Note: New York City's Restrictive Zoning of Adult Businesses: A Constitutional Analysis

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NEW YORK CITY'S RESTRICTIVE ZONING
OF ADULT BUSINESSES: A
CONSTITUTIONAL ANALYSIS

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Introduction

In the last ten years, the "adult entertainment industry" has mushroomed in New York City.1 In response, as part of his "Quality of Life Campaign,"2 Mayor Rudolph Giuliani proposed a controversial zoning amendment3 to restrictively zone non-obscene adult entertainment throughout the five boroughs of New York City.4 After nearly a year of revisions, on September 18, 1995, the City Planning Commission approved a joint proposal by Mayor Giuliani and the City Council.5 On October 26, 1995, the City Council approved Council Resolution No. 1322 (the City's Adult Zoning Resolution).6

Proponents of the City's Adult Zoning Resolution contend that pornography attracts rowdy patrons to residential neighborhoods. Those patrons disturb the nighttime tranquillity; use buildings, curbs, and sidewalks as urinals; and break beer bottles along the ...
street. Crime rates often rise and property values decrease in areas immediately surrounding sex shops, most notably where there is a concentration of such businesses. These are among the most severe secondary effects that contribute to urban blight.

Zoning the location of adult businesses has ignited a hotly charged debate. Adult business proprietors and many First Amendment advocates are pitted against New Yorkers who want pornography and its negative secondary effects out of their neighborhood.

While the majority of the public debate surrounding the City's Adult Zoning Resolution centers on social policy discussion, this Note explores in detail the Resolution's legal consequences. In particular, this Note analyzes whether the City's Adult Zoning Resolution will survive constitutional challenges in light of the most recent United States Supreme Court and New York State Court of Appeals decisions pertaining to laws that affect protected First Amendment expression.

Part I explores the adult pornography industry in New York City and the constitutional framework developed by both federal and New York State courts to regulate non-obscene pornographic expression. Part II analyzes the City's Adult Zoning Resolution in light of decisions of the New York State Court of Appeals, the United States Supreme Court, and various federal district and circuit courts. Part III proposes changes that will increase the probability that the City's Adult Zoning Resolution will survive constitutional challenges. This Note concludes that although the current version of the City's Adult Zoning Resolution infringes un-

8. DCP Study, supra note 1, at vii.
9. This Note uses "adult business" interchangeably with "adult establishment."
11. See infra note 176 for discussion of the social policy impact of the zoning proposal. For instance, the last amendment to the City's Adult Zoning Resolution before it was passed was allegedly in response to pressure from the outlying boroughs whose residents argued that "the original proposals would lead many of Manhattan's sex businesses to migrate en masse to industrial and waterfront areas in Brooklyn and Queens." Jonathan P. Hicks, Sex Shops Zoning Plan Eases Rules in Manhattan, N.Y. TIMES, Sept. 13, 1995, at B1. Shortly after passage of the City's Adult Zoning Resolution, the Commission on Civil Rights of the Association of the Bar of the City of New York submitted written testimony [the New York City Bar's Testimony] to the City Council Land Use Committee regarding the constitutionality of the then-Proposal to Zone Adult Businesses. The Testimony recommended against passage of the then-proposed zoning rules because they did not meet constitutional mandates.
constitutionally on adult business owners' First Amendment speech, a few changes will cure the infirmity.

I. Background

A. New York City's Adult Entertainment Industry

In its Adult Entertainment Study, the Department of City Planning (DCP) examined New York City's adult entertainment industry. In the last decade, the number of adult video stores and topless bars has grown tremendously. Between 1991 and 1993, nationwide sales and rentals of adult videos rose seventy-five percent to $2.1 billion. This rise in revenue is a direct result of an increase in the production of inexpensive triple-X video cassettes and a corresponding decrease in the number of adult movie theaters.

Topless entertainment represents another thriving portion of the adult industry. It tends to cater to a young and affluent clientele, and grosses approximately $50 million a year in New York City alone. In a two-year period, the number of "ritzy," upscale topless clubs in New York has expanded from five in 1990 to more than thirty in 1992.

In 1965, there were only nine adult entertainment establishments in New York City because of heavy restrictions on the sale of pornography. By 1976, after the City lifted the restrictions, the

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12. See supra note 1.
13. DCP Study, supra note 1, at 21. The total number of adult bookstores, peep shows, and video stores increased from 29 to 86 between 1984 and 1993; topless/nude bars increased from 54 to 68; and adult video establishments increased from none in 1984 to 64 in 1993.
14. Id. at 16-17 (citing The Wall Street Journal, July 11, 1994, at A1). If sales from newsstands, general video stores and other outlets not considered "adult entertainment establishments" by the DCP are included, the revenue total increases by hundreds of millions of dollars.
15. Id. at 17, 21. Shooting on video tape versus film, shorter filming periods, shorter scripts, cheaper sets, and drastically lower production budgets, including performer's salaries, have all contributed extensively to the production of inexpensive products. The total number of adult movie and live theaters decreased in New York between 1984 and 1993 from 48 to 23 establishments. Id. See Ravo, supra note 10, at A1 (William H. Daly, director of Mayor's Office of Midtown Enforcement, says the number of adult video stores in mid-Manhattan alone increased from zero to 20 in five years and the cost per tape is as little as $3.99).
16. DCP Study, supra note 1, at 18.
17. Id. Approximately 1,500 dancers are employed by topless establishments throughout the City.
18. Id.
19. Id. at 20.
By 1993 the number of adult establishments reached an estimated 177.\textsuperscript{21} Between the years 1984 and 1993, Manhattan and Queens experienced the greatest increase in adult businesses; both were up forty-seven percent.\textsuperscript{22}

The DCP estimates that at the current rate of increase, by the year 2002, the number of bookstores, peep shows, and stores selling adult videos will increase by 197 percent, to approximately 250; in addition, topless/nude bars will increase from sixty-eight to eighty-six.\textsuperscript{23} If adult establishments cause the secondary effects that lead to urban blight, as many claim, the current statistics and projected trends indicate an urgent need to regulate the proliferation of adult businesses in New York City. Such regulation, however, must pass constitutional muster.

**B. Provisions of the City’s Adult Zoning Resolution**

The City's Adult Zoning Resolution restricts the location of adult establishments\textsuperscript{24} throughout the five boroughs of New York City. Further, the City's Adult Zoning Resolution restricts adult establishments to manufacturing districts, except those manufacturing districts in which residences, joint living-work quarters for artists or loft dwellings are permitted,\textsuperscript{25} and bans adult businesses from all but a few commercial districts.\textsuperscript{26}

\textsuperscript{20} Id.

\textsuperscript{21} DCP Study, supra note 1, at 20. Note that the 1993 estimate is at least outdated by one year and in anticipation of the one-year moratorium, many new establishments sprung up throughout the five boroughs. See infra note 54 and accompanying text.

\textsuperscript{22} DCP Study, supra note 1, at 21. Adult businesses increased from 73 to 107 in Manhattan and from 30 to 44 in Queens. The Bronx, Brooklyn and Staten Island have less than 10% of adult establishments in the City, while Manhattan has 80%, and Queens 11%, of the total. Id. at 21.

\textsuperscript{23} Id. The number of adult movie and live theaters will decrease from 23 to 11 because of the production of inexpensive video cassettes.

\textsuperscript{24} Reso. No. 1322, 12-10. “An ‘adult establishment’ is a ‘commercial establishment’ where a ‘substantial portion’ of the establishment includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof” as defined further in the City’s Adult Zoning Resolution.

\textsuperscript{25} Reso. No. 1322, 42-01(a).

\textsuperscript{26} Reso. No. 1322, 32-01(a) provides that adult establishments shall not be located in C1, C2, C3, C4, C5, C6-1, C6-2 or C6-3 zoning districts. In general, these districts are reserved for the following purposes: C1 zones accommodate retail and personal service shops needed in residential neighborhoods. Typical uses include grocery stores, small dry cleaning establishments, restaurants, and barbershops and cater to the daily needs of the immediate
Within those manufacturing districts and commercial districts
where adult establishments are permitted, "adult establishments
shall be located at least 500 feet from a church, a school, a resi-
dence district," and each adult establishment must be located at
least 500 feet from another adult establishment (the separation
provision). Moreover, no more than one adult establishment
shall be located on a zoning lot, and the floor area and cellar space
of each establishment cannot exceed 10,000 square feet.

