Adult Use Zoning: New York City's Journey on the Well-Travelled Road from Suppression to Regulation of Sexually Oriented Expression

Albert Fredericks
Rosenman & Colin LLP
INTRODUCTION

In October 1995, the New York City Council approved amendments to the City's Zoning Resolution which established, for the first time in New York City, specific restrictions on establishments offering sexually oriented "adult" entertainment.¹ The amendments cover "topless" bars, adult book and video stores, adult theaters and similar businesses. Such establishments are permitted to operate only in designated commercial and manufacturing districts.² Moreover, even within those districts, an adult establishment may not be located within five hundred feet of another adult establishment or within five hundred feet of any school, day-care center or house of worship.³

Soon after the adult entertainment amendments were approved, several actions challenging those provisions were commenced in the Supreme Court of New York, New York County, by a number of owners, operators and customers of adult establishments. These actions were informally consolidated in Stringfellow's of New York, Ltd. v. City of New York.⁴ The plaintiffs therein attacked the amendments as extreme, repressive measures that were designed to censor a form of expression that City officials deemed offensive and that would effectively destroy New York City's adult entertainment industry. They asked the Court to declare the amendments unconstitutional and to enjoin

† Special Counsel, Rosenman & Colin LLP. The author is a former Assistant Corporation Counsel in the New York City Law Department. The views expressed herein are the author's. They do not necessarily reflect the official views or policies of the City of New York.

². Id. §§ 32-01, 42-01.
³. See id.
their enforcement.\textsuperscript{5} Despite these vigorous attacks, the various challenges to the adult entertainment amendments were ultimately rejected and the City was granted summary judgment declaring those regulations valid and enforceable in all respects.\textsuperscript{6}

The failure of these efforts to derail New York City's adult zoning regulations is unsurprising. Those regulations were carefully drafted and preceded by a thorough study of the land use implications surrounding adult establishments. They are similar to regulations adopted by dozens of other municipalities throughout the nation, many of which have withstood legal challenge. Moreover, contrary to the assertions of those that attacked them, the City's regulations reflect a decidedly progressive trend in government's treatment of sexually oriented expression—a trend away from outright bans on the dissemination of such material on the ground that it is "obscene" or "indecent" and toward reasonable "time, place and manner" regulations, which serve a number of legitimate governmental interests and yet assure the public of adequate access to adult entertainment.

I. GOVERNMENT'S EARLY FOCUS: THE SUPPRESSION OF OBSCENE OR INDECENT MATERIAL

Until the mid-1970s, government efforts to control the dissemination of sexually explicit books, films and other expressive matter focused on the suppression of such material through the enforcement of obscenity statutes. The courts had long been in agreement that obscene material, that is, sexually explicit expression designed to excite "lustful" or "lascivious" thoughts,\textsuperscript{7} did not qualify for protection under the First Amendment and that government could therefore properly prohibit its distribution.\textsuperscript{8}

\textsuperscript{5} See Stringfellow's, 653 N.Y.S.2d at 809.
\textsuperscript{6} See id. at 814.
\textsuperscript{7} Roth v. United States, 354 U.S. 476, 487 n.20 (1957).
\textsuperscript{8} See id. at 484-85.

\textsuperscript{[I]}mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.

\textit{Id.} (citations omitted). See Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insult-
At least two rationales were offered in support of attempts to prevent the dissemination of obscene materials. One such justification was the belief that exposure to obscenity could lead to aberrant, antisocial behavior. However, the most commonly offered rationale for the enactment and vigorous enforcement of obscenity laws was that obscene speech and visual displays were simply offensive, indecent and immoral and that, for these reasons alone, society could rightly suppress such material.

In a frequently cited 1963 Columbia Law Review article, Professor Louis Henkin discussed the moral concerns that lay behind obscenity legislation.

Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in decent society. They believe, too, that adults as well as children are corruptible in morals and character, and obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the "consumer." Obscenity, at bottom, is not crime. Obscenity is sin.


[C]an we then say that a state legislature may not act on the . . . assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? “Many of these effects may be intangible and indistinct, but they are nonetheless real.”

Id. See Kaplan v. California, 413 U.S. 115, 120 (1973) (holding the government may reasonably regard obscenity as “capable of encouraging or causing antisocial behavior . . . .”); People v. Fritch, 192 N.E.2d 713, 715 (N.Y. 1963) (quoting 1963 Report of the New York State Joint Legislative Committee to Study the Publication and Dissemination of Offensive and Obscene Material: “[T]he wide availability of obscene and near obscene materials is undermining our standard of conduct, fostering disrespect for duly constituted authority and contributing to delinquency and crime.”). The courts would occasionally acknowledge, however, that there existed little scientific evidence to support such a belief. See, e.g., Paris Adult Theatre I, 413 U.S. at 63; People v. Richmond County News, Inc., 175 N.E.2d 681, 683-84 (N.Y. 1961).

10. See, e.g., Chaplinsky, 315 U.S. at 572 (holding that lewd and obscene utterances “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”); Ex Parte Jackson, 96 U.S. 727, 736 (1877) (holding that statute barring use of the mail for the transmission of "obscene, lewd or lascivious" literature was designed to prevent the dissemination of material “deemed injurious to the public morals”); Frutch, 192 N.E.2d at 714 (holding that New York obscenity law “embodies the recognition that the public interest demands protection against the damaging impact of obscenity on the moral climate of the community”).


12. Id.
A question as to the obscenity of any material was therefore to be determined on the basis of whether it offended "contemporary community standards,"13 and the courts were repeatedly called upon to scrutinize various books, films and other expressive matter—ranging from "hardcore" pornography14 to materials that, today, are widely considered to have significant artistic or literary value15—in order to determine whether they could properly be found obscene under that test. Given the diversity of the communities in the nation and the inherently subjective nature of that inquiry, this proved to be a difficult and frustrating task. Indeed, the United States Supreme Court acknowledged that constitutionally protected expression was "often separated from obscenity only by a dim and uncertain line,"16 and, unsurprisingly, the members of the Court were in frequent disagreement about how and where that line should be drawn.17

For a number of years, New York State was able to call upon another weapon, in addition to penal obscenity statutes, in its battle against sexual immorality. Section 129 of the New

14. See, e.g., Miller, 413 U.S. at 18 (discussing whether unsolicited advertisements for four books entitled INTERCOURSE, MAN-WOMAN, SEX ORGIES ILLUSTRATED, and AN ILLUSTRATED HISTORY OF PORNOGRAPHY, which depicted groups of men and women engaged in a variety of sexual activity, constituted obscene material).
15. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974) (finding the showing of the film CARNAL KNOWLEDGE at a public movie theater was not a violation of obscenity statute); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966) (finding the novel FANNY HILL, a memoir of a prostitute's life, was not obscene); Jacobellis v. Ohio, 378 U.S. 184 (1964) (finding the showing of the French film THE LOVERS was not obscene); Fritch, 192 N.E.2d at 713 (N.Y. 1963) (finding Henry Miller's novel TROPIC OF CANCER obscene under New York's obscenity statute).
17. See, e.g., Miller v. California, 413 U.S. 15, 22 (1973) ("Apart from the initial formulation in the Roth case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power"); Paris Adult Theater I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

This case requires the Court to confront once again the vexing problem of reconciling State efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards.

