



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 15 | Number 1

Article 9

1998

Adult Uses and the First Amendment: The Stringfellow's Decision and Its Impact on Municipal Control of Adult Businesses

Steve McMillen

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [First Amendment Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

McMillen, Steve (1998) "Adult Uses and the First Amendment: The Stringfellow's Decision and Its Impact on Municipal Control of Adult Businesses," *Touro Law Review*. Vol. 15: No. 1, Article 9.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol15/iss1/9>

This Notes and Comments is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

ADULT USES AND THE FIRST AMENDMENT: THE *STRINGFELLOW'S* DECISION AND ITS IMPACT ON MUNICIPAL CONTROL OF ADULT BUSINESSES

I. Introduction

Since the late 1960's adult businesses have thrived in marginal, urban environments in inner cities and, more recently, their suburbs.¹ About the same time, First Amendment doctrine was expanded to protect many types of speech and expression that communities may consider indecent, objectionable or obscene.² During this century, the use of zoning by municipalities to protect the public's health, safety, welfare and morals gained momentum and has given local governments substantial power to regulate everything from parking and aesthetics to adult businesses.³ Most adult uses receive a minimal degree of First Amendment protection, and attempts to constrain adult businesses through local land use regulations such as zoning have occasioned significant struggles.⁴ Tension between land use regulations, protected speech and expression has found its way to the Supreme Court on more than one occasion and reached federal and state courts with surprising regularity.⁵

A recent and much publicized struggle between local land use authority and the First Amendment occurred in *Stringfellow's Ltd.*

¹ N.R. Kleinfeld, *It's Not Easy to Push Sex Into the Shadows*, N.Y. TIMES, Mar. 1, 1998, at B29; see also TOWN OF HYDE PARK, ADULT USE STUDY OF THE TOWN OF HYDE PARK, (GREENPLAN INC. Rhinebeck, New York) Feb. 26, 1996 [hereinafter HYDE PARK STUDY]; Susan Schulman, *Suburbs Scramble to Keep Smut On a Short Leash*, BUFFALO DAILY NEWS, May 25, 1997, at 1A.

² See, e.g., *Cohen v. California*, 403 U.S. 15 (1971); *United States v. O'Brien*, 391 U.S. 367 (1968); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

³ *Euclid v. Ambler Realty, Inc.*, 272 U.S. 365 (1926); *Berman v. Parker*, 348 U.S. 26 (1954); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

⁴ See *infra* note 6.

⁵ See, e.g., *Young v. American Mini Theaters Inc.*, 427 U.S. 50 (1976); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).

v. *City of New York*.⁶ The New York Court of Appeals upheld New York City's Zoning Resolution Amendments N 950384 (hereinafter "Amendments"), which for the first time treated adult uses differently than other commercial uses.⁷ The Amendments, once implemented, will displace most of the adult businesses in Times Square.⁸ *Stringfellow's* is significant because it upheld the Amendments and reinforced the validity of widely-used zoning methods aimed at controlling the secondary effects of adult uses, rather than the message communicated by those businesses.⁹

Part II discusses zoning adult uses generally. Part III analyzes the *Stringfellow's* case and why it is important to municipalities. Part IV discusses types of adult uses and the significance of secondary effects and studies. Part V reviews First Amendment doctrine as applied to adult uses. Part VI analyzes a variety of methods of regulating adult uses including the Amendments. Part

⁶ *Stringfellow's v. City of New York*, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (1998).

⁷ See *id.* at 392, 694 N.E.2d at 412, 671 N.Y.S.2d at 411.

⁸ See Kleinfield, *supra* note 1; see also *Sex-Shop Law Gets a Boost*, REP. DISPATCH, Feb. 25, 1998, at A1-2; Gregg Birnbaum, Robert Hardt Jr. & David Seifman, *Apple's Sex Shops Face XXX-ile*, N.Y. POST, Feb. 25, 1998 at 6-7. The ordinance would reduce the number of adult businesses in New York from 155 to about 30. *Id.* The Amendment was originally challenged by two plaintiffs, Amsterdam Video and Hickerson. Their case was removed to federal district court, the federal constitutional issues retained by the district court, and the case remanded back to state court. *Stringfellow's*, 91 N.Y.2d at 394, 694 N.E.2d at 413, 671 N.Y.S.2d at 412. At that point, *Stringfellow's* joined the action in state court. *Id.* The Court of Appeals then decided the three plaintiffs' suits in favor of New York City, considering issues of both federal and constitutional law. *Id.* at 397-98, 694 N.E.2d at 414-15, 671 N.Y.S.2d at 415-16. Following the Court of Appeals decision, Judge Cedarbaum of the Southern District of New York upheld the amendment on federal constitutional grounds. Benjamin Weiser, *Judge Lifts Order Halting Sex-Shop Law*, N.Y. TIMES, Mar. 7, 1998, at B3. As of March 30, 1998, the Amendment was awaiting enforcement after a federal appeals judge in the Second Circuit issued an order barring application of the Amendment until further hearings were held. John M. Armentano, *Adult Entertainment: New York City's Zoning Scheme Meets Well-Defined Standards*, N.Y. L.J., Mar. 25, 1998, at 5.

⁹ See *Stringfellow's*, 91 N.Y.2d at 402, 694 N.E.2d at 416, 671 N.Y.S.2d at 417.

VII concludes with a deeper analysis of *Stringfellow's* and other adult use adjudication.

II. Zoning Adult Uses

Municipalities are authorized to enact zoning laws based on their police power to protect the health, safety and welfare of the community.¹⁰ Courts have noted that municipalities have broad power to “implement land use controls to meet the increasing encroachments of urbanization on the quality of life.”¹¹ Zoning ordinances enjoy a strong presumption of validity, with courts deferring to “fairly debatable” regulations.¹² Where land use and First Amendment rights intersect, however, zoning restrictions become suspect if aimed at suppressing the content of protected free expression. They may only regulate the time, place and manner of protected expression.¹³

The Supreme Court first addressed adult use zoning restrictions in 1976 when Detroit’s “Anti-Skid Row Ordinance” was upheld in *Young v. American Mini Theaters, Inc.*¹⁴ Since then, a majority of municipalities around the country have adopted similar ordinances that disperse adult businesses in an effort to avoid the deleterious secondary effects of adult uses.¹⁵ Dispersal zoning of adult uses is

¹⁰ *Id.* at 396, 694 N.E.2d at 412, 671 N.Y.S.2d at 413 (citing *Asian Americans For Equality v. Koch*, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988); *Matter of Harbison v. Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958)).

¹¹ *Islip v. Caviglia*, 73 N.Y.2d 544, 550, 540 N.E.2d 215, 217, 542 N.Y.S.2d 139, 141 (1989).

¹² *Id.* at 551, 540 N.E.2d at 217, 542 N.Y.S.2d at 141 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

¹³ *See Caviglia*, 73 N.Y.2d at 551-52, 540 N.E.2d at 218, 542 N.Y.S.2d at 142.

¹⁴ 427 U.S. 50, 76 (1976) (Powell, J. concurring). The Detroit ordinance placed a 1,000-foot distance requirement between adult uses and a 500-foot distance requirement between adult uses and any area zoned for residential use. *Id.* at 52-54.

¹⁵ Secondary effects, in an adult use context, are generally negative activities that accompany adult businesses, especially when such establishments concentrate in one area. *See American Mini Theaters, Inc.*, 427 U.S. at 71 n.34. The activities range from petty crimes to prostitution to drunk and

characterized by distancing provisions generally requiring 250 to 2500 linear feet between adult uses and sensitive uses such as churches, schools, residences and parks.¹⁶ Furthermore, dispersal zoning generally requires that each adult use be between 250 and 2500 linear feet from other adult businesses.¹⁷ Rationales for distancing requirements include reduced crime, increased property values and to prevent urban blight that occurs when adult uses concentrate.¹⁸ These associated characteristics of adult uses have been identified as negative secondary effects, and as such, may be controlled through regulations such as deconcentration measures aimed at the time, place or manner of the uses.¹⁹

disorderly persons, with attendant decreases in property values, the perception of neighborhood integrity and the profitability of surrounding businesses. *Id.* Secondary effects have been shown to lead to economic "dead zones" and urban blight. *See Caviglia*, 73 N.Y.2d at 553, 540 N.E.2d at 219, 542 N.Y.S.2d at 143.

¹⁶ *See, e.g.*, HYDE PARK STUDY, *supra* note 1, at 17; NEW YORK CITY, N.Y. ZONING RESOLUTION AMENDMENTS § 32-00 (Sept. 18, 1995) [hereinafter AMENDMENTS].

¹⁷ *See* HYDE PARK STUDY, *supra* note 1, at 17.

¹⁸ *See American Mini Theaters, Inc.*, 427 U.S. at 54-55; *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Caviglia*, 73 N.Y.2d at 552-54, 540 N.E.2d at 218-220, 542 N.Y.S.2d at 142-144.