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neighborhood. New York City Department of City Planning, Zoning Handbook: A

C2 zones permit a wider range of local retail and service establishments than C1
districts, including, among others funeral homes, small lumber stores, and business
and trade schools; these zones are intended to serve a wider neighborhood. Id. at 78.

C3 zones permit waterfront recreation and uses related to boating and fishing, in-
cluding marinas, boat repair shops and public or private beaches. Id. at 80.

C4 zones are major commercial centers located outside of the central business dis-
tricts allowing department stores, theaters and other commercial uses that serve a
larger area. Id. at 82.

C5 zones are restricted central commercial districts intended for retail uses serving
the metropolitan region and areas with continuous retail frontage such as the retail
area of Fifth Avenue, and with residential space above office or commercial floors.
Id. at 84.

C6 zones are for a wide range of high bulk commercial uses requiring a central
location. Id. at 86.

C6-1, C6-2, C6-3 are defined as general commercial districts outside a central com-
dercial district and are distinguished by different allowable floor area ratios (FAR).
Id. at 86-87.

27. This Note refers to these provisions collectively as the "separation provision."
Reso. No. 1322, 32-01(b) and (c), Special Provisions for Adult Establishments, [in
Commercial Districts,] and 42-01(b) and (c), Special Provisions for Adult Establish-
ments, [in Manufacturing Districts,] provide in pertinent part: (b) "adult establish-
ments shall be located at least 500 feet from a church, a school, a residence district, a
C1, C2, C3, C4, C5-1, C6-1, C6-2, or C6-3 district, or a manufacturing district other
than M1-6M in which new residences, new joint living-work quarters for artists or new
loft dwellings are allowed, under the provisions of the Zoning Resolution, as-of-right
or by special permit or authorization. However, on or after the effective date of this
amendment, an adult establishment that otherwise complies with the provision of this
paragraph shall not be rendered non-conforming if a church or a school is established
on or after April 10, 1995 within 500 feet of such adult establishment." (c) "adult
establishments shall be located at least 500 feet from another adult establishment."

28. Reso. No. 1322, 32-01(d), (e) and (f) and 42-01(d), (e) and (f), provide in perti-
nent part:
(d) "no more than one adult establishment permitted under this Section shall be loc-
cated on a zoning lot."
(e) "adult establishments shall not exceed in total 10,000 square feet of floor area and
cellar space not used for enclosed storage or mechanical equipment."
(f) "adult establishments which existed on the effective date of this amendment and
conform to all provisions of the Zoning Resolution relating to adult establishments
other than the provisions . . . of Section 52-77 (Termination of Adult
Establishments)."
The City's Adult Zoning Resolution also regulates the surface area and illumination of adult establishments' signs in both the manufacturing and commercial districts. For example, in commercial zones, each adult business sign cannot be larger than 150 square feet and only fifty square feet can be illuminated. No portion of the sign can be flashing.

C. The Constitutionally Acceptable Framework

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." The national debate over the regulation of pornography centers on these ten words and the degree of protection these words afford to non-obscene pornographic expression. The protection of the First Amendment, however, is only a minimum, and states may choose to supplement and expand protection under their state constitutions.

1. Obscenity: Speech that Receives No Constitutional Protection

Regulation of "sex shops" requires an understanding of the constitutional distinction between obscenity and non-obscene pornography. More than thirty years ago, Justice Stewart acknowledged the difficulty of separating protected speech from unprotected ob-

29. Reso. No. 1322, 32-69 Additional Accessory Business Sign Regulations for Adult Establishments [in] C6-4, C6-5, C6-6, C6-7, C6-8, C6-9, C7, C8 provide in pertinent part:

Accessory business signs for adult establishments are permitted only as set forth in this Section, and are limited to locations in the districts indicated. The maximum surface area of all accessory business signs for adult establishments shall not exceed, in the aggregate, three times the street frontage of the zoning lot, but in no event more than 150 square feet per establishment, of which no more than 50 square feet may be illuminated non-flashing signs.

Reso. No. 1322, 42-55 Additional Accessory Business Sign Regulations for Adult Establishments [in] M1, M2, M3 provide in pertinent part:

The maximum surface area of all accessory business signs for adult establishments shall not exceed, in the aggregate, three times the street frontage of the zoning lot, but in no event more than 150 square feet per establishment, of which no more than 50 square feet may be illuminated and no portion thereof may be flashing . . . No accessory business signs for adult establishments shall be permitted on the roof of any building, nor shall such signs extend above curb level at a height greater than 25 feet.

32. U.S. CONST. amend. I.
scenity in stating, "I know it when I see it." This statement reflects the continuing struggle of the Supreme Court to develop significant distinctions between expression that is obscene and that which is protected sexually explicit expression.35

In 1973, Chief Justice Burger, writing for the Court in Miller v. California,36 developed the modern legal obscenity test.37 Whether or not a work is obscene depends on:

(a) whether the average person, 'applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ;
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.38

The Court has used the Miller test to deny First Amendment protection only to the most sexually explicit and hard-core pornography.39 Lesser degrees of pornography have consistently merited

35. See Gianni P. Servodidio, The Devaluation of Non-Obscene Eroticism as a Form of Expression Protected by the First Amendment, 67 Tul. L. Rev. 1231 (1993). The author discusses the difficulty the Supreme Court has in distinguishing between material that is obscene and not deserving of First Amendment protection and that pornography which deserves some degree of protection.
37. Id. at 24. In Miller, the Court found obscene brochures used in a mass mailing venture to sell adult books were not constitutionally protected by the First Amendment. Defendants sent the brochures to persons who did not request the material, and the defendant was convicted of violating a statute prohibiting the conscious distribution of obscene material.
38. Id. (citations omitted). The Miller test replaced the test for obscenity in Roth v. United States, 354 U.S. 476 (1957), in which the Court stated that obscenity was sexual material "utterly without redeeming social importance." Id. at 484. The reference to "community standards" in Miller was adopted from Roth, and proves a source of controversy over what the Court meant exactly by "community standards" that generally differ from place to place. Martin Karo & Marcia McBrian, The Lessons of Miller and Hudnut: On Proposing a Pornography Ordinance that Passes Constitutional Muster, 23 U. Mich. J.L. Ref. 179, 182-90 (1989) (citing Roth, 354 U.S. at 484 (suggesting statewide standards may be the best solution)).
constitutional protection. For example, in *American Booksellers Association v. Hudnut*,[40] the Court affirmed the Court of Appeals for the Seventh Circuit’s refusal to uphold regulation of pornography based upon its alleged negative impact on women.[41] In fact, courts regard such regulations as unconstitutional content-based attempts to regulate speech protected by the First Amendment.[42] In *Hudnut*, the Court essentially affirmed that the rights of the pornographer to print film are greater than the rights of women to feel secure, so long as the product passes the narrow obscenity test of *Miller*.[43]

Although pornography cannot be regulated solely on account of its internal qualities and negative impact upon women, the Supreme Court has approved regulations of pornographic expression based upon the non-speech-related harmful secondary effects it has on the surrounding community.[44] Consequently, legislatures in many states, including New York, have passed zoning reg-

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[41] The Seventh Circuit admitted that indeed pornography may harm women but indicated that this effect was one of pornography as speech and therefore cannot be constitutionally regulated on this basis, declaring that as Americans it is “our absolute right to propagate opinions that the government finds wrong or even hateful.” 771 F.2d 323, 328 (7th Cir. 1985). The anti-pornography ordinance was drafted by two well-known radical feminists, Andrea Dworkin and Catharine A. MacKinnon, claiming that pornography leads to sexual inequality and silences the voices of women in the realm of First Amendment speech. Rene L. Todd, Book Note, reviewing *Donald A. Downs, The New Politics of Pornography*, 88 Mich. L. Rev. 1811 (1990). See, e.g., Catherine A. MacKinnon, *Not a Moral Issue*, 2 Yale L. & Pol’y. Rev. 321 (1984); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1 (1985) (providing examples of the radical feminist theory behind the *Hudnut* ordinance).