Id. See also Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 707 (1967) (Harlan, J., dissenting) ("The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since Roth which have held particular material obscene or not obscene would find himself in utter bewilderment.").
York Education Law, enacted in 1947,\textsuperscript{18} made it unlawful to exhibit a motion picture in the State unless a license for the film had been issued by the State Education Department. A license would be denied if the film were found to be "obscene, indecent, immoral, inhuman, sacrilegious, or [was] of such a character that its exhibition would tend to corrupt morals or incite crime."\textsuperscript{19} In \textit{Matter of Commercial Pictures Corporation v. Board of Regents},\textsuperscript{20} the New York Court of Appeals offered a justification of the statute that was expressed, once again, in starkly moralistic terms:

Of course it is true that the State may not impose upon its inhabitants the moral code of saints, but, if it is to survive, it must be free to take such reasonable and appropriate measures as may be deemed necessary to preserve the institution of marriage and the home, and the health and welfare of its inhabitants. History bears witness to the fate of peoples who have become indifferent to the vice of indiscriminate sexual morality—a most serious threat to the family, the home and the State. An attempt to combat such threat is embodied in the sections of the Education Law here challenged.\textsuperscript{21}

\section*{II. The Shift Away From Suppression and Toward Regulation}

Despite this period of vigorous enforcement of the obscenity laws and related statutes, the past several decades have witnessed an explosive increase in the dissemination of sexually explicit material.\textsuperscript{22} Such "adult" entertainment has grown into a booming, multi-billion dollar industry that offers a diverse array of "products," such as movies, videocassettes, books, magazines and live entertainment.\textsuperscript{23} A great deal of adult entertainment is

\begin{footnotes}
\footnote{19. Id. at 1553. In \textit{Joseph Burstyn, Inc. v. Wilson}, 343 U.S. 495 (1952), the United States Supreme Court struck down that portion of the statute that authorized denial of a license on the ground that a film was "sacrilegious."}
\footnote{20. 113 N.E.2d 502 (N.Y. 1953), rev'd, 364 U.S. 587 (1954) (reversing a determination by the Court of Appeals that the French film \textit{LA RONDE} was properly denied a license).}
\footnote{21. See \textit{Commercial Pictures}, 113 N.E.2d at 504. In 1965, the New York Court of Appeals declared the licensing law unconstitutional because it did not contain the procedural safeguards mandated by the United States Supreme Court's decision in \textit{Freedman v. Maryland}, 380 U.S. 51 (1965). See \textit{Trans-Lux Distributing Corp. v. Board of Regents}, 209 N.E.2d 558 (N.Y. 1965).}
\footnote{22. See \textit{Jules B. Gerard, Local Regulation of Adult Businesses} § 1.02, at 2 (1995).}
\footnote{23. \textit{Department of City Planning, City of N.Y., Adult Entertainment Study 16} (1994) [hereinafter DCP Study].}
\end{footnotes}
now available through general or multipurpose sources, such as the mail, cable television, on-line computer services, newsstands and general interest video and book stores. There has also been a significant increase in establishments that deal exclusively or predominantly in adult entertainment. The rise in the number of such establishments is attributable to several factors. First, adult film makers have dramatically cut their production costs in recent years by shooting on videotape rather than film, cutting the length of scripts and even slashing the salaries of performers. As a result, the market has been flooded with inexpensively produced adult videocassettes and there has been a corresponding increase in outlets offering these products for sale, rent or on-premises viewing. In addition, topless bars have recently become a "booming segment of the adult entertainment industry." Many topless clubs have attempted to shed the "sleazy" image associated with such establishments and to attract a more affluent clientele.

The growth of the adult entertainment industry clearly reflects an increased demand for such entertainment and leads to several inescapable conclusions: community standards have evolved; sexually explicit entertainment has entered the realm of "decent" society; and efforts directed toward the outright suppression of such material are no longer appropriate or feasible.

The treatment of sexually explicit material by government and the judiciary has evolved in a corresponding fashion. A significant milepost along this evolutionary road occurred in 1969, when the United States Supreme Court decided Stanley v. Georgia. The defendant in Stanley was convicted in the Georgia courts of knowing possession of obscene matter, after the police, while lawfully searching the defendant's home for evidence of illegal bookmaking, came upon several reels of sexually explicit film. The Supreme Court reversed the conviction, holding that obscenity statutes cannot constitutionally punish the mere private possession of obscene material. The Court found that the traditional concerns behind obscenity statutes, that is, the prevention of moral corruption and deviant behavior, could not jus-
tify “such a drastic invasion of personal liberties guaranteed by
the First and Fourteenth Amendments.” While the Court went
on to stress that governments retained broad power to restrict
the commercial distribution of obscene material, Stanley clearly
reflects a diminished regard for the traditional rationales behind
obscenity legislation and increased acceptance of the notion that
availing oneself of sexually oriented expressive material is a
matter of personal choice. As these views achieved greater cur-
rency throughout society, the courts began hearing significantly
fewer obscenity cases than they had in years past.

While societal attitudes toward sexually explicit entertain-
ment and materials have changed and the enforcement of ob-
scenity statutes has waned, society and its legal institutions
continue to share a consensus that the dissemination of sexually
explicit expression poses certain dangers and should therefore
be controlled. One area of broad concern lies with exposing chil-
dren to such material. Accordingly, there have been enacted in
recent years numerous statutes which prohibit the dissemina-
tion of sexually explicit material to juveniles or which ban the
exploitation of children in the production of such material. The
courts have concluded that society has a compelling interest in
protecting minors from such exposure and exploitation and
statutes of this sort have consistently been upheld.

III. THE RISE OF ADULT ENTERTAINMENT ZONING

In recent years, there has also been growing agreement that
the proliferation of adult video stores, topless bars and other es-

32. Id. at 565-67.
33. See id. at 566-68.
34. For example, a search of United States Supreme Court decisions by the author
reveals that in the 10 year period running from 1965 through 1974, the Court decided
61 cases involving the enforcement of various obscenity statutes. In the following 10
year period (1975 to 1984), the number of such cases dropped to 24. For the 10 year
period running from 1985 to 1994, the Court decided only eight such cases.
the dissemination of indecent material to minors).
36. See, e.g., Protection of Children Against Sexual Exploitation Act, 18 U.S.C.
§§ 2251-60 (1994); N.Y. PENAL LAW § 263.05 (McKinney 1989) (prohibiting the use of a
child in a sexual performance).
37. See Sable Communications of California, Inc. v. Federal Communications Com-
38. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); New York
v. Ferber, 458 U.S. 747 (1982), on remand to People v. Ferber, 441 N.E.2d 1100 (N.Y.
1982); Ginsberg v. State of New York, 390 U.S. 629 (1968); United States v. Lamb, 945 F.
establishments offering sexually oriented entertainment should be controlled. While concerns for children who may be exposed to the material and activities offered in such establishments are often raised, community concerns over adult entertainment establishments go far beyond the welfare of children. Studies conducted by municipal and state governments across the nation have shown that adult establishments, especially in concentration, tend to produce a variety of community impacts, such as increased crime, reduction in the value of surrounding properties and impairment of community character.

For example, a 1977 Los Angeles study indicated that a concentration of adult establishments in a neighborhood had an adverse impact on the value of surrounding commercial and residential property, made it more difficult to rent office space and retain commercial tenants in the area and made it harder for area businesses to attract and retain customers. A 1984 study conducted for the City of Indianapolis found higher crime rates in areas containing at least one adult establishment than in similar areas without adult uses. The Indianapolis study also included a nationwide survey of real estate appraisers. A large majority of the appraisers indicated that, in their professional opinion, an adult bookstore would have a negative effect on the value of both residential and commercial properties located within a one block radius of the store. In a 1989 report, the Minnesota Attorney General reviewed various adult use studies performed within that state, including one conducted in 1980 by Minneapolis and a 1978 study performed by St. Paul. The Minneapolis study found that the opening of even a single adult establishment within a census tract area resulted in a significant increase in the crime rate for that area. The St. Paul study found lower housing values and higher crime rates in areas with multiple adult establishments in comparison with areas containing no more than one such business. Finally, a 1978 study by the City of Whittier, California, found higher turnover rates in commercial and residential areas adjacent to adult uses, numer-

39. See Department of City Planning, City of Los Angeles, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles (1977).
41. See id. at 33-51.
43. See id.
44. See id.
ous reports of excessive noise, drunkenness and pornographic litter connected with adult businesses and far higher crime rates in an area containing adult businesses than in the City as a whole.