¹⁹ Time, place and manner analysis involves intermediate scrutiny of regulations affecting protected speech or expression in public areas. *See generally* *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The Court in *Renton* formulated the time, place and manner analysis used by most federal and state courts in examining First Amendment challenges to adult use zoning. *Caviglia*, 73 N.Y.2d at 552, 540 N.E.2d at 218, 542 N.Y.S.2d at 142. As held in *Renton*, and presented in *Caviglia*, municipalities may regulate adult uses through zoning where:

- (1) the "predominate purpose" of the ordinance is not to control the content of the material presented, but to control the secondary effects of adult uses on the surrounding community;
- (2) the ordinance is designed to serve a substantial government interest;
- (3) the ordinance is narrowly tailored to meet the substantial governmental interest in controlling only those uses which produce the unwanted secondary effects; and
- (4) the ordinance allows for reasonable alternative avenues of expression.

Id. (citing *Renton*, 475 U.S. at 49-51).

Concentration zoning is an alternative type of land use tactic used to control adult uses. Nicknamed the "Combat Zone" approach, concentration zoning limits adult uses to relatively small districts.²⁰ Boston sought to prevent the proliferation of small red-light districts by limiting them to a seven-acre area of the city.²¹ Boston redeveloped the area and has cited benefits such as closer control of the adult entertainment industry, lower enforcement costs and the elimination of proliferation.²² There are other techniques used to control adult uses. Some municipalities use licensing as a way to embellish their control under a zoning ordinance. Others define adult uses as special permit uses and utilize procedures similar to licensing that limit their location and expansion.²³

In passing the Amendments, New York City sought to decentralize adult uses and disperse them to non-residential areas where their secondary effects produce fewer negative impacts on residential neighborhoods.²⁴ The City relied on studies conducted by various organizations, which in turn relied on statistical information, anecdotal reports and studies from other municipalities.²⁵ Specifically, the Amendments prohibit new adult establishments in the City's residential zones and certain manufacturing and commercial zoning districts that allow residential development.²⁶ Existing adult uses will be forced to relocate, pursuant to a one-year amortization provision,²⁷ to

²⁰ See HYDE PARK STUDY, *supra* note 1, at 16.

²¹ See HYDE PARK STUDY, *supra* note 1, at 16.

²² See HYDE PARK STUDY, *supra* note 1, at 16.

²³ See *infra* notes 316-31 and accompanying text.

²⁴ CITY PLANNING COMMISSION, REPORT ON APPLICATION FOR AN AMENDMENT TO THE ZONING RESOLUTION N 950384, Sept. 18, 1995 [hereinafter CPC REPORT].

²⁵ See CPC REPORT, *supra* note 24, at 34.

²⁶ See AMENDMENTS, *supra* note 16, at §§ 32-00(b), 42-00(b).

²⁷ See AMENDMENTS, *supra* note 16, at § 52-77. An amortization period allows a nonconforming use to remain for a specified period of time in order that economic investment in the nonconforming use may be recouped. See AMENDMENTS, *supra* note 16, at § 52-77. The Amendments also allow New York City's Board of Standards and Appeals to issue a limited continuance allowing an adult business to operate for a limited time past the one-year

manufacturing and high-density general commercial districts.²⁸ The Amendments require about 150 of the City's 177 adult businesses to either relocate by choosing among 500 alternative sites,²⁹ predominantly waterfront locations, or close.³⁰ Adult businesses must close if they are within 500 feet from a school, church, residential district or other adult use.³¹ Furthermore, the size and illumination of adult business signs will be controlled by the Amendments in response to complaints that they are out of character with surrounding areas.³² The Amendments also limit the size of adult establishments to 10,000 square feet.³³

Tension exists between local adult use zoning and First Amendment-protected speech and expression. Adult business owners and free speech advocates view the restrictions as bald attacks on free speech and expression.³⁴ Civil libertarians view

amortization period where "substantial financial expenditures related to the nonconform[ing business]" are found. *See* AMENDMENTS, *supra* note 16, at § 72-40.

²⁸ *See* CPC REPORT, *supra* note 24, at 7.

²⁹ Allowing "reasonable alternative avenues of communication" is the final and arguably the most important element of permissible time, place and manner restrictions imposed on land uses which intersect with the First Amendment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (citing *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984)). In an adult use context, where dispersal zoning will force relocation of existing sites or prevent future adult uses from establishing themselves in certain areas of town, reasonable alternative sites must exist to accommodate those uses. *See infra* notes 287-302 and accompanying text. Municipalities, while having broad power to regulate land uses, cannot ban or effectively prohibit such uses which include First Amendment speech or expression. *See infra* notes 307-10 and accompanying text.

³⁰ *See* REP. DISPATCH, *supra* note 8, at 1A-2A; *see also* Birnbaum & Hardt & Seifman, *supra* note 8.

³¹ *See* AMENDMENTS, *supra* note 16, at §§ 32-00, 42-00.

³² *See* CPC REPORT, *supra* note 24, at 43.

³³ *See* CPC REPORT, *supra* note 24, at 58.

³⁴ *See* CPC REPORT, *supra* note 24, at 25, 30; *see also* Mark Schoofs, *Beat It: The City's Moral Fixation: Pushing Porn Out of Town*, VILLAGE VOICE, June 27, 1995, at 14; Mark Sullivan, *Sex Shops Bracing for Crackdown*, N.Y. BLADE NEWS, Feb. 27, 1998, at 1; Coalition for Free Expression, *Hey Rudy! Killing Freedom of Expression Does Not Improve Our "Quality of Life,"* N.Y. TIMES, Mar. 4, 1998.

adult use zoning as cloaking family-values morality with thinly veiled urban planning rhetoric.³⁵ Furthermore, significant economic burdens accompany abandoning an occupied site into which capital has been invested and relocating to a permissible zone.³⁶ Many adult business owners cite the volume and consistency of their patrons, complain that their businesses provide a legitimate commercial function and that, by operating an adult business, they are doing nothing wrong.³⁷

Adult use zoning forces courts to evaluate whether conduct such as topless and nude dancing, waitressing and touching topless dancers is protected under the First Amendment. Courts usually are unable to place the content that characterizes most adult businesses within the narrow confines of obscenity.³⁸ Furthermore, some adult business owners claim that their particular adult establishments do not impact negatively on the surrounding area, and therefore should be immune from adult use zoning.³⁹ Such arguments are usually voiced by so-called “upscale” gentlemen’s clubs, which cater to a wealthy and famous clientele.⁴⁰ However, at least one New York City upscale club has contributed significant negative secondary effects to its neighborhood.⁴¹ Others argue that adult use regulations could be used to shut down businesses such as art galleries, gay and lesbian

³⁵ See Schoofs, *supra* note 34, at 14.

³⁶ See Brief for Respondent at 81-83, *Stringfellow’s v. City of New York*, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (1998).

³⁷ Birnbaum & Hardt & Seifman, *supra* note 8.

³⁸ See *infra* notes 158-64 and accompanying text.

³⁹ CPC REPORT, *supra* note 24, at 60-63; see also Brief for Respondent at 49, *Stringfellow’s*; Birnbaum & Hardt & Seifman, *supra* note 8; Dan Barry, *Topless, and Dancing on the Edge: City’s ‘Quality of Life’ Campaign takes On a Strip Club Tradition*, N.Y. TIMES, Apr. 29, 1998, at B1; Samson Mulugeta, *In Babylon: Topless Bar Tests Zoning Law*, NEWSDAY, Jun. 2, 1996, at E09.

⁴⁰ Brief for Respondent at 49-51, *Stringfellow’s*. Stringfellow’s argument that, as an “upscale” club, it did not contribute negative secondary effects was not persuasive to the Court of Appeals. *Id.* at 402, 694 N.E.2d at 417, 671 N.Y.S.2d 418 (1998).

⁴¹ Brief for Respondent at 50 n.30, *Stringfellow’s*. The club referenced, Scores, was the scene of a double homicide in June 1996, and has been tied to the Mafia. *Id.* Furthermore, residents stated at public hearings that Scores led to an increase in crime and drug activity in the area. *Id.*

bookstores and theater companies which present erotic or other adult-theme material.⁴²

III. *Stringfellow's* Resolves A Land Use And First Amendment Struggle in New York City

By upholding the Amendments, the New York Court of Appeals in *Stringfellow's* affirmed the authority of municipalities to regulate the location of adult uses. Relying on its decision in *Town of Islip v. Caviglia*,⁴³ the court found the Amendments passed the federal constitutional test articulated in the seminal *Renton v. Playtime Theaters, Inc.*⁴⁴ case, which in turn relied on *Young v.*

⁴² CPC REPORT, *supra* note 24, at 52-57.

⁴³ 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989). In *Caviglia*, a local adult use ordinance required a 500-foot buffer zone between adult uses, as defined in the ordinance, and residentially-zoned uses, schools, churches and other places of religious worship, parks, playgrounds and playing fields. *Id.* at 563, 540 N.E.2d at 226, 542 N.Y.S.2d at 150. The ordinance also required a one-half-mile distance between adult uses. *Id.* The Court of Appeals upheld the ordinance as a valid time, place and manner restriction using the test articulated in *Renton v. Playtime Theaters, Inc.* *Id.* at 552, 540 N.E.2d at 218, 542 N.Y.S.2d at 142. Additionally, the court upheld the ordinance on state constitutional grounds as well, noting that "New York has a long history and tradition of fostering freedom of expression, often tolerating . . . works which in other States would be found offensive." *Id.* (quoting *People ex rel. Arcara v. Cloud Books Inc.*, 68 N.Y.2d 553, 557, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986)).