ulations focusing on the secondary effects of adult-oriented businesses.45


New York City was the first municipality to enact a comprehensive zoning scheme, and within ten years approximately 425 other local governments followed the example.46 In 1926, the U.S. Supreme Court, in Village of Euclid v. Ambler Realty Co.47 held that so long as freedom of speech is not threatened, a zoning plan is a valid exercise of local police power if the plan serves a rational interest of the municipality.48 A few years after Euclid, the Court explained further that the rationality test gives substantial deference to legislatures, that should not be second-guessed in close cases.49 Through a series of subsequent decisions, the Court reinforced the notion that local governments have wide latitude in protecting moral and general quality-of-life concerns of their communities.50

When a zoning regulation threatens freedom of speech, however, courts cannot apply this deferential standard. The Supreme Court has consistently held that government regulation of speech on the basis of its content is subject to strict judicial scrutiny.51 Therefore,

45. See, e.g., infra notes 99, 111-17 and accompanying text for discussion of ordinances that survived constitutional challenges.
47. 272 U.S. 365, 395 (1926). See also Zahn v. Board of Public Works, 274 U.S. 325 (1927) (deference given to legislature where validity of zoning ordinance is fairly debatable).
48. Id. at 389-90. For a comprehensive discussion of local zoning regulations and the way in which local knowledge gives “insight into how the law constructs and impedes certain preferences about justice and how law is continually reconstructed as it is applied to actual situations” see Lea S. VanderVelve, Local Knowledge, Legal Knowledge, and Zoning Law, 75 Iowa L. Rev. 1057 (1990).
ordinances that regulate protected expression will be upheld only if they are content-neutral. An ordinance is content-neutral when it meets the following three criteria: first, the government must have a substantial interest in the regulation that is unrelated to the suppression of ideas; second, the means of regulating the protected expression must be narrowly tailored; and third, reasonable alternative avenues of communication must be left open for dissemination of the regulated speech.

The Supreme Court introduced the first “substantial governmental interest” prong in United States v. O'Brien, where the Court affirmed David O'Brien's conviction for burning his draft card in protest of the Vietnam war. The Court held that the government had a substantial interest in overseeing the smooth operation of the military, especially in a time of war. Although David O'Brien intended to convey a message by destroying the draft card, the Court concluded that the government was concerned with his conduct and not with his message. Ultimately, “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”

In a more recent application of the substantial governmental interest prong, the Supreme Court found that the State of Minnesota had a substantial interest in maintaining control of the crowds attending its state fair. This interest supported a regulation that prohibited distribution of any merchandise, including printed pam-
phlets, except from licensed areas within the state fairgrounds.\textsuperscript{62} The Court noted that the existence of a substantial interest depends upon the factual situation of each case.\textsuperscript{63} Where, however, a government regulation affects more than that which the government has a substantial interest in proscribing, the second "narrowly tailored" prong will not be satisfied.\textsuperscript{64} For example, in \textit{Erznoznik v. City of Jacksonville},\textsuperscript{65} the Supreme Court struck down a municipal ordinance prohibiting the display of nudity in outdoor movie theaters visible to non-movie-goers from a public place.\textsuperscript{66} In finding the ordinance unconstitutional, the Court held that non-objectionable nudity, which the government does not have a substantial interest in proscribing, would also be regulated under the ordinance.\textsuperscript{67} Therefore, the Jacksonville ordinance was not sufficiently narrowly tailored to pass constitutional muster.

The final prong of the content-neutral time, place, and manner test requires that a municipality leave open alternative channels of communication for the dissemination of the protected speech being regulated.\textsuperscript{68} The First Amendment not only insures freedom of expression but also mandates that the government safeguard public access to protected speech and expression. Protection of such access extends both to the right of the speaker to speak and of the listener to have access to the protected speech or expression.\textsuperscript{69}

3. \textit{Using the Content-Neutral Time, Place, and Manner Test to Zone Restrictively the Dissemination of Pornographic Material}

The Supreme Court has held that regulations aimed at adult entertainment alone satisfy the content-neutral requirement of valid time, place, and manner regulations if they are aimed at the adverse secondary effects of such businesses. The Court first addressed this issue in 1976, in \textit{Young v. American Mini Theatres},

\begin{itemize}
  \item \textsuperscript{62} \textit{Id.} at 650-51.
  \item \textsuperscript{63} \textit{Id.}
  \item \textsuperscript{64} \textit{Erznoznik v. City of Jacksonville}, 422 U.S. 205 (1975).
  \item \textsuperscript{65} \textit{Id.}
  \item \textsuperscript{66} \textit{Id.} at 206-07.
  \item \textsuperscript{67} \textit{Id.} The municipality's aim in enacting the ordinance was to keep "objectionable" films from the view of the general public, but it would also unconstitutionally prohibit showing, for example, a baby's bottom.
\end{itemize}
In *Schad v. Borough of Mt. Ephraim*, seven years later, the Court struck down a local zoning ordinance that banned all adult theaters, including all live entertainment and nude dancing, from every commercial district in the city. Although the Court recognized the local government's broad zoning power for the purpose of maintaining a satisfactory quality of life, the Court held that this power "must be exercised within constitutional..."
limits." In finding the ordinance unconstitutional, the Court reasoned (i) that the municipality provided no conclusive evidence of a substantial interest in prohibiting all forms of live entertainment, and (ii) the municipality failed to prove that there were adequate alternative channels of communication open to businesses subject to the regulation. The Court stated that its decision in *Young* was not controlling because in *Young* "the restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them."

One commentator stated that the difference between *Young* and *Schad* rests in their emphasis:

> [W]here *Young* stressed that the objective of the regulation must not be the suppression of protected expression and that access to that expression must remain available, *Schad* emphasized that regulation cannot be so broad as to completely prohibit protected expression and that the regulation must further a substantial governmental interest.

4. The Supreme Court's Latest Pronouncement Sets a Deferential Standard: City of Renton v. Playtime Theatres

In 1986, the Supreme Court made its latest proclamation on municipalities' power to zone adult businesses. In *City of Renton v. Playtime Theatres*, the Court considered the validity of an ordinance that prohibited the establishment of an adult motion picture theater within 1000 feet of any residential zone, family dwelling, church, park, or school. Citing *Young*, the Court held that the Renton ordinance was a proper content-neutral time, place, and manner zoning regulation, because it was "designed to serve a substantial governmental interest and d[id] not unreasonably limit al-

78. *Id.* at 68 (citing Moore v. East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment)).
79. *Id.* at 72.
80. *Id.* at 75-76.
81. *Id.* at 71.
84. 475 U.S. 41 (1986).
85. *Id.* at 43. When respondent adult business owners challenged the ordinance as unconstitutional, the district court ruled for the city, and denied the owners' request for a permanent injunction against enforcement of the ordinance. *Id.* The Court of Appeals for the Ninth Circuit reversed and remanded, reasoning that to adequately substantiate its interest, the municipality must conduct original studies of the adult theaters' adverse impact on the City of Renton, or provide evidence independent of data obtained by other cities. *Id.* at 45-50.
ternative avenues of communication." Notably, the Court deferred to the city's desire "to preserve the quality of urban life," stating that this objective satisfied the first "vital governmental interest" prong of the constitutionality test. In fact, the Court stated that as "long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," the evidence will be sufficient to support a finding of a substantial governmental interest.

The Court determined further that a municipality may choose the method by which it furthers its substantial governmental interests. Such regulation will pass the second "narrowly tailored" prong if it affects only that category of theaters that produces the unwanted secondary effects.

Lastly, the ordinance upheld in Renton passed the third prong of the constitutional test because it left open reasonable alternative channels of communication. The Court found that the land left available for relocation of the adult movie theaters was "ample, accessible real estate." It stated further that "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."