In the mid-1970s, municipalities throughout the country began responding to the problems associated with adult establishments by adopting zoning regulations that placed various restrictions on the location and operation of such businesses. These regulations typically prohibited adult establishments from operating in or near residential and local retail areas or in proximity to schools, houses of worship and other such sensitive uses. In addition, the regulations often employed various separation or dispersal devices to prevent adult establishments from clustering. Over the next two decades, the regulation of adult establishments through zoning became increasingly popular. By the mid-1990s, most of the largest cities in the nation, including Los Angeles, Boston, Detroit, Atlanta, San Diego, Kansas City, Seattle and Chicago, had enacted adult entertainment zoning regulations.

A brief examination of several fundamental zoning principles and some of the zoning case law suggests that zoning is, indeed, an appropriate vehicle for ameliorating the impacts associated with adult establishments while simultaneously allowing the significant market for adult entertainment to be served. Zoning is the regulation of the use of land within a municipality in accordance with a comprehensive plan for the orderly and beneficial development of the community. Despite the fact that zoning regulations interfere with an owner's use of his land and often reduce the value of property, the courts have, from the very beginning, enthusiastically embraced this form of police power regulation. They have characterized it as a vital and flex-

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45. See Planning Dep't, City of Whittier, Cal., Amendment to Zoning Regulations, Adult Businesses in C-2 Zone with Conditional Use Permit (1978). See also, Department of Planning & Dev., Town of Islip, N.Y., Study & Recommendations for Adult Entertainment Businesses in the Town of Islip (1980); Planning Dep't, City of Phoenix, Adult Business Study (1979); City of Austin, Office of Land Development & Services Report on Adult Oriented Businesses in Austin (1986); Planning Dep't, New Hanover County, N.C., Regulation of Adult Entertainment Establishments in New Hanover County (1989); Planning and Dev. Dep't, Manatee County, Fla., Adult Entertainment Business Study for Manatee County (1987).

46. See DCP Study, supra note 23.
47. See id. at 9-14.
48. See id.
ible tool that produces safer, more efficient and more "livable" towns and cities.\textsuperscript{50} Furthermore, they have emphasized the broad latitude that planning officials possess in determining how their municipalities should be zoned.\textsuperscript{51}

The essence of zoning is, of course, the segregation of structures and activities that are deemed incompatible into geographically distinct zoning districts.\textsuperscript{52} As a result, the high-rise apartment tower does not stand next to the single family ranch house. The auto wrecker does not sit across the street from the hospital. Significantly, zoning restrictions on a particular use do not imply that such a use is inherently noxious or undesirable or that outright suppression of the use is appropriate.\textsuperscript{53} The United States Supreme Court stressed this fundamental notion in its seminal zoning decision, \textit{Village of Euclid v. Ambler Realty Co.}\textsuperscript{54} In upholding an Ohio zoning ordinance, the Court remarked:

Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality . . . . A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.\textsuperscript{55}

Adult use zoning thus represents a significant and welcome departure from government's earlier efforts to suppress sexually explicit material through the enforcement of obscenity laws. The widespread use of this regulatory device clearly reflects the aforementioned shift in societal attitudes regarding adult entertainment and expressive matter—a shift away from moral


\textsuperscript{52} See \textit{Rathkoff, supra} note 49, §1.01[3][c].

\textsuperscript{53} See \textit{id.} § 1.01[3][a].

\textsuperscript{54} 272 U.S. 365 (1926).

\textsuperscript{55} \textit{Id.} at 388 (internal citation omitted); \textit{see also} \textit{City of Aurora v. Burns}, 149 N.E. 784, 788 (Ill. 1925).

The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development.

\textit{Id.}
judgments about such material and those who avail themselves of it and toward the view that commerce in such material, like many other forms of commercial activity, produces certain community impacts and should therefore be regulated.

IV. A GROWING BODY OF ADULT ZONING CASE LAW

Given the more tolerant treatment of sexually explicit entertainment inherent in adult use zoning and the historically sympathetic judicial response to zoning regulation in general, it should not be surprising that the courts have been, for the most part, favorably disposed toward adult use zoning. The Supreme Court first reviewed an adult use zoning regulation in a 1976 decision, Young v. American Mini Theaters, Inc. Young involved a Detroit zoning ordinance that placed restrictions on motion picture theaters that presented films distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas," terms that were precisely defined in the ordinance. Under the law, such a theater could not be located within five hundred feet of a residential area or within one thousand feet of two other such theaters or other "regulated uses," such as adult bookstores, taverns, hotels and pawnshops. The ordinance was premised upon testimony from urban planners and real estate experts which indicated that "the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."

The operators of two adult motion pictures theaters covered by the ordinance commenced an action in Federal District Court seeking to have the ordinance declared unconstitutional. The District Court granted Detroit summary judgment, finding that the law "represented a rational attempt to preserve the city's neighborhoods." The Court of Appeals thereafter reversed, concluding that the ordinance imposed an invalid prior restraint on constitutionally protected communication. After granting certi-

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56. See, e.g., infra note 114.
58. Id. at 50.
59. Id.
60. Id. at 55.
61. See id.
62. Id. at 56.
63. See id. at 57.
orari, the Supreme Court reversed the Court of Appeals and upheld the ordinance in a plurality opinion written by Justice Stevens.

The Supreme Court began by acknowledging that some of the adult entertainment offered at plaintiffs' theaters was presumptively entitled to First Amendment protection. The Court went on to emphasize, however, that the protected status of that entertainment did not render zoning controls on those theaters inherently improper. It noted the absence of any claim by plaintiffs that the ordinance would diminish public access to adult entertainment, and then stated:

The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

The Supreme Court went on to note that, while the law defined adult theaters on the basis of the content of the films shown in them, the purpose of the law was to avoid the neighborhood deterioration that a concentration of such theaters tends to produce. Because the ordinance was designed to address this "secondary effect," and not to bar the dissemination of "offensive" speech, it did not violate "the government's paramount obligation of neutrality in its regulation of protected communication."

Finally, the Court found that the Detroit Common Council's conclusion that the restrictions imposed by the ordinance would help to preserve the character of the city's neighborhoods had an adequate factual basis. Reflecting the judicial deference generally accorded to municipal land use planning judgements, the

64. See id. at 61.
65. See id. at 62.
66. See id. ("There is no claim that 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 entirety, the market for this commodity is essentially unrestrained.").
67. Id.
68. See id. at 71 n.34.
69. Id. at 70.
70. See id. at 71-72.
Court stressed that it was not its function to determine whether Detroit had chosen the best method of addressing the problems associated with adult theaters or whether some other legislative strategy might be more effective:

In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures.\(^{71}\)

The validity of zoning restrictions upon establishments offering adult entertainment was again considered by the Supreme Court in *City of Renton v. Playtime Theaters, Inc.*\(^{72}\) The City of Renton, Washington had adopted a zoning amendment that placed restrictions on adult motion picture theaters.\(^{73}\) Like the Detroit ordinance at issue in *Young*, the Renton regulations applied to theaters showing films that were "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.'\(^{74}\) The Renton ordinance prohibited such theaters from locating within 1,000 feet of any residential zoning district, residential dwelling, church, park or school.\(^{75}\) A Renton theater owner affected by the regulations commenced an action in Federal District Court seeking to have the regulations declared invalid on First Amendment grounds.\(^{76}\) After the District Court upheld the ordinance, the Court of Appeals for the Ninth Circuit reversed, holding that Renton had failed to demonstrate that the law furthered a substantial government interest unrelated to the suppression of protected expression.\(^{77}\) The Supreme Court thereafter reversed the Court of Appeals and declared the zoning ordinance valid.\(^{78}\)

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71. *Id.*
73. See *id*.
74. *Id.* at 44.
75. See *id*.
76. See *id.* at 45.
77. See *id.* at 46.
78. See *id.* at 54-55.
The Supreme Court initially noted that the zoning regulation, by its terms, was designed, not to suppress the content of the films shown at adult theaters, but to control the secondary effects that such theaters may have on the surrounding community, such as increased crime, a reduction in property values, harm to retailing and a diminution in the general quality of life. Because the regulation could thus be justified without reference to the content of the regulated speech, it was properly viewed as a "content-neutral" time, place and manner regulation[ ]. The Court held that the appropriate test for such a regulation is whether it is "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." The Court then went on to find that the Renton ordinance easily met that standard.