⁴⁴ 475 U.S. 41 (1986). *Renton* is significant because six Justices joined to uphold a local zoning ordinance requiring adult motion picture theaters to locate 1,000 feet from any residential zone, family dwelling, church, park or school. *Id.* at 46. Following in the steps of *American Mini Theaters, Inc.*, the *Renton* Court subjected the adult use regulation to time, place and manner analysis, however noting that the ordinance did not fit neatly into a "content-based" or "content-neutral" category. *Id.* at 47. The Court found that the ordinance was "justified without reference to the content of the regulated speech." *Id.* at 48. *Renton* reinforced *American Mini Theater's* holding that "preserv[ing] the quality of urban life" is a substantial government interest, and that interest may be supported by factual studies exposing negative secondary effects associated with adult businesses. *Id.* at 50. Significantly, *Renton* held that local governments may rely on studies conducted by other cities describing the negative secondary effects of adult uses as long as the "evidence the city relies upon is reasonably believed to be relevant to the

*American Mini Theaters, Inc.*⁴⁵ In *Renton*, the Supreme Court held that a zoning ordinance is constitutionally valid where it can be justified without reference to the regulated speech, serves a substantial government interest and allows reasonable alternative avenues of communication.⁴⁶ The Court of Appeals' primary concern in *Stringfellow's* under state constitutional analysis was whether the Amendments struck the proper balance between "community needs and free expression."⁴⁷ The court noted that "municipal zoning authority is not . . . completely unfettered" and that a purposeful attempt at controlling the content of adult businesses would fail constitutional scrutiny.⁴⁸ However, the court concluded that the Amendments were both "justified by concerns

problem that the city addresses." *Id.* at 51-52. The Court found further that the ordinance was narrowly tailored to affect only the group of uses producing the unwanted secondary effects. *Id.* at 52. And in what has become *Renton's* true legacy, the Court held that the availability of five percent of the entire land area of the town constituted reasonable alternative locations, and that adult business owner must "fend for themselves" in the real estate market because economic impact is not a viable First Amendment argument. *Id.* at 53-54.

⁴⁵ 427 U.S. 50 (1976). *American Mini Theaters* was the first case to tackle the land use and First Amendment struggle. *Id.* at 76 (Powell, J., concurring). In *American Mini Theaters, Inc.*, the Court held that adult uses may be identified by their content and regulated using time, place and manner restrictions where there was no purposeful suppression of speech. *Id.* at 62-63, n.18. The Court countered respondent's prior restraint argument by holding that the locational requirements were valid time, place and manner restrictions. *Id.* The Court then addressed respondent's Equal Protection claims finding that "even within the area of protected speech, a difference in content may require a different governmental response." *Id.* at 66. Based on this assumption, the Court held that, although total suppression will not be "tolera[ted,]" a "line may be drawn on the basis of content without violating the government's paramount obligation of neutrality." *Id.* at 70. The Court then held that, in this case, drawing such a line was justified by ameliorating negative secondary effects to preserve neighborhood character. *See id.* at 71.

⁴⁶ *Renton*, 475 U.S. at 54.

⁴⁷ *Stringfellow's v. City of New York*, 91 N.Y.2d 382, 396, 694 N.E.2d 407, 415, 671 NY.S.2d 406, 414 (1998).

⁴⁸ *Id.*

unrelated to speech” and “no broader than needed to achieve [their] purpose” as required under the state constitution.⁴⁹

Although appellants alleged an improper motive on the part of City legislators to “eradicate”⁵⁰ protected free expression, the court concluded that the secondary effects studies offered by the City provided a “legitimate basis [when read as a whole] . . . particularly where, as here, the non-empirical information [was] extensive.”⁵¹ The court held that zoning regulations may define land uses with reference to their content and noted that it could not invalidate the Amendments based on derogatory comments by “one or more legislators” regarding that content.⁵²

It is obvious that municipalities may avoid telegraphing their moral displeasure for adult uses by evidencing a substantial interest in ameliorating negative secondary effects.⁵³ But *Stringfellow’s* emphasized the key role public commentary can play in establishing those negative effects. The court stated “anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects.”⁵⁴ The City, by compiling studies prepared by City organizations and agencies, provided such evidence to the satisfaction of the court.

Another major issue decided in favor of the City in *Stringfellow’s* was the reasonableness of alternative locations provided by the Amendments, which took into consideration not only the relocation, but expansion needs of the adult entertainment industry. The court agreed with the City that the 500 alternative sites available were reasonable alternatives for the 177 existing

⁴⁹ *Id.* at 397, 694 N.E.2d at 415, 671 NY.S.2d at 414 .

⁵⁰ See Armentano, *supra* note 8.

⁵¹ *Stringfellow’s*, 91 N.Y.2d at 400, 694 N.E.2d at 417, 671 NY.S.2d at 416.

⁵² *Id.* at 399, 694 N.E.2d at 416, 671 NY.S.2d at 415.

⁵³ Interestingly, Judge Titone dissented in *Caviglia* where he wrote: “Public distaste and societal fear of the potential effects of certain speech has never provided sufficient justification to suppress protected speech.” Gary Spencer, *Appeals Court Backs City Sex-Shop Zoning*, N.Y. L.J., Feb. 25, 1998, at 1 col. 4.

⁵⁴ *Stringfellow’s*, 91 N.Y.2d at 400, 694 N.E.2d at 417, 671 NY.S.2d at 416.

adult businesses.⁵⁵ The court rejected appellants' contention that these alternative locations, including industrial areas, undeveloped land, waterfront property, warehouse areas and parking lots, were insufficient.⁵⁶ Utilizing both federal and state precedent, the court determined that the sites made available by the Amendments both were ample and did not impede "the accessibility of [adult] outlets to their potential patrons."⁵⁷ Although the distancing requirements of the Amendments will force approximately 84 percent of the City's adult businesses to relocate, the fact that all the alternative sites in Manhattan and 80 percent of the locations in the outer boroughs are within a ten-minute walk from public transit was persuasive.⁵⁸ The court adhered to federal court precedent, ignoring the impact relocation has on profitability, analyzing instead the "physical and legal availability of alternative sites within the municipality's borders."⁵⁹

By upholding the Amendments, the court not only reinforced the legitimacy of dispersal zoning, but redefined the factual basis a municipality may use to justify its substantial interest in regulating adult uses. Municipalities now have the additional advantage of matching statistical with anecdotal evidence and subjective citizen reports in their secondary effects studies. Moreover, anecdotal evidence may be combined with reports from other communities to create a secondary effects study, even where no adult uses exist.⁶⁰ Considering the number of adult uses, the Amendments' factual basis and the well-recognized dispersal technique employed by the

⁵⁵ See Armentano, *supra* note 8.

⁵⁶ See *Stringfellow's*, 91 N.Y.2d at 404, 694 N.E.2d at 419, 671 N.Y.S.2d at 418.

⁵⁷ *Id.* at 402, 694 N.E.2d at 418, 671 N.Y.S.2d at 417.

⁵⁸ See CPC REPORT, *supra* note 24, at 44.

⁵⁹ *Stringfellow's*, 91 N.Y.2d at 402, 694 N.E.2d at 419, 671 N.Y.S.2d at 417.

⁶⁰ See *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51-52 (1986) (holding that the First Amendment does not require new studies or independent evidence of secondary effects as long as the evidence relied upon is "reasonably believed to be relevant to the problem that the [municipality] addresses"); *Caviglia*, 73 N.Y.2d at 553-54, 540 N.E.2d at 219, 542 N.Y.S.2d at 143 (holding that municipalities need not wait until "business areas become wastelands").

Amendments, the *Stringfellow*'s decision may be seen as creating a paradigm for constitutionally permissible adult use regulations. Holding the Amendments to be no broader than necessary in furthering the City's goals, Judge Titone stated: "By preventing adult uses from locating in potential residential districts while allowing such establishments to locate in manufacturing and commercial districts, the Amendments protect only those communities and community institutions that are most vulnerable to their adverse impacts."⁶¹

IV. Types of Adult Uses and Their Affect on Communities

A. Types of Adult Uses

Adult uses include triple-X video and bookstores, live or video peep shows, topless or fully nude dancing establishments, combination book/video and "marital aid" stores, non-medical massage parlors, hot oil salons, nude modeling studios, hourly motels, body painting studios, swingers clubs, S&M clubs, X-rated movie theaters, escort service clubs and combinations thereof.⁶² Adult uses provide sexual entertainment or services from commercial premises.⁶³

Adult uses, in their modern form, emerged in the early 1960s and expanded rapidly through the late 1960s and early 1970s.⁶⁴ In New York City, there were nine adult establishments in 1965, and that number grew to 151 by 1976.⁶⁵ Between 1984 and 1993, the

⁶¹ See Spencer, *supra* note 53, at 1.

⁶² See generally, DEPARTMENT OF CITY PLANNING, ADULT ENTERTAINMENT STUDY, Nov. 1994, at 1-2 [hereinafter DCP STUDY]; HYDE PARK STUDY, *supra* note 1, at 1-2; Young v. American Mini Theaters, Inc., 427 U.S. 50, 52-54 (1976); Dana M. Tucker, *Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning The Solution?*, JOUR. LAND USE & ENVT'L. L., 392, 393 (1997).