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86. Id. at 47. For a discussion of recent developments of the standard of review applied to the regulation of adult entertainment, see generally David J. Christiansen, Zoning and the First Amendment Rights of Adult Entertainment, 22 VAL. U. L. REV. 695, 705-09 (1988). Christiansen argues that the time, place, and manner standard in adult entertainment cases is not stringently applied. Id. at 712.
87. Id. at 50 (quoting Young, 427 U.S. at 71 (plurality opinion)).
88. See Renton, 475 U.S. at 50.
90. Id. at 52.
91. Id. (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) in defining the narrowly tailored standard as "imposing no greater burden on adult entertainment than is absolutely necessary to further the government's interest"). See supra notes 77-82 and accompanying text for a discussion of the Court's holding in Schad that a total ban on live entertainment was not the least intrusive means of regulating adverse secondary effects of adult theaters and similar entertainment.
92. 475 U.S. at 52.
93. Id. at 53-54.
94. Id. at 53 (quoting with approval from the record at the district court level).
95. Id. at 54. Petitioners argued that although the ordinance left "some 520 acres, or more than five percent of the entire land area of Renton" for the location of adult theaters, because some of the land was already occupied and "practically none" was
Despite the Court's refusal to disturb the trial court's finding that other land was available to establish an adult business, it may in fact have created a "major competitive disadvantage" for proprietors of adult theaters trying to locate in an urban area. Arguably, the wide latitude given to municipalities in fashioning a restrictive zoning ordinance has resulted in the treatment of non-obscene eroticism as a lesser form of protected expression.

The Renton decision does not delineate standards for enacting a constitutional ordinance. Its progeny, however, gives some interpretive guidance on the proper application of this constitutional test. If one factor is clear in the time, place, and manner analysis, it is that the constitutionality of each ordinance must be tested on a case-by-case, fact-specific basis. For example, the United States Court of Appeals for the Eighth Circuit upheld an ordinance that provided ninety-seven relocation sites for adult businesses. The United States Court of Appeals for the Ninth Circuit, however, struck down an ordinance that left 11,613.1 acres "definitively available" for relocation of adult businesses in Los Angeles.

for sale or lease there were no "commercially viable" sites left for adult theaters within the 520 acre designation. The Court of Appeals held the land was not truly "available"; thus the ordinance would "result in a substantial restriction on speech." Here the Supreme Court disagreed, stating: "Respondents must fend for themselves in the real estate market," and need not be "on an equal footing with other prospective purchasers and lessees." Id. at 54.

96. See id. at 53 & n. 53. See also id. at 65 (Brennan & Marshall, JJ. dissenting) (arguing that the ordinance does not put adult business on equal footing, but rather bans a form of protected speech).


98. Some commentators have suggested that the ultimate impact of Renton was to remove adult films from the realm of public entertainment. By treating this result as insignificant, or even beneficial, the Court seems to indicate that pornography is of lesser value than other forms of First Amendment expression. See Servodidio, supra note 97, at 1241. See also Brody, supra note 46 (analyzing cases where municipalities have been given wide latitude to fashion ordinances restricting protected speech).


100. Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1531 (9th Cir. 1993), cert. denied, 114 S.Ct. 1537 (1994). For a discussion of the Topanga decision see infra notes 166-170 and accompanying text.
5. A More Restrictive Approach: New York's Highest Court Sets a Different Standard

Despite the deferential standard in the *Renton* decision,\(^{101}\) the New York State Constitution, as interpreted by the highest court of New York in *Arcara v. Cloud Books*\(^ {102}\) and *Town of Islip v. Caviglia*,\(^ {103}\) affords greater protection to First Amendment expression than the United States Constitution does. In *Arcara v. Cloud Books, Inc.*,\(^ {104}\) the New York State Court of Appeals, on remand from the United States Supreme Court, found that "when a governmental regulation designed to carry out a legitimate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is *no broader than needed to achieve its purpose.*"\(^ {105}\)

In *Arcara*, owners of a bookstore selling pornographic material challenged a public health law provision that permitted the district attorney to enjoin conduct that constituted a nuisance.\(^ {106}\) The bookstore was forced to close under the law because of sexual activity allegedly occurring on the premises.\(^ {107}\) The district attorney argued that the bookstore was closed on account of conduct occurring on the premises and not the content of the material sold.\(^ {108}\)

The Court of Appeals struck down the provision, finding that permanent closure of the store was broader than necessary to abate the nuisance, and achieve the governmental purpose.\(^ {109}\) The Court reasoned that if the government had unsuccessfully used other sanctions, such as arresting offenders or obtaining injunctive relief, ultimately closing the bookstore would be justified.\(^ {110}\)

In *Islip*, the Court of Appeals found that the town of Islip, in enacting a zoning ordinance restricting the location of adult

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101. See *supra* notes 83-98 and accompanying text for a detailed discussion of the *Renton* decision.
102. 503 N.E.2d 492 (N.Y. 1986).
103. 540 N.E.2d 215 (N.Y. 1989). This decision follows New York's long-established tradition of tolerating works that other states would find offensive. *Id.* at 221.
104. 503 N.E.2d 492 (N.Y. 1986).
107. *Id.*
108. *Id.* at 1097.
109. *Id.* at 1099.
110. *Id.* at 1098.
businesses, did not violate the federal constitution, or the more liberal New York State Constitution. The New York State Constitution provides in pertinent part that:

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

The court reasoned that the New York State Constitution, like the federal constitution, requires that if zoning rules are an intentional restriction on speech, they are subject to strict scrutiny review. Specifically, "the governmental interest to be achieved [must] outweigh the resulting interference with free expression;" however, under the New York State Constitution the means of regulation must be "no broader than needed to achieve its purpose."

First, the court found that the regulations at issue were not a purposeful attempt to regulate speech, but were enacted to correct the negative effects adult businesses had on the surrounding community. Moreover, the zoning regulations were no broader than necessary to achieve Islip's purpose of curtailing the negative effects, because the regulations left available ample space for the adult businesses to relocate, would not decrease the total number of adult businesses, and did not hinder public access to the adult businesses.

111. The court stated that "New York may interpret its own Constitution to extend greater protection to its residents." Islip, 540 N.E.2d at 221. New York has used this right to extend greater protection to First Amendment expression demonstrated through "New York[']s ... 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." Id. (citing Arcara, 503 N.E.2d at 494).

112. Id. at 221 n.5 (quoting N.Y. Const. art. I, § 8).

113. Id. at 221.

114. Id. at 221.

115. Islip, 540 N.E.2d at 223 (quoting Arcara, 503 N.E.2d at 495).

116. Id. at 222. The court cited to Islip's study that documented the negative effects of adult businesses. Id. at 222 n.6.

117. Id. at 223. In finding that the regulations were no broader than necessary, the court compared the Islip ordinance to the means used in Arcara, and reasoned that "the zoning regulations are less restrictive than banning adult uses altogether, and more compatible with free speech values than a licensing scheme which arguably could present opportunities for the improper exercise of discretion." Id.
II. Does the City's Adult Zoning Resolution Reach Too Broadly?

If the City's Adult Zoning Resolution is to survive legal challenges, it must meet the federal constitutional prerequisites set forth by the United States Supreme Court in Renton, and the New York constitutional requirements as interpreted by the New York State Court of Appeals.

A. The Substantial Governmental Interest Prong: Is there sufficient evidence of adverse secondary effects?

The Supreme Court permits a municipality to rely on the studies and conclusions of harmful secondary effects in other cities, as long as the studies are "reasonably believed to be relevant to the problem that the city addresses."\(^{118}\) The New York State Court of Appeals, however, has implied that a regulating municipality must produce an independent study indicating that adult businesses cause harmful secondary effects in that locality to prove that it has a significant governmental interest in enacting the regulation.\(^{119}\)

The City's Adult Zoning Resolution satisfies the more stringent New York State standard because it is based upon the City's own DCP Study.\(^{120}\) The DCP Study includes an exploration of studies available to the City, but the City's Adult Zoning Resolution must be based upon studies that are "reasonably believed to be relevant to the problem that the city addresses."\(^{118}\)

\(^{118}\) City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 51-52 (1986). A city need not produce its own studies or introduce evidence to satisfy the constitutional mandate.