With regard to the first prong of that test, the Supreme Court initially emphasized that the purposes behind the Renton ordinance were indeed legitimate and substantial, reiterating that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" The Court then took issue with the Court of Appeals' determination that, because the Renton ordinance was enacted without the benefit of studies specifically relating to the particular problems or needs of Renton, the City's justifications for the ordinance were "conclusory and speculative." The Supreme Court ruled that the Court of Appeals had "imposed on the city an unnecessarily rigid burden of proof." The Court found that Renton had properly relied on the experiences of, and studies produced by, the City of Seattle, Washington, which had adopted an adult theaters ordinance after finding that such theaters produced a number of negative secondary effects. The Court emphasized that, in enacting an adult use ordinance, a city is not required to conduct new studies or produce evidence independent of that already generated by other localities, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."

79. See id. at 47.
80. Id. at 49.
81. Id. at 50.
82. Id. at 50 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).
83. Id.
84. Id.
85. See id. at 51-52.
86. Id.
The Supreme Court went on to find that the method chosen by Renton to address the problems associated with adult theaters was a valid one, emphasizing, once again, that municipalities possess considerable discretion in that regard and may elect to either disperse adult uses or encourage them to concentrate in designated areas. The Court also noted that the Renton ordinance was “narrowly tailored” to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the defect of over-inclusiveness.

With regard to the second element of the test for time, place and manner regulations, the Supreme Court noted that the Renton ordinance left some 520 acres, or more than five percent of the entire land area of Renton, open for use as adult theater sites. This acreage consisted of a mix of vacant parcels and properties developed with commercial and industrial uses. It therefore concluded that the ordinance provided reasonable alternative avenues for the dissemination of adult entertainment. Finally, the Court emphasized that a properly drafted adult zoning ordinance is a vehicle, not for the suppression of a particular message, but for the preservation of communities:

In sum, we find that the Renton ordinance represents a valid governmental response to the “admittedly serious problems” created by adult theaters. 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 is, after all, the essence of zoning. Here the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment.

Several years after Renton, the New York Court of Appeals also had occasion to consider the validity of an adult use zoning regulation. Town of Islip v. Caviglia considered the validity of a zoning ordinance adopted by the Town of Islip, Long Island, that placed restrictions on adult bookstores, theaters, motels, cabarets and massage parlors. The ordinance defined each of the regulated uses as an establishment which is “not open to the public generally but excludes any minor by reason of age.”

87. See id. at 52.
88. Id.
89. See id. at 53-54.
90. See id.
91. Id. at 54-55.
93. Id.
Under the ordinance, adult uses were confined to certain industrial zoning districts. Moreover, an adult use was not allowed to operate within five hundred feet of a school, church, park, playground or playing field, within five hundred feet of a residential zoning district and within a half mile of another adult use.\footnote{94}{See id. at 225-26.} The ordinance also required that nonconforming adult uses be terminated in accordance with a schedule of amortization based upon the user's investment in the business.\footnote{95}{See id. at 226.} In response to an action by Islip seeking to enjoin the owner of an adult bookstore from continuing to operate in a prohibited zone, the store owner claimed that the ordinance deprived him of the freedom of expression guaranteed by the federal and state constitutions.\footnote{96}{See id. at 217.}

The Supreme Court and the Appellate Division upheld the ordinance and the Court of Appeals affirmed.\footnote{97}{See id.} The Court of Appeals began by stressing both "the broad power of municipalities to implement land use controls to meet the increasing encroachments of urbanization on the quality of life," and the strong presumption of constitutionality that zoning enactments enjoy.\footnote{98}{Id.} The court went on to hold that the Islip ordinance was consistent with these general zoning principles: "Undeniably, the purpose of preventing the deterioration of neighborhoods, including downtown business districts, comes well within the confines of the public welfare that defines the limits of the police power."\footnote{99}{Id. at 218.} The court acknowledged that the Islip ordinance also implicated free speech concerns, but held that the law comported with both federal and state constitutional standards in that regard.\footnote{100}{See id. at 218-19.}

The Court of Appeals initially determined that the ordinance satisfied the test of validity under the Federal Constitution established in Renton and Young. The court found that the Islip ordinance was content neutral because it was designed, not to regulate expression, but to eliminate the secondary effects associated with adult uses: "The governmental interest supporting the ordinance is the eradication of the effects of urban blight and neighborhood deterioration and furtherance of the general underlying purpose of zoning, the enhancement of the quality of life for the town's residents."\footnote{101}{Id. at 219.} The Court of Appeals went on to

\begin{footnotes}
\footnote{94}{See id. at 225-26.}
\footnote{95}{See id. at 226.}
\footnote{96}{See id. at 217.}
\footnote{97}{See id.}
\footnote{98}{Id.}
\footnote{99}{Id. at 218.}
\footnote{100}{See id. at 218-19.}
\footnote{101}{Id. at 219.}
\end{footnotes}
find that Islip's conclusion that these goals could be furthered by restrictions on adult uses had a strong factual basis.\textsuperscript{102} It noted in that regard that Islip had performed its own study of the secondary effects of adult uses and had considered studies performed by other municipalities. Islip's study showed that the presence of several adult uses in the downtown area created a "dead zone," in which traffic was sparse and non-adult businesses suffered, and in general had a deleterious effect on the quality of life in the communities of the town.\textsuperscript{103} The court went on to explain: "Studies relied on and prepared by the Town demonstrated that the location of adult businesses in certain areas heightened public apprehension about entering them, thus driving out traditional downtown businesses as customers avoided locations near adult bookstores, increased criminal activity and lowered nearby residential property values."\textsuperscript{104} The court also noted that the Islip ordinance was "narrowly tailored to affect only those uses shown to produce the unwanted secondary effects."\textsuperscript{105}

Finally, the Court of Appeals found that the Islip ordinance provided ample space—over 6,000 acres with miles of road frontage—for adult uses within the Town. The court noted there was no showing that enforcement of the ordinance would produce a decline in the number of adult bookstores in Islip or that fewer potential customers would be able to conveniently patronize them.\textsuperscript{106}

After analyzing the Islip adult use ordinance under federal constitutional law, as established by \textit{Renton} and \textit{Young}, the Court of Appeals proceeded to determine whether the ordinance comported with state constitutional standards, stressing that "New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community."\textsuperscript{107} The court nevertheless held that the Islip ordinance did not deprive the store owner of rights guaranteed under the New York Constitution. The court began by indicating that the applicable test under the State Constitution was quite similar to the federal standard. Under that test, content-neutral regulations, that is, "those justified without reference to the content of the regulated

\textsuperscript{102} See id.
\textsuperscript{103} Id. at 220.
\textsuperscript{104} Id. at 219.
\textsuperscript{105} Id. at 220.
\textsuperscript{106} See id. at 220-21.
\textsuperscript{107} Id. at 221.
speech and relating only to the time, place and manner of expression,” are evaluated by balancing the government interest to be achieved and the resulting interference with free expression.\textsuperscript{108} Such a regulation will be upheld if it is “designed to carry out legitimate and important governmental objectives” and “is no broader than needed to achieve its purpose.”\textsuperscript{109}