⁶³ See DCP STUDY, *supra* note 62, at 2.

⁶⁴ TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, REPORT ON THE SECONDARY EFFECTS OF THE CONCENTRATION OF ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE AREA, Apr. 1994, at 9-10 [hereinafter TSBID STUDY].

⁶⁵ See DCP STUDY, *supra* note 62, at 19.

number in New York City grew to 177.⁶⁶ Recently, the trend has been the proliferation of adult video stores and upscale “gentlemen’s” clubs, which feature nude and table dancing.⁶⁷ An increase in the availability of low-cost pornographic video tapes has provided opportunities for video stores to open with a modest investment and secure a stable business selling inexpensive adult videos.⁶⁸ The adult video market is fueled by people’s desire to avoid the stigma of pornography, and has led to the decline of adult movie theaters.⁶⁹ In fact, interest in adult videos soared by 75 percent from 1991 to 1994 when 550 million adult videos were sold and rented at a cost of over \$2.1 billion.⁷⁰ Many topless clubs have shed their unfavorable images in favor of an upscale environment and are frequented by wealthy businessmen. In New York City upscale topless clubs have grown in number from five in 1990 to 30 in 1992.⁷¹

Thriving mostly in marginal urban areas, adult entertainment businesses have also become a booming industry in suburban and some rural areas.⁷² Adult business are often characterized by blacked-out windows or large gaudy signs. The objectionable appearance of adult establishments is often combined with illegal sex or drug-related activities.⁷³ Once an adult establishment takes root, other adult uses tend to concentrate, especially in populous

⁶⁶ See DCP STUDY, *supra* note 62, at 19.

⁶⁷ See DCP STUDY, *supra* note 62, at 15-17; HYDE PARK STUDY, *supra* note 1, at 19.

⁶⁸ See DCP STUDY, *supra* note 62, at 15-16.

⁶⁹ See DCP STUDY, *supra* note 62, at 16. The reduction in adult movie theaters has been from 800 in 1979 to about 50 in 1990. *Id.* (quoting John Needham, *Gone With The Sin: Closure Of Adult Theater In Santa Ana Reflects Trend Credited To Or Blamed On The Videocassette Revolution*, L.A. TIMES, Aug. 14, 1990, at E-1).

⁷⁰ See HYDE PARK STUDY, *supra* note 1, at 19; DCP STUDY, *supra* note 62, at 15 (citing THE WALL ST. J., July 11, 1994, at 1).

⁷¹ See DCP STUDY, *supra* note 62, at 17 (quoting Walter Fee, *Bare Market: For New Upscale Clubs, It’s Boom And Bust*, N.Y. NEWSDAY, CITY EDITION, Dec. 20, 1992, at 7).

⁷² See HYDE PARK STUDY, *supra* note 1, at 18.

⁷³ See generally CPC REPORT, *supra* note 24, at 34-39.

areas that have suffered economically.⁷⁴ Adult uses have gradually worked their way into the suburbs where, even if concentration is not a problem, even the appearance of one adult use has been found to have deleterious effects on the immediately surrounding community.⁷⁵ The tendency of adult uses to concentrate in one area is among the primary worries of municipal officials.⁷⁶ It is when adult uses cluster that their secondary effects become particularly noticeable, and have the potential to significantly impact the surrounding neighborhood.

B. Secondary Effects: The Factual and Legal Relationship to Land Use Regulations

Adult uses, especially where concentrated, create negative impacts on the surrounding community. These impacts are generally referred to as secondary effects.⁷⁷ Secondary effects cited by studies include increased sex-related crimes, increased drug dealing and petty street crime, reduction in property values, long-term economic decay, adverse affects on surrounding businesses, and the perception of blight and decay.⁷⁸ Secondary effects provide the legal, factual and political justification for limiting adult uses. The Supreme Court has held that secondary effects studies are the factual backbone supporting the substantial government interest necessary for controlling adult uses through land use regulations.⁷⁹ Municipalities desiring to draft adult use zoning should at least acquire studies from other jurisdictions and

⁷⁴ DEPARTMENT OF CITY PLANNING, ADULT ENTERTAINMENT STUDY, Nov. 1994, at 1-2, at vii.

⁷⁵ *Id.* at 64.

⁷⁶ See HYDE PARK STUDY, *supra* note 1, at 28.

⁷⁷ Young v. American Mini Theaters, Inc., 427 U.S. 50 n.34 (1976).

⁷⁸ See generally, CPC REPORT, *supra* note 24, at 34-39; DCP STUDY, *supra* note 62, at 3-14, 59-66 (quoting secondary effects studies from other locations such as Los Angeles, Indianapolis, Phoenix and New Hanover County, North Carolina); HYDE PARK STUDY, *supra* note 1, at 27-29 (finding that "in community after community the results of the studies are almost universally the same").

⁷⁹ Renton v. Playtime Theaters, Inc., 475 U.S. 41, 50; *American Mini Theaters, Inc.*, 427 U.S. at 71, n.34.

identify the relevance to their own concerns, or prepare original studies. Municipalities lacking existing or proposed adult uses, but considering adult use zoning, should apply external findings hypothetically to current land uses and citizen concerns.

New York City's Amendments relied on a number of adult use studies, as well as public hearings, to establish a factual basis for regulation.⁸⁰ Findings collected in these studies mirrored data gathered in other municipalities around the country.⁸¹ The Times Square Business Improvement District ("TSBID") secondary effects study conducted in 1993-94 showed a slower rate of increase for total assessed property values on blocks in the Times Square area containing adult businesses, and a higher incidence of criminal complaints where adult uses were concentrated.⁸² A Department of City Planning ("DCP") study conducted around the same time indicated that 80 per cent of real estate brokers responding to a DCP survey felt adult uses are perceived to negatively effect nearby property values.⁸³ The Chelsea Business Survey found, in that neighborhood, adult uses caused a decline in the neighborhood's reputation, a reduction in business vitality and businesses to relocate.⁸⁴

Municipalities in which no adult uses are located have undertaken studies on which they have based proactive adult use legislation.⁸⁵ Hyde Park prepared a secondary effects study

⁸⁰ See CPC REPORT, *supra* note 24, at 34-37.

⁸¹ DCP STUDY, *supra* note 62, at 3-14.

⁸² See DCP STUDY, *supra* note 62, at 31-32.

⁸³ See DCP STUDY, *supra* note 62, at 53-54.

⁸⁴ See DCP STUDY, *supra* note 62, at 38-39 (quoting the 1993 Chelsea Business Survey).

⁸⁵ See HYDE PARK STUDY, *supra* note 1. Proactive legislation may be an intelligent strategy for any municipality, however unlikely it may be that an adult use may appear, especially now with adequate federal and state court precedent. Municipalities in the past have been "completely caught off guard." See Kate Stone Lombardi, *Communities Study Port Chester's Fight Over Topless Bar*, N.Y. TIMES, Dec. 19, 1993, at 13WC1 (statement of George O'Hanlon). Adult establishments are not just urban phenomena and can appear anywhere. (statement of Richard Roth). *Id.* In some cases, surrounding municipalities have enacted restrictive adult use zoning, pushing adult businesses into nearby towns without such controls. See Chau Lam, *X Shops Are Shown the Exit*, NEWSDAY, Jan. 7, 1996, at A68. In such cases,

although it had neither an adult use nor a proposed adult use. Hyde Park's examination analyzed studies prepared by other municipalities and discovered universal negative secondary impacts associated with adult businesses.⁸⁶ The study estimated potential impacts of adult uses on specific land uses and found that because a significant part of the town's economy revolved around tourists attracted to the many historic and scenic sites, adult uses could "irreparably damage" Hyde Park's quality of life, character and tourism trade.⁸⁷ The Hyde Park study concluded that adult uses should be regulated differently from other establishments, and that proactive land use legislation should be drafted.⁸⁸ Proactive legislation will prevent a situation where adult use regulations are enacted hastily in response to deleterious secondary effects, thereby reducing the likelihood of a legal challenge.

As courts have held, the substantial government interest in adult use restrictions must be supported by evidence gathered through public hearings, law enforcement memoranda, affidavits from urban planners, sociologists, real estate experts, and statistical and anecdotal evidence.⁸⁹ Information collected in secondary effects studies becomes the factual and evidentiary basis justifying restrictions on adult uses. The Supreme Court has held that each municipality need not prepare its own study, and may rely on one or more studies prepared by other municipalities.⁹⁰ Furthermore, studies may be relied on even if the method a municipality chooses to regulate adult uses differs from that chosen by the municipality preparing the study.⁹¹ Municipalities need only rely on evidence "reasonably believed to be relevant to the problem" it seeks to

the threat of an adult use opening in a municipality prompts quick legislative action. See Schulman, *supra* note 1; Emi Endo, *XXX Marks The Spot in the Village: Residents Are Resigned to New Law Limiting But Not Banning Adult Shops*, *NEWSDAY*, July 27, 1997, at E13.

⁸⁶ See HYDE PARK STUDY, *supra* note 1, at 3-16.

⁸⁷ See HYDE PARK STUDY, *supra* note 1, at 21-22.