\(^{119}\) In Islip, the court indicated that it is very important that a municipality conduct its own study — thus one may infer that Islip's case would have been much weaker had it not conducted an independent study of the adverse secondary effects adult businesses had on the community of Islip. Islip, 540 N.E.2d at 219-20. For example, the court emphasized that Islip's study was more comprehensive than the study in Renton, and the court stated in discussing the underinclusiveness of Renton's ordinance that Renton did not prove it was regulating the adverse secondary effects caused by adult businesses because "[i]t conducted no independent studies to identify the harmful secondary effects of each business and establish their existence, as petitioner [in Islip] did, but relied solely on the experience of other cities." Id. at 220. The court also discussed petitioner's study as proof of a substantial governmental interest in regulating negative effects of adult businesses, not the content of the materials sold. Id. at 222 n.6.

\(^{120}\) The DCP Study provides proof of harmful secondary effects in New York City. See generally DCP Study, supra note 1. Ordinances found unconstitutional for failure to document a substantial governmental interest in curtailing adverse secondary effects generally did not include any relevant evidence proving the existence of the interest. See, e.g., Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1332-33 (9th Cir. 1987), cert. denied, 484 U.S. 1059 (1988); Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987); City of Portland v. Tidyman, 759 P.2d 242, 247-48 (Or. 1988). The New York City Bar's Testimony concluded that the DCP Study did not sufficiently prove that adult entertainment causes adverse secondary effects in New York City. New York City Bar's Testimony, supra note 11, at 12. The Bar's position is too
and regulations of other localities, an in-depth analysis of the adult entertainment industry across the nation and in New York City, and a description of the secondary impacts caused by these businesses within New York City.121

The DCP Study indicates that the most severe secondary effects of adult businesses occur where adult businesses cluster together, creating a "combat zone" effect.122 For example, the concentration of adult businesses contributes to the high rate of criminal arrests and prostitution in the Times Square Business District.123 In the Chelsea section of Manhattan, a local business survey revealed negative impacts from adult businesses included declining community reputation, worsening economic vitality of individual businesses and decreasing potential for business development.124 This Chelsea survey also showed that businesses will or have already left on account of the presence of adult video stores.125

A public meeting of The Task Force on the Regulation of Adult Businesses in October 1993 discussed adult uses in Manhattan, including Tribeca, Downtown Manhattan, Chelsea, East Harlem, and regulations of other localities, an in-depth analysis of the adult entertainment industry across the nation and in New York City, and a description of the secondary impacts caused by these businesses within New York City.121

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A public meeting of The Task Force on the Regulation of Adult Businesses in October 1993 discussed adult uses in Manhattan, including Tribeca, Downtown Manhattan, Chelsea, East Harlem,
Times Square and the East Side. The transcript cited crime most frequently, including drugs and prostitution, as a negative effect of adult businesses. Littering, noise, late night operations, and offensive signage also contributed to neighborhood decline and were problematic for families with children.

Just as problematic as increased crime rates is the value deterioration of property located in close proximity to an adult business. The Times Square Business Improvement District conducted a study that revealed that property in blocks with adult businesses arguably do not increase in value at a rate commensurate with those blocks not containing adult uses. The DCP Study indicated that real estate brokers support the contention that adult businesses have a negative impact on the market value of neighboring properties. Moreover, real estate appraisers and urban planners suggest that a single adult establishment causes negative perceptions of a neighborhood, and those negative perceptions can lead to disinvestment and overall economic decline. This negative impact, coupled with fear of proliferation and the exposure of lewd, sexual images to children, indicates that even a single adult business affects the quality of life in a neighborhood.

Finally, the DCP Study concluded that signage for adult establishments is at odds with that of other businesses. Not only do many adult businesses display graphic material, but their signs occupy a greater portion of the storefronts and are substantially more illuminated than signs of other businesses. Consequently, New York City has adequately established that it has a substantial interest in regulating adult businesses.

126. *DCP Study, supra* note 1, at 38-39. The Task Force was established in 1993 by Ruth W. Messinger, Manhattan Borough President, in response to community concerns about increasing concentrations of sex-related businesses. *Id.* at 38.

127. *Id.*

128. *Id.*

129. *Id.* at 40-41 (citing Insight Associates, *Secondary Effects of the Concentration of Adult Use Establishments in the Times Square Area* (1994)). The Times Square Business Improvement District contracted for this study to be done on the Times Square area.

130. *DCP Study, supra* note 1, at viii. Eighty percent of real estate brokers who responded to the DCP Study indicate negative impact on surrounding property values.

131. *Id.*

132. *DCP Study, supra* note 1, at 48.
B. The Narrowly Tailored Requirement: Will the City’s Adult Zoning Resolution reach too broadly into the realm of protected speech?

The second prong of the federal Renton test requires that a zoning regulation be narrowly tailored to prohibit only those categories of protected speech known to produce the unwanted secondary effects. This requirement is necessary to prevent the flaw fatal to the regulation in Schad, where the ordinance regulated speech that did not cause adverse secondary effects.

The New York State Court of Appeals has interpreted the New York State Constitution to require that a restrictive zoning ordinance be no broader than necessary to achieve the government’s objective.

Moreover, the New York State Constitution requires more than a mere rational relationship between the exercise of police powers and the suppression of First Amendment expression. In Bellanca v. New York State Liquor Authority, on remand from the United States Supreme Court, the New York State Court of Appeals required that a municipality have more than a mere rational basis for regulating topless dancing through its power to regulate the sale and consumption of alcohol. Although the Supreme Court decided that the municipality’s action was justified under the Twenty-First Amendment to the federal constitution, the New York court found, as it did in Islip, that the New York State Consti-

133. Renton, 475 U.S. at 52.
134. Id.
135. Islip, 540 N.E.2d at 223 (citing Arcara v. Cloud Books, Inc., 503 N.E.2d 492 (N.Y. 1985) as the source for the “applicable State Standard for reviewing such [a zoning] regulation . . . .”). The court in Islip also analyzed the zoning ordinance under the federal narrowly tailored prong. Id. at 220. In upholding the ordinance as sufficiently narrowly tailored, the court cited to Arcara and the discussion of the requirement that an ordinance be no broader than needed to achieve the governmental purpose. Id.
138. The regulating municipality must have a substantial interest in regulating topless dancing. Id. at 769.
139. The court decided that freedom of expression under the New York State Constitution is not curtailed by the Twenty-First Amendment power to regulate the sale of alcohol, but may be curtailed under the police power of the state. Id. at 766.
140. U.S. Const. amend, xxxi. The Twenty-First Amendment to the United States Constitution provides in pertinent part:

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
tution requires more.\textsuperscript{141} Topless dancing\textsuperscript{142} is protected expression under Section 8 of Article I of the New York State Constitution;\textsuperscript{143} thus, municipalities cannot regulate topless dancing through the power to regulate the sale and consumption of alcohol unless there are:

circumstances so functionally related to the exercise of the State's authority to regulate the sale and consumption of alcoholic beverages as to overcome the applicable constitutional guarantee of freedom of expression, as for instance, by a rule... prohibiting topless dancing performed on a stage or platform less than 18 inches above the immediate floor level or removed by less than six feet from the nearest patron.\textsuperscript{144}

Although in the \textit{Bellanca} decision the court did not lay out the exact standard for the constitutional exercise of police powers, subsequently, in \textit{Islip}, the court indicated that the New York State Constitution requires that the City prove it has a substantial governmental interest in regulating protected expression.\textsuperscript{145}

Topless bars make up the majority of adult establishments outside Manhattan, and in Manhattan are most lucrative in tourist areas;\textsuperscript{146} yet, the DCP Study fails to prove that topless bars cause unwanted secondary effects. In fact, the DCP Study attributes the recent success of these clubs to the fact that they:

\textsuperscript{141} Bellanca, 429 N.E.2d at 768-69. In \textit{Islip}, the New York State Court of Appeals found that Islip's study document that the regulated adult businesses have harmful effects in that community. \textit{Islip}, 540 N.E.2d at 222 n.6.