In applying that test, the Court of Appeals first reiterated that the Islip ordinance was, indeed, content-neutral and designed to further important government interests: “The Town did not single out adult uses for regulation because of any hostility to the views expressed in the material they purveyed or in an attempt to insulate the public from their messages but because they produced injurious effects on the Town’s neighborhoods.”\textsuperscript{110} The court went on to find that the ordinance was no broader than necessary to achieve its goals. It rejected the notion that the Town was required to first attempt alternative remedies for the problems associated with adult uses and concluded that “the Town’s use of its zoning powers was the most appropriate means to address its substantive problems.”\textsuperscript{111} The court noted that the Islip ordinance was less restrictive than other methods that might have been used to address the problems created by adult uses. It did not represent a total ban on adult uses and it avoided the potential for improper suppression of speech inherent in a licensing scheme.\textsuperscript{112} The ordinance also left open ample channels for dissemination of adult material. The court therefore concluded that the Islip ordinance was also valid under the New York Constitution.\textsuperscript{113} 

Renton, Young and Islip are only the leading decisions in a long line of cases that have upheld zoning regulations that impose locational and other restrictions on adult entertainment establishments.\textsuperscript{114}

\textsuperscript{108} Id. at 223.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 222.
\textsuperscript{111} Id. at 222.
\textsuperscript{112} See id.
\textsuperscript{113} See id. at 223-24.
\textsuperscript{114} See North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441 (7th Cir. 1996); Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995); Grand Brittain, Inc. v. City of Amarillo, Texas, 27 F.3d 1068 (5th Cir. 1994); ILQ Investments v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994); Ambassador Books & Video, Inc. v. City of Little Rock, Arkansas, 20 F.3d 858 (8th Cir. 1994); Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993); Lakeland Lounge of Jackson, Inc. v. City of Jackson, Mississippi, 973 F.2d 1255 (5th Cir. 1992); D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1991); Alexander v. City of Minneapolis, 928 F.2d 278 (6th Cir. 1991); International Eateries of America, Inc. v. Broward County, Florida, 941 F.2d 1157 (11th Cir. 1991); SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); Thames Enterprises, Inc. v. City of St.
V. NEW YORK CITY'S ADULT USE REGULATIONS

It was against the foregoing backdrop that New York City's effort to regulate adult establishments was undertaken. Beginning in 1993, the City's Department of City Planning conducted an examination of the adult entertainment industry, which resulted in a study published in 1994 (DCP Study).\textsuperscript{115} The DCP Study found that, consistent with nationwide trends, the number of adult establishments in New York City had risen dramatically over the last three decades, from a total of 9 in 1965 to the 177 that were identified in a 1993 survey.\textsuperscript{116} Once found predominantly in midtown Manhattan, adult establishments had opened in neighborhoods throughout all five boroughs of the City.\textsuperscript{117} Moreover, most of the City's adult establishments were located in zoning districts that permitted residential uses, as well as a variety of community facilities, such as schools and houses of worship.\textsuperscript{118}

The DCP Study's examination of adult entertainment also produced ample evidence of the negative community impacts that adult establishments tend to produce. The agency reviewed a number of studies of adult establishments previously performed by communities across the nation, each of which indicated that such establishments cause various secondary impacts, such as a reduction in the value of surrounding properties and an increase in crime.\textsuperscript{119} The DCP Study also considered surveys of New York City's adult establishments that had been performed by other organizations.\textsuperscript{120} Two of those surveys focused on what had undoubtedly been the nation's preeminent labora-

\textsuperscript{115} See DCP STUDY, supra note 23.
\textsuperscript{116} See id. at 19-20.
\textsuperscript{117} See id. at 20-21.
\textsuperscript{118} See id. at 23-24.
\textsuperscript{119} See id. at 3-15.
\textsuperscript{120} See id. at 34-41.
tory for studying the effects of a concentration of sexually ori-
City's Office of Midtown Enforcement indicated that by the mid-
1970s, Times Square was filled with over one hundred sex-
related businesses. During that period, some 1,200 prostitutes
worked out of area hotels and the neighborhood "was clogged
with pimps, johns, and hookers as well as the addicts and muggers who along with them preyed on the public."

Shortly before the DCP Study was published, the Times
Square Business Improvement District released a study of adult
uses in Times Square. The TSBID Report compared two areas
where adult uses had concentrated (West 42nd Street between
Seventh and Eighth Avenues and Eighth Avenue between 42nd
and 50th Streets) with several nearby control areas without
adult uses. The study found that, between 1986 and 1994, the
aggregate assessed value of property in the study areas in-
creased at a lower rate than did the value of property in the
control areas. The TSBID Report also examined crime statis-
tics and found that criminal complaints were approximately
twice as high in the study areas than in the control areas.

Finally, the Department of City Planning conducted its own
survey of several areas in which adult establishments were lo-
cated. While each of the areas examined by the Department of
City Planning contained only a small number of adult establish-
ments, this survey produced further evidence of the detrimental
impacts associated with such businesses.

On the basis of the findings contained in the DCP Study,
the City Planning Commission and the City Council adopted an
amendment to the City's Zoning Resolution, which imposed a
one year moratorium on new adult establishments, beginning in

121. See id. at 35 (citing New York Mayor's Office, Annual Report of Midtown
Enforcement (1983)).
122. Id.
123. See id. at 40-41 (citing Times Square Business Improvement District, Report
on the Secondary Effects of the Concentration of Adult Use Establishments in the
Times Square Area (1994) [hereinafter TSBID Report]).
124. See id.
125. See id.
126. See id. The TSBID Report went on to indicate that, beginning in the early
1980s, several factors, including condemnation activity relating to the City-State 42nd
Street Development Project and intensified law enforcement in the area, combined to
produce a significant drop in the number of adult establishments operating in Times
Square. The area has undergone a corresponding cultural and economic revival, which
continues to date. TSBID Report, supra note 123, at 9-10.
November 1994. The Department of City Planning and the Planning Commission then commenced the field work, the legislative drafting and the public review process needed to enact a set of permanent adult use regulations. During the public review process, the Planning Commission heard from numerous City residents, elected officials and representatives of community organizations. Some of those individuals opposed restrictions on adult establishments, contending that they would excessively infringe upon freedom of expression and would have a particularly severe impact on establishments patronized by certain groups, such as the City's gay and lesbian community. However, a large majority of those who testified supported the regulation of adult establishments. Many of these persons provided additional evidence of the adverse community impacts caused by adult uses, including increases in litter, loitering and crime, especially prostitution, a decline in real estate values and economic activity, offensive use of signs and the inappropriate exposure of children and adolescents to graphic sexual images. They expressed the belief that the adult uses in their neighborhoods produced a decline in community character and their quality of life.

In September 1995, the City Planning Commission adopted amendments to the Zoning Resolution that rescinded the temporary moratorium on new adult uses and replaced it with comprehensive permanent adult use regulations. On October 25, 1995, the City Council gave final approval to those amendments and they thereupon took effect. The adult use regulations are applicable to any "adult establishment," a term which is defined in a manner similar to many other adult use ordinances, including those upheld in Renton and Young. The regulations thus apply to theaters, book and video stores, restaurants, bars and other establishments that offer entertainment or material that is characterized by an emphasis on "specified anatomical areas" or "specified sexual activities," terms that are explicitly defined in the text of the law. The applicability of the adult use regulations is further limited to establishments in which a "substan-
tial portion" of the facility is devoted to adult material or establish-ments that regularly feature adult entertainment. The regulations therefore reach only the types of establishments that tend to produce negative community impacts, that is, those in which sexually explicit entertainment or materials are the primary focus. The regulations place no restrictions on entertainment or material containing incidental displays of nudity or sexual activity. Nor do they have any application to establishments, such as newsstands and general interest book and video stores, which contain relatively modest sections of adult materials.