⁸⁸ See HYDE PARK STUDY, *supra* note 1, at 27-29.

⁸⁹ *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71 (1976); see also John M. Armentano, *Adult Entertainment: New York City's Zoning Scheme Meets Well-Defined Standards*, *N.Y.L.J.*, Mar. 25, 1998, at 5.

⁹⁰ *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51-52. (1986).

⁹¹ *Id.* at 52.

address.⁹² Not only must a nexus between adult uses and negative secondary effects be shown, but zoning restrictions must indicate expected mitigation, amelioration or prevention. Secondary effects studies support the purpose of the legislative action as based on deleterious secondary effects and not the content of adult establishments.⁹³ Unambiguous statutory language and a sufficient legislative record will most likely produce constitutionally permissible adult use regulations. Basic tenets of the First Amendment prohibit restrictions based on suppressing adult content no matter how objectionable, and zoning regulations must be shown to further the substantial government interest in controlling adult uses.⁹⁴

In New York, a municipality may have a “far stronger case” if it prepares independent studies directly relating to its own existing or potential secondary effects.⁹⁵ The New York Court of Appeals, in both *Caviglia* and *Stringfellow’s*, hinted at the superior nature of establishing an independent legislative record consisting not of “generic conclusions drawn from out-of-state studies,” but rather its own findings.⁹⁶ While the court did not, in either case, explicitly delineate guidelines as to how inclusive a study must be, or whether *Renton’s* factual standard is sufficient in New York, it

⁹² *Id.*

⁹³ See Tucker, *supra* note 62, at 416; see also Armentano, *supra* note 89; but see Phillips v. Borough of Keyport, 107 F.3d 164, 178 (3d Cir. 1997) noting that:

[t]here is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court . . . and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of a legislative measure,” and holding that the latter is not required but the former is required.

Id.

⁹⁴ See Town of Islip v. Caviglia, 73 N.Y.2d 544, 552, 540 N.E.2d 215, 218, 542 N.Y.S.2d 139, 142 (1989).

⁹⁵ *Id.* at 555, 540 N.E.2d at 220, 542 N.Y.S.2d at 144; see also Armentano, *supra* note 8; HYDE PARK STUDY, *supra* note 1, at 1.

⁹⁶ *Stringfellow’s of New York Ltd. v. City of New York*, 91 N.Y.2d 382, 694 N.E.2d 407, 417, 671 N.Y.S.2d 406, (1998) (stating that “[m]oreover, the City did not rely exclusively on generic conclusions drawn from out-of-state studies but also conducted studies of its own”).

both distinguished the City of Renton ordinance⁹⁷ and “explicitly acknowledged the value of studies from other jurisdictions.”⁹⁸ In both cases, the Court of Appeals quoted liberally from the studies conducted by Islip and New York City.⁹⁹ The court recognized that studies may be conducted and regulations enacted prior to any actual deterioration caused by secondary effects, thereby acknowledging that time is a factor in furthering municipal goals of preventing or reversing neighborhood decay.¹⁰⁰

C. The Power of Community and Local Business Opposition to Adult Uses

Secondary effects studies uniformly show that business owners and residents of neighborhoods disapprove of the negative secondary impacts of adult uses.¹⁰¹ In fact, the strongest opposition to adult uses comes from residents living near them.¹⁰² Other community members find adult uses morally objectionable or harmful to children in less quantifiable ways.¹⁰³ Community opposition is best channeled into public hearings and secondary

⁹⁷ See *Caviglia*, 73 N.Y.2d at 555, 540 N.E.2d at 220, 542 N.Y.S.2d at 144.

⁹⁸ *Stringfellow's*, 91 N.Y.2d at 399, 694 N.E. at 417, 671 N.Y.S.2d at 416. (citing *Caviglia*, 73 N.Y.2d at 553; 540 N.E. at 219, 542 N.Y.S.2d at 143).

⁹⁹ See *Caviglia*, 73 N.Y.2d at 552-54, 540 N.E.2d at 218-20, 542 N.Y.S.2d at 142-44; *Stringfellow's*, 91 N.Y.2d at 399, 694 N.E. at 417, 671 N.Y.S.2d at 416.

¹⁰⁰ See *Caviglia*, 73 N.Y.2d at 553-54, 540 N.E.2d at 219-20, 542 N.Y.S.2d at 143-44.

¹⁰¹ DEPARTMENT OF CITY PLANNING, ADULT ENTERTAINMENT STUDY, Nov. 1994, at 3-14; HYDE PARK STUDY, *supra* note 1, at 1, 3-16; TSBID STUDY, *supra* note 64, at 3-4.

¹⁰² TSBID STUDY *supra* note 64, at 67; see also Lombardi, *supra* note 85; Endo, *supra* note 85; Dale Anderson, *Residents Protest Potential Reopening of Topless Bar*, BUFFALO NEWS, Aug. 19, 1997, at 1B; Jane Kwiatkowski, *Rights Issue Raised in Arrests at Adult Store*, BUFFALO NEWS, Aug. 11, 1996, at 1C.

¹⁰³ See Schulman, *supra* note 1; Steven Lee Myers, *A Switch in Bastion of Liberalism: Not Many Protesting Sex Zoning*, N.Y. TIMES, Sept. 25, 1994, at A41.

effects studies to serve as a factual basis for land use regulations controlling the location of adult uses.¹⁰⁴

While statistical evidence may be inconclusive in showing a concrete relationship between adult uses and increased crime or decreased property values, interviews with residents, business owners and community groups provide some evidence of the connection. In fact, Judge Titone in *Stringfellow's* emphasized the importance of "anecdotal evidence" relaying the negative impacts of secondary effects.¹⁰⁵ Judge Titone found that:

anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects (citation omitted) . . . particularly where, as here, the non-empirical information is extensive and indicative of a clear relationship between adult uses and urban decay.¹⁰⁶

The TSBID interviewed twelve real estate owners, managers and developers and found that adult businesses inhibit increased value of adjacent businesses, negatively affected the ability to rent adjacent buildings, diminished the overall image of the neighborhood, and that trouble in renting next to adult establishments tended to promote clustering.¹⁰⁷ Restaurant owners in the same study cited the unsavory character of adult uses as detracting from their own businesses.¹⁰⁸ Retailers and block associations in Times Square stated that loiterers and petty criminals interfere with surrounding businesses and the everyday

¹⁰⁴ As Judge Titone stated in *Stringfellow's*, "anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects." *Stringfellow's*, 91 N.Y.2d at 400, 694 N.E. at 417, 671 N.Y.S.2d at 416. New York City's City Planning Commission referred the Amendments to New York City's community boards for public review, all of which was duly recorded and some of which appeared in the CPC's report in support of enacting the amendment. CPC REPORT, *supra* note 24, at 13-32.

¹⁰⁵ *Stringfellow's v. City of New York*, 91 N.Y.2d 382, 400, 694 N.E.2d 407, 417, 671 N.Y.S.2d 406, 416 (1998).

¹⁰⁶ *Id.*

¹⁰⁷ TSBID STUDY, *supra* note 64, at 37-39.

¹⁰⁸ TSBID STUDY, *supra* note 64, at 41.

quality of life.¹⁰⁹ Residents stated concentrated adult businesses diminished neighborhood self-esteem, increased the danger of drugs and drug-related activities, created the unpleasing aesthetic of darkened windows or garish signage, and visibly increased prostitution.¹¹⁰

The DCP study undertook a broader view of adult uses by including the outer boroughs of New York City.¹¹¹ The DCP study found that, based on other studies and anecdotal evidence, adult uses tend to concentrate, further exacerbating the secondary effects problems of drugs and prostitution.¹¹² However, the DCP study could not conclusively substantiate higher crime statistics and lower property values.¹¹³ In surveying people outside the core of the City, the DCP study found that isolated or potential adult uses have outraged residents and led to pickets, petitions and pressure tactics.¹¹⁴ Fear over potential proliferation is a primary factor among residents.¹¹⁵ Even one successful adult use may set a precedent for others to follow, leading to clustering, and the DCP study cited instances of community groups forming to fight the

¹⁰⁹ TSBID STUDY, *supra* note 64, at 43-44.

¹¹⁰ TSBID STUDY, *supra* note 64, at 44. Eighth Avenue has seen increase in adult businesses since many were displaced from other areas of Times Square. See CPC REPORT, *supra* note 24, at 35. With the increased clustering, residents noticed increased negative aspects such as petty crime, prostitution, loitering and noise. See CPC REPORT, *supra* note 24, at 35. Chelsea has seen increase in adult uses mirroring the thirty-five percent increase since the late 1980's, and noticed increases in the attendant negative secondary effects. See CPC REPORT, *supra* note 24, at 36-37.

¹¹¹ DCP STUDY, *supra* note 62, at 1.

¹¹² DCP STUDY, *supra* note 62, at 39.

¹¹³ DCP STUDY, *supra* note 62, at 57-58. Secondary effects studies have varying degrees of success in substantiating crime and property value statistics because (1) information regarding arrests and convictions is hard to obtain, and (2) many times adult business owners pay inflated rents which create false positives for study purposes. See, e.g., TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, REPORT ON THE SECONDARY EFFECTS OF THE CONCENTRATION OF ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE AREA, Apr. 1994, at 11-12, 26, 30, 31-34.