\textsuperscript{142} Two later New York decisions in the Appellate Division, Second Department, recognized the power of a municipality to regulate "adult" performances under a Liquor Authority Rule prohibiting lewd and indecent conduct in premises selling alcohol. Both performances were deemed lewd, and both were subject to regulation. Both decisions also stated that topless dancing is not inherently obscene. These decisions imply that topless and nude dancing is protected expression that can only be regulated by the Liquor Authority or through other police powers if the performance is deemed obscene. \textit{See} Blau-Par Corp. v. New York State Liquor Auth., 482 N.Y.S.2d 841 (N.Y. App. Div. 1984) (holding that regulation of obscene behavior does not violate the state constitution); Highway Tavern Corp. v. McLaughlin, 483 N.Y.S.2d 323 (N.Y. App. Div. 1984).

\textsuperscript{143} \textit{See supra} note 112 and accompanying text for text of article I, § 8.

\textsuperscript{144} Bellanca, 429 N.E.2d at 766 (citation omitted).

\textsuperscript{145} Islip, 540 N.E.2d at 221.

\textsuperscript{146} David Firestone, \textit{In Land of Topless Bars, a Ho-Hum}, \textit{N.Y. Times}, Sept. 25, 1994, at 41 (stating that thirty out of forty-four adult establishments in Queens are topless bars, and seventeen out of twenty-six in the Bronx, Brooklyn and Staten Island are topless bars); \textit{DCP Study, supra} note 1, at 26.
shed their "sleazy" reputations and become more mainstream by providing topless entertainment in safe, elegant surroundings furnished with other attractions such as giant closed circuit television screens, pool tables and air hockey.\(^{147}\)

Because the City has failed to produce evidence that topless entertainment causes adverse secondary effects, under the federal constitution the City's Adult Zoning Resolution is not sufficiently narrowly tailored. Moreover, under the New York State Constitution, it is broader than needed to achieve the City's purpose of regulating adverse secondary effects.

C. Reasonably Available Alternative Avenues of Communication

The third prong of the time, place, and manner test requires that a regulating municipality leave open a reasonable number of alternative relocation sites for the displaced businesses.\(^{148}\) The federal courts and the highest New York State court\(^{149}\) agree that in order to pass constitutional scrutiny, a restrictive zoning ordinance should not reduce the total number of adult businesses.\(^{150}\)

1. Federal Constitutional Requirements

In Young,\(^{151}\) Justice Stevens's plurality opinion and Justice Powell's concurrence concluded that the challenged Detroit zoning ordinance was constitutional because it did not reduce the public's access to adult establishments, nor did it "affect the operation of existing establishments but only the location of new ones."\(^{152}\) Subsequently, in Schad,\(^{153}\) a majority of the Court struck down a regu-

\(^{147}\) DCP Study, supra note 1 at 18-19 (recognizing the upscale clientele and high profitability of these establishments) (emphasis added).

\(^{148}\) See supra notes 68-69, 93-100 and accompanying text for a detailed discussion of the third prong of the time, place, and manner test.

\(^{149}\) In both Islip and Arcara, the New York State Court of Appeals required that the municipality enact regulations (that curtail First Amendment expression) that are no broader than needed to achieve its governmental objective. See supra notes 111-17 and accompanying text for a detailed discussion of the Islip decision, and see supra notes 104-10 and accompanying text for a detailed discussion of the Arcara decision.

\(^{150}\) See, e.g., Schad, 452 U.S. at 71; Young, 427 U.S. at 62, n. 35; Islip, 540 N.E.2d at 223.

\(^{151}\) 427 U.S. 50 (1976)

\(^{152}\) Id. at 71 n.35 (quoting Nortown Theatre, Inc. v. Gribbs, 373 F.Supp. 363, 370 (E.D. Mich. 1974)). Justice Powell also reasoned that the Detroit ordinance passed the third prong because the ordinance did not cause a "significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience." Id. at 79 (Powell, J., concurring).

lation that prohibited nude dancing, and distinguished the regulation from the Detroit ordinance because the Detroit ordinance "did not affect the number of adult movie theatres that could operate in the city . . . ."\textsuperscript{154}

Several circuit court decisions also stress that an ordinance must not reduce the total number of adult businesses.\textsuperscript{155} For example, in \textit{Christy v. City of Ann Arbor},\textsuperscript{156} the United States Court of Appeals for the Sixth Circuit was concerned that an ordinance would severely limit the total number of adult businesses in the community.\textsuperscript{157} The court reasoned that an ordinance need not wipe out all adult establishments, but may merely be overly restrictive (thus decreasing the overall number of adult businesses), to be struck down as unconstitutional under the strict analysis in \textit{Schad}.\textsuperscript{158}

Circuit courts have also warned that a separation provision\textsuperscript{159} increases the likelihood that a zoning ordinance will decrease the total number of adult businesses. For example, in \textit{Walnut Properties, Inc. v. City of Whittier},\textsuperscript{160} the Court of Appeals for the Ninth Circuit distinguished Whittier's ordinance from the ordinance the Supreme Court examined in \textit{Renton}, because Whittier's ordinance separated adult businesses by 1,000 feet from other adult businesses, churches, schools and parks.\textsuperscript{161} Although 99.5 acres of land were deemed available to adult businesses, the court held that the

\textsuperscript{154} \textit{Id.} at 71. In \textit{Renton}, the Court's latest pronouncement on the regulation of adult businesses, one can infer that the Court did not address whether the ordinance at issue would reduce the number of adult businesses in the city because only one such business existed in Renton, and 560 acres were available for relocation. \textit{Renton}, 475 U.S. at 44.


\textsuperscript{156} 824 F.2d at 489.

\textsuperscript{157} \textit{Id.} at 492. The court relied on earlier Sixth Circuit zoning decisions that considered the factual basis of each municipality in determining the regulation's constitutionality. \textit{Id. Keego Harbor Co. v. City of Keego Harbor}, 657 F.2d 94, 98 (6th Cir. 1981) (striking down ordinance that effectively banned all adult theatres). \textit{See also CLR Corp. v. Henline}, 702 F.2d 637, 639 (6th Cir. 1983) (holding that permitting only two to four restricted businesses in a half-mile strip of a twenty-five square mile city constitutes a severe restriction on First Amendment expression).

\textsuperscript{158} \textit{Christy}, 824 F.2d at 492 (citing \textit{CLR Corp.}, 702 F.2d at 639). The court vacated the district court's order denying petitioners a preliminary injunction and remanded, finding that .23 percent of land made available for relocation may not satisfy the alternative relocation requirement.

\textsuperscript{159} \textit{See supra} note 27 for details of the separation provision in the City's Adult Zoning Resolution.

\textsuperscript{160} 861 F.2d 1102 (9th Cir. 1988), \textit{cert. denied}, 490 U.S. 1106 (1989).

\textsuperscript{161} \textit{Id.} at 1109. \textit{See also CLR Corp.}, 702 F.2d at 638-39 (In a pre-\textit{Renton} decision the court found that an ordinance with a separation provision permitting two to four
separation provision would actually leave only a fraction of the acreage potentially available to adult businesses, and would force the plaintiff's adult theatre to close.

Notably, Los Angeles is the only municipality with close to the number of adult establishments that operate in New York City that attempted to restrictively zone their location and was challenged on First Amendment grounds. In *Topanga Press, Inc. v. City of Los Angeles*, the United States Court of Appeals for the Ninth Circuit enjoined Los Angeles's ordinance because it failed to leave an adequate number of relocation sites for the adult businesses that it ultimately forced to close. The court assessed "whether a particular relocation site is in fact part of the real estate market," and whether those sites determined to be in the market are sufficient to support the displaced businesses. The court reasoned that the separation provision, the low percentage of commercially

restricted adult businesses in a half-mile of the city impermissibly restricted First Amendment expression.).

162. *Walnut Properties*, 861 F.2d at 1109. The court reasoned that the separation requirement made the ordinance "vastly different" from the ordinance in *Renton*, where only market forces determined the availability of land. *Id.*

163. *Id.* This reasoning implies that a separation requirement in Renton's ordinance may have led the Supreme Court to a different conclusion.

164. See *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532 (9th Cir. 1993), cert. denied, 114 S. Ct. 1537 (1994). There were 102 adult businesses in Los Angeles at the time of the decision. *Id.* at 1532.