The centerpiece of New York City's adult use zoning regulations is a set of locational restrictions governing adult establishments. The goal behind these restrictions is to shield the City's residential areas, its low density neighborhood commercial districts and certain facilities that serve City residents from the negative impacts produced by such establishments. The studies considered by the City Planning Commission and the testimony received at its hearings indicate that residential communities, including the local retail areas that serve neighborhood residents, are particularly sensitive to the adverse impacts of adult uses. There was substantial evidence that even a single adult use in or near a residential neighborhood can impair the character and economic viability of that area.

In furtherance of these goals, the regulations permit adult establishments to operate only in the City's manufacturing and high density commercial zoning districts. The regulations governing these districts generally prohibit new residential development, but allow a wide range of retail, service, amusement and other commercial uses. In the districts in which adult establishments are permitted under the regulations, such establishments must be located at least five hundred feet from most zoning districts in which new residential uses are allowed. Adult uses must also be located at least five hundred feet from any church, school or day-care center. The regulations therefore shield the areas of the City where people live and facilities in which families, and especially children, frequently assemble from the impacts produced by adult uses.

136. Id.
137. See id.
138. See id. §§ 32-01(b), 42-01(b).
139. See generally New York, N.Y., Zoning Resolution §§ 32-00, 42-00.
ADULT USE ZONING

The regulations also contain several provisions designed to prevent concentrations of adult uses, which have been shown to have a particularly severe impact on communities. In the districts in which adult establishments are permitted, a new adult use must be located at least five hundred feet from any other adult use. Moreover, only one adult establishment, not to exceed ten thousand square feet of usable floor area, may be located on a zoning lot. Finally, in order to provide relief to neighborhoods which were already experiencing the adverse effects of adult uses, the regulations generally required existing nonconforming adult establishments to come into compliance or terminate within one year of their effective date. The City's Board of Standards and Appeals was authorized to extend this termination deadline if an adult use owner demonstrated that additional time was needed to recoup his investment in the business.

VI. CHALLENGES TO THE CITY'S REGULATIONS

Several months after they were enacted, New York City's adult use zoning regulations were challenged in three separate actions brought in New York Supreme Court. Two of the actions were commenced on behalf of over one hundred owners and operators of adult establishments. The third action was brought by the New York Civil Liberties Union on behalf of several patrons of adult establishments. In these actions, which were informally consolidated, the plaintiffs contended that the regulations abridged their freedom of expression and other rights.

141. See id. §§ 32-01(c), 42-01(c).
142. See id. §§ 32-01(d), (e) and §§ 42-01(d), (e).
143. See id. §§ 52-734, 52-77. The regulations contain several exceptions to the above-mentioned termination requirement. Adult establishments that existed on the effective date of the regulations and, while otherwise conforming, are located within 500 feet of, or on the same zoning lot as, another adult use or exceed 10,000 square feet in size are not required to terminate. Id. §§ 32-01(f), 42-01(f). In addition, an otherwise conforming adult use is not required to terminate if a school, day-care center or place of worship is subsequently established within 500 feet of it. Id. §§ 32-01(b), 42-01(b). An existing adult use therefore will not be affected by the informed and voluntary decision of such a community facility to locate in proximity to it.
144. See id. §§ 72-40.
146. See id. at 802-03 (concerning the claims brought by Rachel Hickerson and other aggrieved patrons).
protected by the New York Constitution. While a number of arguments were offered by plaintiffs, two contentions predominated. First, it was claimed that the City had failed to provide sufficient evidence that adult establishments produced harmful impacts on any of the City's communities. Plaintiffs argued in that regard that the City had relied too heavily on outside studies and that the evidence in the legislative record concerning New York City's adult establishments consisted primarily of anecdotal testimony rather than reliable, "empirical" evidence. Plaintiffs' other chief contention was that the City's adult use regulations restricted adult establishments to remote, inaccessible and otherwise unsuitable areas and therefore failed to provide reasonable "alternative channels" for the dissemination of adult entertainment. An examination of the legislative record, the large body of adult zoning case law and, once again, general zoning principles serves to refute both of these contentions and to demonstrate why, to date, the challenges to New York City's adult use zoning regulations, like most similar challenges, have been unsuccessful.

As to the issue of the community impacts produced by the City's adult establishments, it is settled, first of all, that studies performed by other communities may properly be considered by municipal officials in determining whether to adopt adult use regulations. Indeed, the courts have consistently held that, in considering adult use legislation, a municipality need not conduct any independent studies of its own and instead may rely exclusively on studies conducted by other communities. It is

147. Plaintiffs in the Amsterdam and Hickerson actions asserted similar claims pursuant to the United States Constitution. However, shortly after those actions were commenced, defendants removed the federal constitutional claims to the United States District Court pursuant to the federal removal statute, 28 U.S.C. § 1441 (1994). See also Stringfellow's, 653 N.Y.S.2d at 803 (noting removal of these actions to federal court). In June 1996, the District Court remanded to the Supreme Court all claims in the two actions arising under the New York Constitution, retained jurisdiction over the Federal claims and stayed an adjudication thereof pending determination of the state law claims. Hickerson v. City of New York, 932 F. Supp. 550 (S.D.N.Y. 1996). Accordingly, the litigation in the New York courts involved only claims under the New York Constitution.

also clear that municipalities are not required to produce empirical proof of the secondary impacts caused by adult establishments in order to justify enactment of an adult use ordinance. Rather, such an ordinance will be deemed to further legitimate governmental interests so long as whatever evidence the municipality relies upon "is reasonably believed to be relevant" to the problems and concerns that led to its enactment.\(^\text{149}\) In \textit{Islip}, for example, the Court of Appeals noted that the Town's ordinance was adopted after a thorough study of the community and its adult uses by professional planners and municipal officials, which led to the conclusion that such uses had a deleterious effect on the Town's quality of life. Town officials also considered studies of adult uses prepared by other municipalities.\(^\text{150}\) The Court found these studies more than adequate to support the ordinance, stating:

To be sure, planning studies, by their nature, are not scientific nor their predictions certain but the Town was entitled to credit the evidence in its study of past deterioration and the prediction that, unless remedied, the deterioration would continue; it was not required to wait before acting until its business areas became wastelands.\(^\text{151}\)

Municipal officials, in considering the impact that adult uses have had in their communities, may therefore rely upon such non-empirical evidence as the opinion of planning officials,\(^\text{152}\) surveys of real estate professionals\(^\text{153}\) and testimony from concerned citizens and community organizations.\(^\text{154}\) Where

sonable (at least for constitutional review purposes) for local legislative bodies to assume that human nature—at least in respect of such basic matters as human sexuality and its commercial exploitation—will not vary greatly between generally comparable metropolitan areas within even so heterogeneous a society as that of twentieth century America. We therefore assess the reasonableness of Newport News' determination not solely on the basis—concededly sparse—of what had already demonstrably occurred within its geographical borders, but of what it might reasonably foresee in light of a sufficiently documented wider national experience properly reflected in matters of public record. . . .

\textit{Id.} at 1169-70 n.7.

\(^\text{149}\) \textit{Renton}, 475 U.S. at 51-52; \textit{see also} FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 236 (1990) (finding that a Los Angeles Study exploring the effect of adult motels on surrounding neighborhoods reasonably supported the belief that motels within short rental time periods fostered prostitution).


\(^\text{151}\) \textit{See id. at 219.}


\(^\text{154}\) \textit{See Landover Books, Inc. v. Prince George's County, 566 A.2d 792, 802 (Md.}
such evidence is itself sufficient to support a conclusion that adult uses produce secondary impacts, the existence of contrary opinion or evidence in the legislative record does not render that conclusion invalid. 155

The case law regarding the nature and quality of the evidence required to support an adult use ordinance is consistent with general zoning principles. While zoning is often concerned with such quantifiable matters as traffic patterns and demographic trends, zoning laws may also legitimately focus on various intangible matters that relate to the "quality of life" found in a community.156 The courts, for example, have consistently held that preserving the character157 and the aesthetic appeal158 of a municipality are legitimate zoning concerns. Concerns of this sort are simply not susceptible to empirical analysis.