¹¹⁴ DCP STUDY, *supra* note 62, at 42.

¹¹⁵ DCP STUDY, *supra* note 62, at 43.

establishment of adult businesses even where zoning would allow them.¹¹⁶

Most residents who speak out mention quality of life as a blanket concern.¹¹⁷ Quality of life concerns may be a political basis for a municipality to exercise its police power to protect the health, safety and welfare of a community. However, community opposition to actual or perceived degradation of their quality of life resulting from adult use proliferation is legitimate and indeed powerful ammunition for municipalities to use in supporting adult use zoning regulations. Municipalities undertaking to control existing or proposed adult uses may tap public outcry over adult businesses and use quality of life concerns to their advantage in developing the necessary factual record needed to withstand a constitutional challenge.

V. Federal and State Constitutional Protections Within Adult Uses

A. Federal Protection

The First Amendment prevents “Congress” from “abridging the freedom of speech.”¹¹⁸ First Amendment protection has been expanded by the Supreme Court over the last 200 years to incorporate such seemingly disparate types of communication as public demonstrations,¹¹⁹ displaying an expletive on a jacket,¹²⁰

¹¹⁶ DCP STUDY, *supra* note 62, at 43.

¹¹⁷ DCP STUDY, *supra* note 62, at 40; Myers, *supra* note 103 (stating “[t]o put it another way, “free speech” has nowadays become much less of a political rallying cry in New York City than “quality of life”); Schoofs, *supra* note 34; Endo, *supra* note 85.

¹¹⁸ U.S. CONST. amend. I The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*

¹¹⁹ See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

¹²⁰ See *Cohen v. California*, 403 U.S. 15 (1971).

advertising an electrical utility,¹²¹ viciously parodying a public figure,¹²² wearing black arm bands in school,¹²³ and live nude dancing.¹²⁴

The Supreme Court has recognized that many types of speech and expression are protected by the First Amendment, even if they may be offensive or obscene to some members of the public, but do not rise to the level fighting words¹²⁵ or obscenity.¹²⁶ While the plurality opinion in *American Mini Theaters, Inc.* held the constitutional interest in protecting messages communicated by adult books and films is of a “wholly different, and lesser, magnitude than the interest in untrammelled political debate,” erotic messages conveyed by adult books and films may not be totally suppressed.¹²⁷

The Supreme Court recognized in *United States v. O'Brien*¹²⁸ that although some symbolic expression¹²⁹ may be protected, an “apparently limitless variety of conduct can [not] be labeled speech,” and that governmental interest in regulating the nonspeech elements of conduct can justify “incidental limitations of First Amendment freedoms.”¹³⁰ *O'Brien* considered the “speech” and “nonspeech” elements expressed by the defendant

¹²¹ See *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

¹²² See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

¹²³ See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

¹²⁴ See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

¹²⁵ Fighting words have been defined as those that, when addressed to an ordinary citizen, are likely to provoke violent reaction. See *Cohen v. California*, 403 U.S. 15, 20 (1971).

¹²⁶ *Id.*; see also *infra* notes 157-63 accompanying text.

¹²⁷ *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976).

¹²⁸ 391 U.S. 367 (1968).

¹²⁹ Symbolic expression is characterized by conduct which contains speech elements protected by the First Amendment and nonspeech elements that are not protected. *Id.* at 376. In *O'Brien*, the Court held that while burning a draft card may have contained some message, the actual burning of the card was conduct unprotected by the First Amendment, and thus the government could impose justifiable incidental limitations on the protected speech included in the conduct. *Id.*; See also *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991).

¹³⁰ *O'Brien*, 391 U.S. at 376.

who burned his draft card.¹³¹ The Court articulated a four-part test which a government seeking to regulate the “nonspeech” element of certain conduct must pass in order to justify incidental limitations on the “speech” portion of the given conduct.¹³² The *O’Brien* test held:

that government regulations will be sufficiently justified if: (1) they are within the constitutional power of the government; (2) they further an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to further the substantial interest.¹³³

With protection of symbolic expression settled in *O’Brien*, the Court has had the opportunity to apply that protection to topless and nude dancing. Unlike adult books or films, topless or nude dancing is a type of expressive conduct that contains both speech and nonspeech elements.¹³⁴ The holding in *Barnes v. Glen*

¹³¹ *Id.* at 376-77.

¹³² *Id.* at 377.

¹³³ *Id.*

¹³⁴ See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991). *Barnes* is a complex plurality decision regarding a state-wide ban on public nudity. *Id.* Eight of nine Justices found nude dancing to be constitutionally protected speech, but four Justices held that it was only a minimally protected form of expression. *Id.* Only three Justices joined Chief Justice Rehnquist, who wrote the opinion, in holding that enforcement of morality is a proper substantial government interest under *O’Brien* for banning nudity. *Id.* at 561-63. Justice Souter concurred in the judgment, but based his holding on the legitimacy of negative secondary effects as a basis for incidentally restricting free expression. *Id.* at 580-82 (Souter, J., concurring). Upholding the state ban on nudity, the plurality held that the ban did not target speech, as all public nudity was banned, and was justifiably incidental to protected nude dancing because dancers could continue to convey their erotic message while wearing pasties and g-strings. *Id.* at 560-61. Furthermore, Justice Souter was careful to distinguish the evil sought to be eliminated as “prostitution, sexual assault and other criminal activity,” not “nudity” itself. *Id.* at 571, 583 (Souter, J., concurring).

Theater, Inc.,¹³⁵ while dangerous precedent for enacting bans on public nudity, is significant because eight of nine Justices held nude dancing to be a protected form of free expression. The Court has repeatedly held that, like adult books and films, topless and nude dancing are types of expression that must be afforded at least a minimum of First Amendment protection.¹³⁶

Certain types of conduct relevant to adult uses are not protected by the First Amendment. Recreational dancing, because it lacks a communicative element between audience and performer, is not a protected form of speech when performed for exercise or personal pleasure.¹³⁷ Therefore, recreational dancing may be proscribed by a zoning ordinance.¹³⁸ Similarly, the First Amendment does not protect a patron's right to touch or tip a topless dancer or an employee's right to wear revealing clothing, or work in the nude.¹³⁹ Obscenity is not protected under the First Amendment, but has been defined by state legislation and the courts apply to a narrow range of materials.¹⁴⁰

B. State Constitutional Protection

¹³⁵ *Id.* The plurality in *Barnes* upheld a state public nudity ban which, the court held, was valid with respect to nude dancing because that type of expression is at the outer limits of First Amendment protection, and, under *O'Brien*, the substantial government interest justified the incidental burden on free expression. *Id.* at 561-63. The Court was sharply divided over what constituted the substantial government interest, with Justice Souter opining secondary effects, and Chief Justice Rehnquist finding support from only two Justices for his public morals basis. *Id.* at 561-63, 580-82 (Souter, J., concurring).

¹³⁶ *California v. LaRue*, 409 U.S. 109 (1972) (holding that nude dancing might be afforded First Amendment protection in some circumstances); *Doran v. Salem Inn Inc.*, 422 U.S. 922 (1975) (finding that customary "barroom" types of nude dancing may involve the "barest minimum" First Amendment protection); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (upholding a lower court's finding that "live nude dancing is protected by the First Amendment).

¹³⁷ See *Kent's Lounge, Inc. v. City of New York*, 104 A.D.2d 397, 398, 478 N.Y.S.2d 928, 929 (2d Dep't 1984).

¹³⁸ See *id.*

¹³⁹ See *Hang On, Inc. v. Arlington*, 65 F.3d 1248 (5th Cir. 1995).

¹⁴⁰ See *Tucker*, *supra* note 62, at 419-21.

The New York State Constitution offers at least as much protection to free speech as the federal constitution.¹⁴¹ In fact, the New York Court of Appeals has twice invalidated adult use regulations upheld by the Supreme Court, indicating that New York may go further in protecting free expression.¹⁴²

In *Bellanca v. New York State Liquor Authority*,¹⁴³ the Court of Appeals held that a New York State Liquor Authority regulation banning topless dancing in establishments serving alcohol was invalid under the New York State Constitution.¹⁴⁴ The U.S. Supreme Court remanded *Bellanca* after determining that the liquor authority regulation was a valid exercise of state power under the Twenty-First Amendment.¹⁴⁵ The Court of Appeals did not consider whether New York's constitutional guarantees were "broader" than those of the federal constitution because the Twenty-First Amendment has "no application to New York's constitution."¹⁴⁶ The court noted, however, that "at the very least, the guarantee of freedom of expression [in New York's Constitution] is of no lesser vitality [than in the federal constitution]" and invalidated the regulation on state constitutional grounds.¹⁴⁷

¹⁴¹ N.Y. CONST. art. I § 8. The New York State Constitution states that "[e]very 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." *Id.*

¹⁴² See *Bellanca v. N.Y. State Liquor Auth.*, 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981); *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986).

¹⁴³ 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981).

¹⁴⁴ *Id.* at 229, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

¹⁴⁵ *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981).