165. *Id.*

166. *Id.* at 1533. Pursuant to the City Department of Planning study, Los Angeles enacted a municipal code prohibiting adult businesses from being located, enlarged, or subject to transfer of ownership within 500 feet of churches, schools, parks, or within 1,000 feet of other adult businesses. The code was amended four times; the third amendment added the 500 foot separation requirement from residential zones. *Id.* at 1527.

167. *Topanga*, 989 F.2d at 1530. The court recognized that *Renton* did not state what sort of factors may be considered when deciding whether relocation sites provided by a city are reasonable. The court acknowledged further that "Renton assumed that the relocation sites were already part of the market." *Id.* at 1529. The court in *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992), adopted the Ninth Circuit's analysis of *Renton* in stating that "the Court [in *Renton*] obviously contemplated that there was a 'market' in which businesses could purchase or lease real property on which business could be conducted." 959 F.2d at 1306.

168. *Topanga*, 989 F.2d at 1531. Loss of profits, cost of overhead or the feasibility of the site for adult businesses should not be considered in determining whether a site is part of the real estate market, but rather whether the site is part of a real estate market for commercial enterprises in general. *Id.* A geographical expert testified that although there were 11,613.10 acres of land "available" under the ordinance, much of the land was not truly available after he assessed physical and practical factors such as inaccessibility or unsuitability due to, among other things, a harbor, a landfill, a portion of a hospital, property leased for a term of years, inaccessibility and lack of an infrastructure. *Id.* at 1532.
zoned land, and the lack of accessibility to manufacturing zones contribute to a reduction in the number of relocation sites within the relevant real estate market, making the Los Angeles regulation unconstitutional.  

2. **New York State Precedent**

The New York State Court of Appeals interprets the New York State Constitution to require that a municipality's regulation be "no broader than needed" to regulate protected expression. Specifically, in upholding an ordinance that zoned restrictively adult businesses, the court in *Islip* emphasized that no evidence indicated that the ordinance would cause the total number of adult businesses to decline, nor would the ordinance curtail access to the protected expression. The *Islip* ordinance restricted adult businesses to 6,000 acres zoned as Industrial I, and required separation of one half mile between each regulated use. The court stressed that had the facts shown that by enforcing the ordinance "the total number of adult bookstores will decline or that fewer potential customers will be able to conveniently patronize them," the ordinance would not have met the strict requirements of the New York State Constitution.

3. **The City's Adult Zoning Resolution**

The City's Adult Zoning Resolution is unconstitutional because it will reduce the total number of adult businesses in New York City, as well as reduce access to those businesses. Although

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169. The expert determined that although there were 120 relocation sites in the relevant real estate market, the separation of one adult business from another would reduce this number even further. *Id.* at 1533.
170. *Islip*, 540 N.E.2d at 223.
171. *Id.* at 223. The court upheld the ordinance under both the federal and state constitutions, citing to both *Renton* and *Young*. *Id.* at 218-19, 221.
172. *Id.* at 220.
173. *Id.* at 223.
174. See *id.*. The City was reportedly estimating that before the most recent amendment, the then-proposed zoning regulations would reduce the number of adult businesses to fifteen. Robin Pobgrebin, *Neighborhood Report: Manhattan Up Close; Sex Zone Rules: A Roundup*, N.Y. Times, June 11, 1995, § 6 at 6. See also Robin Pobgrebin, *Mayor Finds Obstacles In Regulating Sex Shops*, N.Y. Times, July 23, 1995, § 1 at 29 ("[N]ew zoning . . . would limit sex businesses to manufacturing and commercial areas and is expected to reduce the number of such establishments initially to 15 city-wide, from 177"); Vivian S. Toy, *Council Approves Package Of Curbs On Sex Businesses*, N.Y. Times, Oct. 26, 1995, at A1 ("[I]f they withstand the court challenge that opponents have promised, the new rules will sharply reduce the number and location of sex shops and theaters in parts of the city . . . ."); John Tierney, *The Big City; XXXposition Center*, N.Y. Times Magazine, Oct. 22, 1995, § 6, at 36 (referring to
the Planning Commission amended the City's Adult Zoning Resolution\textsuperscript{176} to increase the land area in Manhattan that is available for adult businesses by forty percent,\textsuperscript{177} this figure did not cure the infirmity. Despite the amendment, few commercial districts in Manhattan and in the outer boroughs are available to adult businesses, thus banishing the existing adult establishments primarily to manufacturing districts in the outer boroughs.\textsuperscript{178} Consequently, the total number of adult businesses in New York City will be unconstitutionally reduced.\textsuperscript{179}

\textsuperscript{175} See Islip, 540 N.E.2d at 220.
\textsuperscript{177} Hicks, \textit{Planning Commission Approves Limits on Sex Businesses by Slim Margin}, supra note 176; Hicks, \textit{Sex Shops Zoning Plan Eases Rules in Manhattan}, supra note 176.
\textsuperscript{178} Originally, adult businesses would be banned to areas zoned Manufacturing I and II. Telephone Interview with Kevin Davitt, Director of Public Information for the Department of City Planning, (Feb. 1995) (Mr. Davitt no longer holds this position).
\textsuperscript{179} The most recent amendment to the City's Adult Zoning Resolution increased the commercial land area available to adult businesses by removing a 500 foot buffer zone between "areas where adult establishments are allowed and the high density commercial areas where they would be prohibited." Hicks, \textit{Planning Commission Approves Limits on Sex Businesses By Slim Margin}, supra note 176. This added relocation space in areas such as the Diamond District, Times Square, and Herald Square. \textit{Id.} Importantly, it is impossible to estimate how many adult businesses a specific area will accommodate until a business actually locates in that area because of the separation provision. Telephone Interview with Kevin Davitt, (March 22, 1995). For exam-
An earlier amendment to the City’s Adult Zoning Resolution concerning commercial districts designated C6-4 illustrates further how the separation provision can limit significantly the number of adult businesses that can locate in a given area. Although the C6-4 districts compose approximately five percent of the City’s land mass, they could accommodate only twelve to fifteen businesses because of the separation provision.

III. Developing Means to a Constitutional End: A Few Changes May Rid the City’s Adult Zoning Resolution of Constitutional Infirmitiy

The City’s Adult Zoning Resolution must undergo some essential, although not drastic, alterations to withstand constitutional scrutiny. With these changes, the City will meet its objective of curtailing the adverse secondary effects of adult businesses, while complying with constitutional mandates. The adjustments that may correct the constitutional infirmities of the City’s Adult Zoning Resolution are: removal of topless dancing as a regulated business; inclusion of more commercial districts; and tougher signage regulation.

A. The City’s Adult Zoning Resolution Should Not Include Topless Dancing as a Regulated Business in Absence of Proof of Adverse Secondary Effects

The City’s Adult Zoning Resolution is not sufficiently narrowly tailored and is broader than necessary to achieve the City’s objective, because it regulates the location of adult establishments that provide topless dancing — a type of adult business that the City has not shown causes adverse secondary effects. The City should remove topless dancing from the list of regulated business so that
the City's Adult Zoning Resolution regulates only those adult businesses that cause adverse secondary effects.

B. The City's Adult Zoning Resolution Should Not Exclude Commercial Districts

The City's Adult Zoning Resolution will reduce the number of adult establishments and therefore not meet the New York State and federal constitutional mandates. Banning adult establishments from the majority of commercial districts contributes significantly to the reduction because the adult businesses are shut out of districts considered appropriate for the location of commercial enterprises. Therefore, the City should add more dense commercial districts to its Resolution in order to provide adult

a substantial governmental interest in regulating the protected First Amendment expression.

183. See supra notes 174-81 and accompanying text for detailed discussion of how the City's Adult Zoning Resolution will reduce the total number of adult businesses.