With regard to adult use zoning, the aforementioned studies do, in fact, contain a good deal of empirical evidence relating to the impact that adult establishments have on such things as crime and property values. However, those studies also reflect broad agreement on the part of community residents, business persons and officials that adult establishments, especially in concentration, tend to degrade the character, beauty and overall quality of many residential and commercial areas. The fact that this consensus is demonstrated, not by empirical studies, but by the testimony of concerned individuals and other "anecdotal" evidence makes it no less credible or worthy of judicial respect.

The question of whether an adult use ordinance allows for adequate access to adult entertainment and materials is undoubtedly the most hotly contested issue in much of the litigation involving adult use zoning. In Islip, the New York Court of Appeals found that over six thousand acres of land in the Town, containing more than eighty-five miles of road frontage, was

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156. Rathkopp, supra note 49, § 1.02[4][a].


zoned to permit adult uses. Moreover, the Court noted that the ordinance did not apply to general purpose bookstores selling adult materials in segregated areas. The Court therefore concluded that the ordinance did not unduly restrict access to adult entertainment.

In Renton, the United States Supreme Court also considered the issue of adult use access. The Court noted that the Renton ordinance left some 520 acres, or more than five percent of the entire land area of Renton, open for use as adult theater sites. This area included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is crisscrossed by freeways, highways, and roads." The Ninth Circuit Court of Appeals had nevertheless determined that because much of that land was already occupied by existing commercial and manufacturing facilities and because most of the undeveloped portions were not for sale or lease, the land in question was not truly available. The Supreme Court disagreed, stating:

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. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," American Mini Theatres, 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See id., at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ("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.

160. See id. at 222.
161. See id. at 223.
163. The Court of Appeals found that a substantial portion of the land on which adult theaters were permitted was occupied by a sewage treatment plant, a horse racing track, a business park containing buildings suitable only for industrial uses, a warehouse and manufacturing facilities, an oil tank farm and a fully-developed shopping center. Id. at 54.
164. Id. (citation omitted).
Other courts have likewise held that the areas of a municipality that a zoning ordinance sets aside for adult uses may properly have a range of characteristics and need not be "prime" locations. Areas zoned for, and developed with, industrial uses may be appropriate. The areas designated for adult uses may include undeveloped sites, as well as sites currently occupied by businesses. That the cost of developing a site with an adult use may be prohibitive is also irrelevant to the access issue. The courts have nevertheless stressed that an adult use ordinance may not impose an outright ban on adult establishments and that such an ordinance must provide adult businesses with a reasonable opportunity to locate in areas that can be considered part of the municipality's general commercial real estate market.

New York City's adult use zoning regulations unquestionably meet this requirement. Adult establishments may operate under those regulations in a number of commercial and manufacturing districts that are located throughout the City. All of these districts authorize, and already contain, a variety of retail, recreational, entertainment and other commercial uses. In Manhattan, such districts are located in various areas, including Midtown, the Far West Side, Greenwich Village and Lower Manhattan. Such districts are also located in each of the other boroughs of the City. All of the districts are accessible by car and by mass transit.

166. See, e.g., Schneider v. City of Ramsey, 800 F. Supp. 815, 823 (D. Minn. 1992), aff'd, 12 F.3d 140 (8th Cir. 1993).
168. See, e.g., Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858, 864-65 (8th Cir. 1994) ("Although Ambassador argues that the cost of relocation to all or many of those [permitted] areas would prevent relocation, the cost factor is unimportant in determining whether the ordinance satisfies the standards of the First Amendment"); 15192 Thirteen Mile Road, Inc. v. City of Warren, 626 F. Supp. 803, 827 (E.D. Mich. 1985).
170. See Grand Brittain, Inc. v. City of Amarillo, Tex., 27 F.3d 1068, 1070 (5th Cir. 1994); Topanga Press, Inc. City of Los Angeles, 989 F.2d 1524, 1530-31 (9th Cir. 1993); see also Islip, 540 N.E.2d at 219-21.
171. The DCP STUDY indicated that all of the property in Manhattan that is zoned to permit adult uses and at least 80% of the land area in the other boroughs that is so zoned is within a 10 minute walk from a rapid transit line or a major bus route. See
The districts in which adult establishments are permitted constitute over eleven percent of New York City's total land area.\textsuperscript{172} The New York City Department of City Planning has calculated that under all of the locational and dispersion requirements contained in the adult use regulations, up to five hundred adult establishments may operate in these districts. As indicated, a survey taken shortly before the adult use regulations were adopted identified 177 adult establishments operating in New York City.\textsuperscript{173} Moreover, while the regulations permit an adult establishment to have up to ten thousand square feet of usable floor area, all but a few of the adult establishments now operating in the City occupy far less than ten thousand square feet. Therefore, the regulations not only permit all of the City's existing adult establishments to continue to operate in New York City, but also allow for a very significant expansion of the City's adult use market. Furthermore, the regulations place no restrictions on establishments, such as general purpose book or video stores or newsstands, that offer a limited amount of adult material. In short, the City's adult use regulations unquestionably provide for adequate access to adult entertainment and materials.

In view of all the foregoing, the outcome of the litigation challenging New York City's adult use zoning regulations is unsurprising. Soon after that litigation was commenced, the City moved for summary judgment and, in support thereof, submit-

\textsuperscript{172} See City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 53 (1986) (noting that adult uses are permitted in more than 5% of city's land area); North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441, 445 (7th Cir. 1996), cert. denied, 117 S.Ct. 684 (1997) (noting that adult uses are permitted in less than 1% of city's land area); O'Malley v. City of Syracuse, 813 F. Supp. 133, 146 (N.D.N.Y. 1993) (noting that adult uses are permitted in at least 4% of city's land area); Schneider v. City of Ramsey, 800 F. Supp. 815, 821 (D. Minn. 1992), aff'd, 12 F.3d 140 (8th Cir. 1993) (noting that adult uses are permitted in 2.5% of city's land area); Southern Entertainment Co. v. City of Boynton Beach, 736 F. Supp. 1094, 1098 (S.D. Fla. 1990) (noting that adult uses are permitted in 3.25% of city's land area); S & G News, Inc. v. City of Southgate, 638 F. Supp. 1060, 1066 (E.D. Mich. 1986), aff'd, 819 F.2d 1142 (6th Cir. 1987) (noting that adult uses are permitted in 2.3% of city's land area); County of Cook v. Renaissance Arcade and Bookstore, 522 N.E.2d 73, 77 (Ill. 1986) (noting adult uses are permitted in 5.7% of county's land area).

\textsuperscript{173} See DCP STUDY, supra note 23. In determining whether an adult use ordinance provided for sufficient public access to such uses, \textit{Istip} and other cases considered whether the ordinance under review allowed for the operation of as many adult establishments as existed in the community at the time of the law's enactment. \textit{Istip}, 540 N.E.2d at 223; Woodall v. City of El Paso, 49 F.3d 1120, 1127 (5th Cir. 1995); Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1530 (9th Cir. 1993); Lakeland Lounge of Jackson, Inc. v. City of Jackson, Mississippi, 973 F.2d 1255, 1260 (5th Cir. 1992).
ted most of the legislative record behind the regulations, including the various studies relied upon by the City Planning Commission and the City Council. In opposition to the City’s motion, plaintiffs submitted the affidavits of several experts who disputed the defendants’ contentions regarding the secondary effects produced by the City’s adult establishments and the degree of access to adult entertainment that the regulations allow for.

