

ZONING (AND OTHER REGULATION OF) ADULT USES

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Intro: The regulation of adult uses involves an inherent conflict between the right of adults to choose their preferred form of entertainment and the desire of local government to regulate to avoid the adverse effects of adult entertainment.

I. Basic First Amendment Analysis Required.

A. Regulation must be content-neutral.

1. Look to purposes - if regulation is unrelated to content, is directed to other governmental goals (secondary effects - neighborhood deterioration, etc.) and is viewpoint-neutral, it will likely be found to be content neutral.
2. Even if the secondary effects which the regulation seeks to control are "associated" with the type of speech, if they are not a direct result of the speech itself, content neutrality will be found.

Young v. American Mini-Theaters, 427 U.S. 50 (1976); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

B. If the regulation is content-neutral, the court's analysis will be as a time, place and manner restriction.

1. Under Renton, this was a two-part test for zoning restrictions:
 - (a) Whether there was a legitimate governmental interest served by the regulation;
 - (b) Whether the regulation allows reasonable alternative avenues of communication.
2. But under Barnes v. Glen Theater, 111 S. Ct. 2456 (1991), which addressed a statute which prohibited nude dancing, the Court applied the test outlined in United States v. O'Brien, 391 U.S. 367 (1968) (The "O'Brien test").
 - (a) Whether the regulation furthers a substantial governmental interest;
 - (b) Whether the interest served is unrelated to free expression;

(c) Whether any incidental restriction on free speech rights is no greater than is essential to the furtherance of the governmental interest.

C. Other First Amendment problems.

1. Vagueness
2. Overbreadth
3. Undue discretion

D. As a practical matter, the municipality has the burden to justify the regulation, because of 1st Amendment issues. Must base its regulation on its intent to avoid "secondary adverse effects" of adult businesses.

II. Zoning regulations which have been upheld.

A. Locational Requirements - in what zoning classifications may adult uses be located.

B. Distancing Requirements - address proximity to specified uses, such as schools, residential areas, other adult uses.

1. Clustering - all adult uses are located together to isolate the problems.
2. Dispersing - separates adult uses from each other and from specified uses or zoning classifications to avoid problems of "skid row" areas.

Young v. American Mini Theaters recognized secondary effects such as attracting transients, increased crime, deterioration of property values, and the tendency of other businesses and residents to relocate, as justifying locational requirements.

Renton v. Playtime Theaters - No new studies of the "secondary adverse effects " are required. A municipality can rely on the cumulative experience of other municipalities. The Court in Renton upheld an ordinance limiting available locations to 5% of the city's land area.

NOTE: Though the courts will not normally look beyond the stated legislative purpose (which should be clearly set forth in the ordinance), the courts may strike an ordinance as unconstitutionally motivated in circumstances where the regulation is

clearly intended to shut down an existing business (Walnut Properties v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988), cert. denied sub nom. City of Whittier v. Walnut Properties 490 U.S. 1086 (1989)); or where other improper motives are involved (E&B Enters. v. City of University Park, 449 F.Supp. 695 (N.D. Tex. 1977), where court found that basis of regulation was unsupported, and ordinance was adopted to address concerns of local church); or where officials openly state purposes such as a desire to prohibit certain activities everywhere in the community because of certain moral issues or other abhorrence of the activities. (Triplette Grille v. City of Akron, 816 F.Supp. 1249 (N.D. Ohio 1993)).

But last minute adoption of regulation in response to potential business is not necessarily a basis for striking the ordinance. D.G. Restaurant v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1992).

B. Limitations

1. Property must be developable and zoned for the use. Need not be commercially desirable or available. Renton v. Playtime Theaters.
2. Regulation must not be an effective preclusion of adult uses. Alexander v. City of Minneapolis, 531 F.Supp. 1162 (D. Minn. 1982), aff'd 698 F.2d 936 (8th Cir. 1983); After amendment of the ordinance, it was upheld in Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991). But see also Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981), where a town of 3000 people and 300 acres was allowed to ban adult theaters because the court viewed the relevant market as county-wide.
3. Regulation must be narrowly tailored to address the ills it seeks to remedy. See World Wide Video, Inc. v. City of Tukwila, Wash., 117 Wash.2d 382, 816 P.2d 18 (1991) (en banc), in which an ordinance was stricken because it regulated businesses with as little as 10% of their stock in trade being adult-oriented.
4. Permissibility of use may not be subject to discretionary special use - specific standards required.

- C. Amortization of existing uses may be allowed based on a balancing of interests applied to the time period for amortization. Hart Bookstores, Inc. v. Edminsten, 612 F.2d 821, (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); SDJ, Inc. v. City of Houston, 636 F.Supp. 1359 (S.D. Tex. 1986), aff'd 827 F.2d 1268 (5th Cir. 1988), cert. denied, 489 U.S. 1052 (1988); County of Cook v. Renaissance Arcade and Bookstore, 122 Ill.2d 123, 522 N.E.2d 73, appeal dismissed for want of substantial federal question, sub nom. Mannheim Books, Inc. v. County of Cook, 488 U.S. 882 (1988).

III. Other successful regulations.

- A. Liquor licensing - No nudity in conjunction with licensed businesses. New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).

B. Juice Bars

1. Zoning regulations can govern location if based on avoiding secondary adverse effects.
2. Regulations concerning operation are allowed.
 - (a) Prohibit contact between patrons and dancers.
 - (b) Prohibiting tipping of dancers.
 - (c) Requiring a raised, lighted stage at a distance from patrons.

See Kev v. Kitsay County, 793 F.2d 1053 (9th Cir. 1986). Such regulations are justified by interest in avoiding prostitution and drug sales.

- C. Open Movie Booth Ordinances requiring open doors, lighting, and visibility of movie booths from public areas, and prohibiting openings between booths, are all regulations justified by goals of preventing health problems associated with anonymous sexual contact and masturbation in conjunction with showing of adult movies. Berg v. Health and Hospital Corp., 865 F.2d 797 (7th Cir. 1989); Wall Dist. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986); Ellwest Stereo Theaters v. Wenner, 681 F.2d 1243 (9th Cir. 1982); Doe v. City of Minneapolis, 898 F.2d 612 (8th Cir. 1990); Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989).

D. Licensing

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

Other sources: Gerard, Jules B., Local Regulation of Adult Businesses, Clark, Boardman, Callaghan, 1992.

Coronado, Steven F.; Baker, David S., "Regulatory Conduct Associated with Juice Bars: A New Twist to An Old Dance", Governmental Liability (Defense Research Institute, Inc.), Nov., 1993.