184. Even First Amendment advocates concede that pornography is inappropriate in residential communities, while they assert that adult businesses must have access to commercial locations. Should Pornography Be Legal? (CNN Television Broadcast, Jan. 28, 1995) (Interview with Cathleen Cleaver, acting director of National Law Center for Children and Nadine Strossen, President of the ACLU)). Ms. Strossen stated that pornography has a place in public areas that are commercial where there are many expressions people may find offensive, including sexually provocative ads for underwear and jeans. Id. Circuit and state courts have noted that the availability of commercial land is an important factor in determining whether there are a sufficient number of relocation sites for adult businesses. See, e.g., Ambassador Book & Video, Inc. v. City of Little Rock, 20 F.3d 858 (8th Cir. 1994), cert. denied, 115 S. Ct. 186 (1994) (upholding ordinance that did not exclude commercial areas, and left open ninety-seven potential relocation sites prevented decrease in the number of adult businesses); Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) (finding that 285 acres, or 10.2 percent of city's commercial land was sufficient for relocation of adult businesses); Lakeland Lounge v. City of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992), cert. denied, 113 S.Ct. 1845 (1993) (upholding restriction of six adult businesses to light industrial use areas and part of the central business district without a permit); S&G News, Inc. v. City of Southgate, 638 F.Supp. 1060, 1066 (1986), aff'd 819 F.2d 1142 (6th Cir. 1987) (finding it permissible to restrict adult businesses to commercial districts comprising 2.3 percent of the city); City of National City v. Weiner, 838 P.2d 223 (Cal. 1992), cert. denied, 114 S.Ct. 85 (1993) (upholding ordinance that made available "the entire commercially zoned area of the city, or 572 acres of land" and only the opening of new businesses would be affected); 23 West Washington St., Inc. v. City of Hagerstown, 972 F.2d 342 (4th Cir. 1992), cert. denied, 113 S.Ct. 1262 (finding it permissible to keep two existing adult uses out of only some commercial districts).

185. Dense commercial districts for purposes of this Note are those commercial districts that are zoned primarily for commercial use, and are primarily occupied by commercial establishments. For example, this Note does not advocate adding C1 or C5 Commercial Districts. C1 districts "accommodate the retail and personal service shops needed in residential neighborhoods. These districts are often mapped as an
businesses with substantially more commercially viable and publicly accessible land.\textsuperscript{186}

If a business community is opposed to an adult establishment locating in a commercial district, there are self-regulatory channels available to concerned residents to rid the area of the unwanted business.\textsuperscript{187} Property owners can collectively decide not to rent to adult businesses — a good business decision because owners often get lower rents for upper floors of a building with an adult business on the ground floor.\textsuperscript{188} For example, on Eighth Avenue from 35th to 41st Streets, a group called the "Fashion Center Business Im-

overlay along major avenues in otherwise residentially zoned neighborhoods. They are widely mapped throughout the City. Typical uses included grocery stores, small dry cleaning establishments, restaurants and barber shops. All cater to the daily needs of the immediate neighborhood." Department of City Planning, Zoning Handbook: A Guide to New York City's Zoning Resolution 76 (1990) [hereinafter Handbook]. "C5 is a restricted central commercial district intended primarily for retail uses which serve the metropolitan region and for areas where continuous retail frontage is desired . . . typically developed with department stores, large office buildings, and mixed buildings with residential space above office or commercial floors." Id. at 84 (emphasis added).

186. The City should add dense commercial zones that are defined in the following ways:

C4 — "major commercial centers located outside of the central business districts. They allow department stores, theaters and other commercial uses that serve a larger area." Handbook, supra note 185, at 82.

C6 — "C6 districts are zoned for a wide range of high bulk commercial uses requiring a central location. Most C6 districts are in Manhattan and provide for corporate headquarters, large hotels, entertainment facilities, retail stores, and some residential development in mixed buildings." Id. at 86.

For example, adding commercial zone C4 will add approximately seventy-five districts throughout the five boroughs. Zoning Resolution of the City of New York, City Planning Commission and the Department of City Planning, (Map Volume) [hereinafter Zoning Resolution]. Further, C6 zones will greatly increase the available commercial areas in Manhattan, id., and yet adult businesses that try to locate in these areas will be subject to the separation provision. To put the impact of the separation provision in perspective, and thus illustrate the need for more commercial land in Manhattan and the outer boroughs, there are approximately 2200 Protestant and Orthodox Churches in New York City, and 351 Roman Catholic Churches. Encyclopedia of New York City, supra note 179, at 222 (not including Jewish Temples, Arab Mosques, and other types of houses of worship). There are also 1069 public high schools, id. at 960, and forty-seven colleges offering baccalaureate degrees (excluding colleges of the City of New York, and those offering only two year degrees). Id. at 252-53. Thirty-nine of those colleges are located in Manhattan. Id.

187. Lipsyte, supra note 176 (Gowanus, Brooklyn residents see that the solution to the problem of excluding commercial areas is to leave the porn shops in commercial areas and let people protest.); Neighborhood Report; Caffeine and Crackdowns: Dispatches from '94, N.Y. TIMES, Jan. 1, 1995, § 13 at 5 (discussing 42nd Street redevelopment process — kicking out porn shop owners with new business ventures).

provement District” convinced more than eighty percent of the landlords to sign an agreement not to rent to adult establishments. Residents also have the option to picket against the adult business in order to drive it out of their neighborhood. Ultimately, signage regulations in the City’s Adult Zoning Resolution will prevent a single adult business from damaging the economic viability of a commercial area.

C. The City’s Adult Zoning Resolution’s Provision That Regulates Adult Businesses’ Advertising Should Be More Restrictive

Although advertising, or “commercial speech,” is protected by the First Amendment, like pornography it receives lesser protection. The Supreme Court declared that regulations of commercial speech are constitutional if the regulating body has a substantial interest, the regulation directly advances that interest, and it is narrowly tailored to serve that interest. In 1984 the Supreme Court granted more latitude to municipalities by including the promotion of aesthetic values as a substantial governmental interest sanctioning restriction of commercial speech. In its most recent decision on this issue, the Court stated that “governments may regulate the characteristics of signs — just as they can within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.”

189. See id. See Ravo, supra note 10 (Pressure on landlords proved to be a successful tactic for closing adult businesses in Chelsea and Murray Hill.).
191. See supra notes 124-25 and accompanying text for discussion of how adult businesses’ advertising can negatively affect consumers’ perceptions of a commercial district.
193. Id. (finding that commercial speech is protected from unwarranted governmental regulations). See also Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984).
194. Taxpayers for Vincent, 466 U.S. 789 (upholding as content-neutral time, place, and manner regulation an ordinance prohibiting signs from all public property).
Nevertheless, it remains essential for a municipality regulating commercial speech to prove the existence of the offending secondary effects.\textsuperscript{196} The Court recently struck down a law regulating magazine stands in order to control litter that the stands allegedly caused because the law did not also regulate those stands selling newspapers.\textsuperscript{197} Although the Court acknowledged that it upheld the ordinance in \textit{Renton} that regulated adult theatres but not other adult businesses,\textsuperscript{198} it distinguished the City of Renton’s ordinance because Renton provided documentation of the adverse secondary effects produced by the adult businesses, while Cincinnati did not show that magazines created more adverse effects than did newspapers.\textsuperscript{199}

Applying the above principles, the City’s Adult Zoning Resolution constitutionally regulates signage of adult businesses.\textsuperscript{200} However, the City should make the Resolution more restrictive in order to reduce further the likelihood that one adult business will deter patrons from commercial areas where an adult business is located. For example, the City’s Adult Zoning Resolution should (i) specifically prohibit adult businesses from advertising with graphic window displays, and (ii) reduce further the permitted surface area of each sign.

\textbf{Conclusion}

The City’s Adult Zoning Resolution restrictively zoning adult entertainment establishments throughout New York City is an essential step toward curtailing the adverse secondary effects that adult businesses bring into a community. However, the City’s Adult Zoning Resolution must be drawn carefully to regulate only those businesses that cause the harmful secondary effects. Because the extensive DCP Study does not show that topless establishments contribute to negative secondary effects, topless dancing must be removed from the list of regulated adult businesses.

Further, the City’s Adult Zoning Resolution must not cause a constitutionally impermissible decline in the overall number of adult establishments. By expanding the number of permissible commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." COMMITMENT.
commercial districts in which adult businesses can locate, the likelihood of a decline will be reduced, and public access to constitutionally protected, non-obscene adult entertainment will be ensured.