¹⁴⁶ *Bellanca*, 54 N.Y.2d at 234-35, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

¹⁴⁷ *Id.* at 235, 429 N.E.2d at 768, 445 N.Y.S.2d at 90. The concurrence of Judge Fuchsberg stated that the New York Constitution extended free expression guarantees such that "[New York's] profound commitment to personal liberty demands not only that we respect [rights of topless dancers to dance], but, correlatively, that we evince like respect for the right of adults who elect to attend [topless bars]." *Id.* at 236-37, 429 N.E.2d at 769, 445 N.Y.S.2d at 91 (Fuchsberg, J., concurring).

In *People ex rel. Arcara v. Cloud Books, Inc.*,¹⁴⁸ the Court of Appeals noted that in the case of books, movies and the arts generally, the U.S. Supreme Court has been reluctant to expand First Amendment protections, instead deferring to the states to “supplement” federal constitutional guarantees based on community standards.¹⁴⁹ The court declared 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. Thus, the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State’s constitutional guarantee of freedom of expression.¹⁵⁰

New York courts have interpreted *Arcara* to mean that New York’s free expression protections are broader.¹⁵¹ *Arcara* and cases following it make clear that New York has filled the gap left by the Supreme Court by protecting expression in the arts with a higher standard than currently bestowed by the federal constitution. This broad accommodation of free expression explains the reluctance of the City to attempt to enact adult use zoning until 1994.¹⁵²

¹⁴⁸ 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986).

¹⁴⁹ *Id.* at 557, 503 N.E.2d at 494, 510 N.Y.S.2d at 846.

¹⁵⁰ *Id.* at 557-58, 503 N.E.2d at 494-95, 510 N.Y.S.2d at 846-47; see *Barbulean v. City of Newburgh*, 168 Misc. 2d 728, 640 N.Y.S.2d 935, (Sup. Ct. Orange County 1995) (relying on *Arcara* and stating that New York’s citizens are afforded greater protection in the exercise of their right to free expression).

¹⁵¹ See *Times Square Books, Inc. v. Rochester*, 223 A.D.2d 270, 274-75, 645 N.Y.S.2d 951 (4th Dep’t 1996) (citations omitted); *Barbulean*, 168 Misc. 2d at 732-33, 640 N.Y.S.2d at 940 (citing *Arcara*, 68 N.Y.2d at 557-58, 503 N.E.2d at 494-95, 510 N.Y.S.2d at 846-47).

¹⁵² DCP STUDY, *supra* note 62. New York City attempted zoning of “adult physical culture establishments” in 1975 and proposed zoning amendments in 1977 after the *Young v. American Mini Theaters, Inc.* decision. DCP STUDY, *supra* note 62, at 32. Both were scuttled, the second because public hearings revealed intense opposition to the alleged creation of “red light districts”

C. Adult Uses And The Question of Obscenity

It is important for municipalities to note the three-part test articulated in *Miller v. California*¹⁵³ and avoid proscribing certain conduct perceived by some as obscene.¹⁵⁴ The Supreme Court has held topless or nude dancing to “constitute expressive conduct intended to convey a particularized message,” which is protected by the First Amendment.¹⁵⁵ Furthermore, *Miller* has had the effect of narrowly confining obscenity to the “most explicit, thoroughly hardcore materials that lack any redeeming value whatsoever.”¹⁵⁶ The Supreme Court has further shown its concern for protecting First Amendment freedoms by limiting a jury’s discretion to use the *Miller* “community standard” test to determine what is obscene.¹⁵⁷

There are, however, types of pornographic materials that courts have found to be obscene. These include bestiality, flagellation, sadomasochism, extreme violence and child pornography. In fact, most if not all states have laws prohibiting the sale or possession of

created where adult establishments were dispersed by the zoning. DCP STUDY, *supra* note 62, at 33-34. .

¹⁵³ 413 U.S. 15 (1973).

¹⁵⁴ Materials and conduct are obscene under *Miller* if: (1) the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 18-19. *Miller* held that obscene materials and conduct may be regulated by the States, but subject to the content meeting each prong of the test. *Id.* Some municipalities enforce state obscenity laws against adult businesses and arrest employees, most of whom are out of jail quickly and are not prosecuted. See Kwiatkowski, *supra* note 102. Some residents would like to see adult uses banned. See Endo, *supra* note 85.

¹⁵⁵ Tucker, *supra* note 62, at 394.

¹⁵⁶ Tucker, *supra* note 62, at 394.

¹⁵⁷ See *Jenkins v. Georgia*, 418 U.S. 153 (1974). In *Jenkins*, the Court held that juries need not be instructed to apply national standards, and that a “community standard” instruction may be given to juries without reference to a specific community. *Id.* at 155.

child pornography.¹⁵⁸ The Supreme Court has held that states' power over children is broader than its power over adults, and therefore they may place age restrictions on what adult businesses sell, and to whom, to protect the well-being of youths.¹⁵⁹ States have vast power to criminalize materials or conduct that comes under the narrow description of what is obscene.

Since most states criminalize obscenity there is little room for municipalities to act in this arena. In addition, most conduct found in adult uses is not obscene under Supreme Court holdings.

VI. Local Adult Use Zoning Regulations

A. New York City's Adult Use Zoning Amendments As A Model

New York City first sought to deal with proliferating and clustering adult uses in 1975. In 1977, the Department of City Planning ("DCP") concluded that adult businesses had negative impacts on their surrounding communities. A zoning proposal failed to materialize because the City Planning Commission ("CPC") could not agree on the proper extent of the regulations, fearing that dispersing adult uses would lead to proliferation in other areas of the city.¹⁶⁰ In 1978 the Mayor of New York cracked down on adult establishments using building and fire code violations.¹⁶¹ In 1983, the Office of Midtown Enforcement reported that it had reduced legal and illegal adult uses by 46

¹⁵⁸ See *New York v. Ferber*, 458 U.S. 747 (1982) (upholding New York criminal statute which prohibited persons from knowingly promoting sexual performances, including the sale of books, magazines and films, by children under sixteen years old); *Osborne v. Ohio*, 495 U.S. 103 (1990) (holding that states may constitutionally prohibit the private possession and viewing of child pornography).

¹⁵⁹ See *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹⁶⁰ See DCP STUDY, *supra* note 62, at 34.

¹⁶¹ See *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 691, 389 N.E.2d 815, 817, 416 N.Y.S.2d 219, 212 (1979). This attempt at controlling, or harassing, adult establishments using building code and other violations has been attempted by various municipalities. See Collin Nash, *Trying To Shut A Sex Shop, Officials Close All Stores*, *NEWSDAY*, July 13, 1997, at E13.

percent from 1979 to 1983, and in so doing, reduced the number of sex-related arrests from 419 to 300, albeit without an aggressive adult use ordinance.¹⁶²

Using New York City as an example, what marks the recent drive to control adult uses is the solidarity among all types of residents, community groups and politicians, both liberal and conservative.¹⁶³ There is a pervasive sentiment of not-in-my-backyard ("NIMBY") regarding adult uses, and an overriding concern that adult uses drive down property values, add to urban blight and crime, and negatively influence children exposed to such uses.¹⁶⁴ This sentiment is backed by studies from other municipalities cited in the DCP, TSBID and Hyde Park studies. The political atmosphere is best summed up by New York Mayor Rudy Giuliani's quest for improved "quality of life" in New York City, of which limiting adult uses in Times Square through zoning is a large part.¹⁶⁵

The Amendments challenged and considered in *Stringfellow's* provide a prototypical example of constitutionally permissible adult use dispersal zoning. Language incorporated by the Amendments specifically defining adult uses has been upheld by both state and federal courts.¹⁶⁶

¹⁶² See DCP STUDY, *supra* note 62, at 37.

¹⁶³ See Myers, *supra* note 103. Myer's article points out that one of New York's most liberal politicians, Manhattan Borough President Ruth W. Messinger, is in favor of adult use restrictions, although far less sweeping than those eventually enacted. Meyers, *supra* note 103. The article, alluding to Mayor Giuliani's "quality of life" campaign, points out that free speech has become far less of a political rallying cry today than quality of life. Meyers, *supra* note 103.

¹⁶⁴ See Meyers, *supra* note 103.

¹⁶⁵ See Birnbaum & Hardt & Seifman, *supra* note 8; see also Sullivan, *supra* note 34.

¹⁶⁶ See, e.g., *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 53 (1976); *Islip v. Caviglia*, 73 N.Y.2d 544, 562-63; 540 N.E.2d 215, 225-226; 542 N.Y.S.2d 139, 149-150 (1989). This article has uncovered no use of concentration zoning in New York State, although when a municipality does not impose a distance requirement between adult uses themselves, but between adult uses and residential uses, a form of concentration zoning is effectively implemented. See CITY OF ROCHESTER, N.Y. ZONING ORDINANCE § 115-56 (1986). Rochester provides that, except within the "Inner Loop," a 500-foot

The Amendments are applicable to any "adult establishment" defined as "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."¹⁶⁷ The four categories of adult establishments are further defined. The Amendments tie their definitions of each of the four categories to whether "specified anatomical areas" or "specified sexual activities" are depicted, and whether the business "excludes minors by reason of age."¹⁶⁸ These definitional characteristics are important in distinguishing adult uses from other uses that may incorporate similar yet minimal adult content, such as regular video stores or gay bookstores.¹⁶⁹

"Specified anatomical areas," "specified sexual activities," and "exclu[sion] of minors by reason of age" are all further defined.¹⁷⁰ Furthermore, the Amendments detail how to determine whether an

buffer zone shall be in place between adult uses themselves, and churches, schools, parks and public gathering places. *Id.*

¹⁶⁷ AMENDMENTS, *supra* note 16, at § 12-10.