The trial court subsequently granted the City’s motion for summary judgment and declared the adult use regulations valid in all respects.\textsuperscript{174} With regard to the issue of secondary community impacts, the court stressed that a “reasonable belief” that adult establishments produce such impacts is all that is constitutionally required,\textsuperscript{175} and that the voluminous record before the Planning Commission and the City Council provided ample support for such a conclusion.\textsuperscript{176} On the issue of access to adult entertainment, the court found the City had met its initial burden of showing that the adult use regulations permit adult establishments to operate in a number of areas that are both accessible and suitable for commercial development and that those areas are large enough to accommodate current and future demand for adult entertainment.\textsuperscript{177} While plaintiffs disputed the City’s evidence, the court found that they did so by way of an analysis that was inconsistent with the controlling case law. They argued, for example, that the areas in which adult establishments are permitted to operate are inadequate because many are “industrial” in nature and because they include properties that are already encumbered with long term leases and land that is undeveloped.\textsuperscript{178} The court concluded:

While x-rated businesses may no longer be located on every street corner and may no longer dominate the Times Square area, as long as the current demand for them exists their numbers will certainly not lessen. It is true, however, as plaintiffs contend that instant availability to pornography on demand will be eliminated from some sections of the City. It is also true that those who seek to patronize adult establishments may be minimally inconvenienced by the need to travel a bit to satisfy their desires and that the owners and operators of certain adult establishments may sustain some economic hardship as a result of the [adult use

\begin{thebibliography}{9}
\bibitem{175} Id. at 808.
\bibitem{176} See id. at 809.
\bibitem{177} See id. at 809-14.
\bibitem{178} Id. at 811-12.
\end{thebibliography}
regulations]. ... [N]one of those factors render the [regulations] constitutionally infirm.179

The trial court's decision granting New York City's motion for summary judgment was affirmed, in a brief opinion, by the Supreme Court's Appellate Division.180 Thereafter, in February of 1998, the New York Court of Appeals also affirmed the award of summary judgment.181 In its decision, the Court of Appeals began by reviewing the "extensive legislative record connecting adult establishments and negative secondary effects" that had been assembled by the City Planning Commission and the City Council.182 As it did in Islip, the Court held that this connection can be established sufficiently through non-empirical methods such as surveys of public perceptions and anecdotal evidence. Commenting on the aforementioned DCP Study, the Court found that, "a reading of [the DCP] report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area."183 The Court went on to conclude that the City's adult use regulations were "not an impermissible attempt to regulate the content of expression," but a legislative effort to prevent this sort of deterioration within the City's communities.184

The Court of Appeals proceeded to address the issue of whether New York City's adult use regulations allow the public reasonable access to adult entertainment. Reiterating the test it used in Islip, the Court stated that "there must be (1) 'ample space available for adult uses after the rezoning' and (2) no showing by the challenger that enforcement of the ordinance will either substantially reduce the total number of adult outlets or significantly reduce the accessibility of those outlets to their potential patrons."185 The Court indicated that, for the purpose of analyzing the sufficiency of access to adult entertainment under the New York State Constitution, criteria similar to those

179. Id. at 814.
182. Id. at 415.
183. Id. at 416.
184. Id.
185. Id. at 418 (quoting Town of Islip v. Caviglia, 540 N.E.2d 215 (N.Y. 1989)).
used in Renton and other federal cases should be employed. Discussing those criteria, the Court stated:

[L]and that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry. Rather, the inquiry is limited to the physical and legal availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market.

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for some 'generic commercial enterprise.'

The Court of Appeals went on to find that, under these criteria, the City's adult use regulations provide the public with sufficient access to adult entertainment. The Court noted that the evidence submitted by the City showed that the regulations allow at least five hundred potential sites for adult businesses to operate "in districts that permit a wide mix of commercial, retail, entertainment and manufacturing uses" and that are readily accessible to the public. The Court held that this showing satisfied the City's initial burden concerning the issue of access.

The Court then considered the evidence regarding access submitted by the plaintiffs in their opposition to the summary judgment. That evidence consisted chiefly of the affidavit of a land use consultant who offered an opinion that the City's regulations do not allow for sufficient public access to adult entertainment. However, the Court of Appeals found that the affidavit of plaintiffs' consultant was lacking in many regards. First, the Court of Appeals agreed with the trial court that the consultant's opinion was premised on criteria for the suitability of alternative sites that were unsupported by case law. For example, the consultant deemed industrial areas, warehouse areas, undeveloped land and parking lots to be unsuitable for new adult establishments, contrary to the holdings in Renton, Islip and many other cases. Another significant flaw in the consult-

186. Id. at 418-19 (citations omitted).
187. Id. at 419.
188. Id.
189. See id. at 419-20.
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Ant's affidavit was "the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable." The Court found that, "given this shortfall, the accuracy of the City's over-all calculations was not called into serious question." The Court of Appeals therefore concluded that, "the City's effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the standards set forth by the United States Supreme Court in Renton v. Playtime Theatres (supra) or by this Court in Matter of Town of Islip v. Caviglia (supra)."

CONCLUSION

In the relatively brief span of several decades, sexually explicit entertainment and expressive material has moved from the fringes of "decent" society to become a highly visible, multi-billion dollar industry. The treatment of these matters by government and the courts has undergone a corresponding evolution. Enforcement of obscenity and related statutes, which found their justification in concerns over the moral rectitude of the individual and society and were designed to achieve the outright suppression of such material, has declined. The focus has shifted to the regulation of commerce in sexually explicit entertainment and materials in order to further certain concrete and well-defined goals—to protect children from exposure to, or involvement in, adult entertainment and to protect communities from the well documented land use impacts associated with businesses that specialize in such entertainment.

190. Id. at 420.
191. Id.
192. Id. at 421. After the Court of Appeals affirmed the award of summary judgment to the City, the plaintiffs returned to federal court in an effort to challenge the adult use regulations under the First Amendment. In Hickerson v. City of New York, Nos. 96 CIV. 2203, 2204, 1998 WL 105583 (S.D.N.Y. Mar. 6, 1998), the District Court refused to grant a preliminary injunction against enforcement of the regulations. The court held that, because the standards for assessing the validity of an adult use ordinance under the federal and New York constitutions are essentially the same, all issues dispositive of plaintiffs' First Amendment claim had been decided in the state litigation. The court went on to hold that the Federal Constitution's Full Faith and Credit Clause and principles of collateral estoppel precluded plaintiffs from relitigating those issues in federal court. The District Court's decision was subsequently affirmed by the Second Circuit Court of Appeals. See Hickerson v. City of New York, Nos. 98-7269, 98-7270, 1998 WL 203205 (2d Cir. June 3, 1998).
Zoning ordinances designed to accomplish the latter goal have consistently survived judicial review. Such ordinances are generally deemed to be reasonable "time, place and manner" regulations that serve legitimate government interests and fit comfortably within the broad zoning authority traditionally vested in municipalities. The courts have stressed, however, that adult entertainment is a constitutionally protected form of expression that may not be completely suppressed. The courts have therefore insisted that adult use zoning regulations allow for adequate public access to adult entertainment and materials and they have carefully scrutinized such ordinances to ensure that this requirement has been met.

In undertaking to enact its own adult use zoning regulations, New York City was in a better position than many municipalities to ensure that whatever regulations it ultimately adopted would be effective and would survive a legal challenge. First, as one of the last major cities in the country to adopt such regulations, City officials were able to review studies of the impacts caused by adult establishments that had already been performed in a number of other municipalities, as well as a large body of adult use case law. City officials were also able to study the community impacts that had been produced by the large number of adult establishments that have operated in the City for many years. As a result, New York City has adopted adult use regulations that clearly comport with constitutional standards. Those regulations protect City residents and the businesses and institutions that serve them from the impacts associated with adult establishments while ensuring that adult entertainment and expressive materials are available to all who want them.