the provision is scrutinized as a content-neutral provision of an overall SOB zoning ordinance. This was discussed by New York's highest court in *Town of Islip v. Caviglia*, 540 N.E.2d 215 (N.Y. 1989):

Respondents also claim that amortization applied to uses enjoying constitutional free speech protection amounts to content based regulation and, therefore, legislation regulating them must be prospective or "grandfather-in" existing uses. Since the ordinance is content neutral under both the Federal and State Constitutions, the amortization provisions rest upon the same legal foundation as such provisions generally and, on the facts presented here, are valid (see *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, supra [six-month period plus discretionary extensions]; see, *Dumas v. City of Dallas*, 648 F.Supp. 1061 [three-year amortization period]; *Cook County v. Renaissance Arcade*, 122 Ill.2d 123, 118 Ill.Dec. 618, 522 N.E.2d 73, supra [six-month period with extensions]; *Northend Cinema v. City of Seattle*, 585 P.2d 1153, supra [90-day period]).

*Id.* at 224. And see *Hart Book Stores, Inc. v. Edmisten*, 861 F.2d 821, 830 (4th Cir. 1979), which upheld a six-month amortization period of an "adult" use zoning ordinance as an inherent part of a content-neutral statute.

Ordinances that provide for shorter amortization periods for SOBs than for other types of nonconforming uses have survived equal protection challenges as well. *Schneider v. City of Ramsey*, 800 F.Supp. 815, 823 (D.Minn. 1992), *aff'd sub nom Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1994); *Lim v. City of Long Beach*, 12 F.Supp.2d 1050, 1067 (C.D. Cal. 1998) *rev'd in part on other grounds* 217 F.3d 1050 (9<sup>th</sup> Cir. 2000)(adverse secondary effects of adult businesses justifies their being treated differently for amortization purposes).

For municipalities already suffering the negative secondary effects of SOBs, enacting an SOB zoning ordinance with an amortization period that is reasonable is an essential step toward improving the quality of life in the community.

## 6.5 - Moratoriums

A city attorney's worst nightmare: a sudden and unexpected business license application from a sexually oriented business that wants to locate in the heart of a downtown revitalization project, or near a prestige residential neighborhood. What to do? Obviously, the best strategy is to be prepared by enacting an ordinance before you receive an application or before an establishment opens in town. But in this case, it's too late. What should the city do?

Unfortunately, some municipalities panic and rush through the city council a moratorium that denies any SOB the right to open until the council has time to prepare an ordinance regulating "adult" uses. Courts generally view such attempts with extreme disfavor, since during the time period that the moratorium is in place the city is refusing to allow any location for SOBs, a clear violation of constitutional principles. See *e.g. Schneider v. City of Ramsey*, 800 F.Supp. 815, 817 (D.Minn. 1992), *aff'd sub nom Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1994) (court issued a temporary restraining order against city ordinance that banned "adult uses, with criminal penalties, while the city drafted a zoning ordinance).

A moratorium may also be seen as evidence that a legislative body has an improper motivation to prevent any SOBs from locating there, which could taint subsequently enacted ordinances. The best approach for a city facing an SOB application before it has an ordinance in place is to follow the usual process for the SOB while immediately enacting a comprehensive and constitutional ordinance, laying the proper foundation in the form of a legislative record, to establish content neutrality. The ordinance should contain a strong and relatively short amortization clause as well. This will put you in nearly as strong a position for regulating the SOB if it decides to go ahead and open as you would have been if the SOB opened in violation of a pre-existing ordinance. But you will have a much stronger position during the eventual litigation, because you will be able to show that you were respectful of the First Amendment rights of the SOB and followed all the correct procedures and timetables in enacting your ordinance.