¹⁶⁸ AMENDMENTS, *supra* note 16, at § 12-10.

¹⁶⁹ See CPC REPORT, *supra* note 24, at 48-57. The report states that Department of City Planning staff entered various gay bookstores and art galleries to assess whether they may fall under the restrictions in the amendment, and those who voiced concern that such establishments would be subject to the amendment were quickly assured that it was not the purpose of the CPC and the amendment to restrict in any way these "general interest" establishments. CPC REPORT, *supra* note 24, at 48-57. The CPC followed techniques employed by some municipalities where, by including in adult establishment definitions the exclusion of minors by reason of age, the adult use defines itself. See HYDE PARK STUDY, *supra* note 1, at 15-16.

¹⁷⁰ AMENDMENTS, *supra* note 16, at § 12-10; see also Appendix A, *infra* pp. 75-87. "Specified anatomical areas" and "specified sexual activities" is language found in many adult use zoning ordinances and upheld in many legal challenges. See, e.g., CITY OF SCHENECTADY, N.Y. ZONING CODE § 264-91(B) (1986); VILLAGE OF VALLEY STREAM, N.Y. LOCAL LAW 4-1994 § 99-241 (1994); see also *Times Square Books, Inc. v. Rochester*, 223 A.D.2d 270, 645 N.Y.S.2d 951 (4th Dep't 1996); *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153 (Wash.1978). The language probably originated, for purposes of modern constitutional analysis, with Detroit's "Anti-Skid Row" ordinance challenged and upheld in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 53-54 (1976).

establishment contains a "substantial portion" of its area for use as an adult establishments.¹⁷¹ Additionally, factors are provided to help determine whether an adult bookstore devotes a "substantial portion of its stock-in-trade" to regulated adult materials.¹⁷² The Amendments contain an array of dispersal requirements and anti-clustering provisions. In addition to being barred from all residential districts, both new and existing adult uses are barred from certain manufacturing and commercial districts which also permit residential development.¹⁷³ In manufacturing and commercial districts in which adult uses are allowed, they must be located at least 500 feet from a number of "sensitive receptors" defined as churches, schools, residence districts, low-density commercial districts and manufacturing districts where new residential development is allowed.¹⁷⁴ Adult establishments also must be located at least 500 linear feet from another adult use.¹⁷⁵ The Amendments allow for adult uses which otherwise conform with the Amendments to remain if a church or school is established within 500 feet after the effective date of the Amendments.¹⁷⁶

¹⁷¹ The Amendments' definitions are more comprehensive than others, including the Islip definitions on which they are based in part. See AMENDMENTS, *supra* note 16, at § 12-10(d).

¹⁷² AMENDMENTS, *supra* note 16, at § 12-10(d). The CPC states that, as a general guideline, an adult establishment would require "at least 40 percent" of accessible floor area used for adult purposes to fall under the definitions in § 12-10. CPC REPORT, *supra* note 24, at 50.

¹⁷³ See AMENDMENTS, *supra* note 16, at § 32-01(a).

¹⁷⁴ AMENDMENTS, *supra* note 16, at § 32-01(b). During the CPC-sponsored public hearings on the Amendments, proposals were received to expand the list of "sensitive receptors" from which adult uses must remain 500-feet distant. See CPC REPORT, *supra* note 24, at 61. Those uses included parks, playgrounds, nursing homes, colleges and universities, legal non-conforming residences, libraries, museums, landmarks and recreational facilities. CPC REPORT, *supra* note 24, at 61. While a municipality may buffer such sensitive uses, *see, e.g.*, TOWN OF HYDE PARK, N.Y. ZONING CODE § 108-19(F)(8)(b)(3) (1996), the CPC declined to add to the Amendments' list because "the addition of sensitive receptors raises a number of procedural and policy questions, and . . . the Commission believes that the regulations as proposed will provide significant protection against the adverse secondary effects of adult establishments . . ." CPC REPORT, *supra* note 24, at 62.

¹⁷⁵ See AMENDMENTS, *supra* note 16, at § 32-0 (c).

¹⁷⁶ See AMENDMENTS, *supra* note 16, at § 32-0 (c).

Other provisions limit one adult establishment per zoning lot and placing a 10,000-square foot limit on usable floor area and cellar space.¹⁷⁷ The Amendments impose special restrictions on accessory business signs which partially supersede existing sign provisions in the Zoning Resolution as applied to adult uses.¹⁷⁸ Adult establishment accessory business signs must not exceed 150-square feet per establishment, and may have no more than 50-square feet of illuminated non-flashing signage.¹⁷⁹

Adult establishments that violate the dispersal requirements become non-conforming uses and are subject to an amortization period of one year.¹⁸⁰ The amortization period is designed to “permit the owner gradually to make plans for the future during the period when the owner is allowed to continue the non-conforming uses of property.”¹⁸¹ Both adult establishments and their non-conforming accessory business signs are subject to the one-year amortization period.¹⁸² The amendment provides that “a non-conforming use may not be changed, initially or in any subsequent change, to an adult establishment, except as provided for in Sections 32-01(f) and 42-01(f).”¹⁸³ Furthermore, the Board of Standards and Appeals may hear and grant limited extensions beyond the one-year period where:

- (a) an application is made by the owner of such establishment . . . at least 120 days prior to the date on which such establishment or sign must terminate;
- (b) the Board shall find, in connection with such establishment or sign, that:
 - (1) the applicant had made, prior to the non-conformity, substantial financial expenditures related to the non-conformity; and,

¹⁷⁷ AMENDMENTS, *supra* note 16, at § 32-01(d), (e).

¹⁷⁸ AMENDMENTS, *supra* note 16, at § 32-69.

¹⁷⁹ AMENDMENTS, *supra* note 16, at § 32-69.

¹⁸⁰ AMENDMENTS, *supra* note 16, at § 52-77.

¹⁸¹ AMENDMENTS, *supra* note 16, at § 51-00.

¹⁸² AMENDMENTS, *supra* note 16, at § 52-734, 52-77.

¹⁸³ AMENDMENTS, *supra* note 16, at § 52-38.

- (2) the applicant has not recovered substantially all of the financial expenditures related to the non-conformity; and,
- (3) the period for which such establishment or sign may be permitted to continue is the minimum period sufficient for the applicant to recover substantially all of the financial expenditures incurred related to the non-conformity.¹⁸⁴

B. Zoning in Other New York Municipalities

In 1989, the New York Court of Appeals upheld Islip's dispersal zoning, based in part on Detroit's ordinance.¹⁸⁵ Islip's ordinance allows adult uses in an "Industrial 1 District" only and seeks to prevent concentration by prohibiting them within a 500-foot radius of residential-zoned areas, schools, churches or other places of religious worship, parks, playgrounds or playing fields.¹⁸⁶ Additionally, adult uses must locate at least one-half mile from each other.¹⁸⁷ Adult bookstores, adult drive-in theaters, adult entertainment cabarets, adult motels, adult theaters and peep shows

¹⁸⁴ AMENDMENTS, *supra* note 16, at § 72-40. The Amendments provide further that "financial expenditures" concern the "capital outlay" made to establish the adult use, not the fair market value of the building or property associated with the use, and does not reflect any improvements made which were unrelated to the non-conforming adult use or sign. AMENDMENTS, *supra* note 16, at § 72-40.

¹⁸⁵ See *Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989). The Islip ordinance initially contained a special permit provision which was invalidated and severed by the Appellate Division and not appealed by Islip. *Id.* at 549, 540 N.E.2d at 217, 542 N.Y.S.2d at 141. The Islip ordinance differs from the Detroit and New York City zoning in that it does not define various adult uses in terms of "specified anatomical areas" or "specified sexual activities," but rather characterizes all adult businesses as excluding minors by reason of age. *Id.* at 562-63, 540 N.E.2d at 225, 542 N.Y.S.2d at 149. This obviously did not halt the Court of Appeals from upholding the ordinance. The Islip ordinance also provided a waiver provision by which the special adult use restrictions could be made to not apply. See Appendix B, *infra* pp. 88-91. Islip provided a scaled amortization approach based on the dollar amount of "capital investment" which allowed amortization periods of between one-and-a-half and five-and-a-half years. See *Caviglia*, 73 N.Y.2d at 564, 540 N.E.2d at 226, 542 N.Y.S.2d at 150.

¹⁸⁶ See TOWN OF ISLIP, N.Y. ZONING CODE § 68-341.1 (1980).

¹⁸⁷ *Id.*

are defined in reference to excluding minors by reason of age.¹⁸⁸ Adult massage establishments are differentiated from hospitals, nursing homes, medical clinics or the offices of duly licensed physicians.¹⁸⁹ The Islip ordinance provides an amortization schedule phasing out existing adult businesses based on their "capital investment" and allows the Zoning Board of Appeals to grant exceptions.¹⁹⁰

Other New York municipalities that have adopted dispersal zoning either based on the Detroit or Islip models are Schenectady,¹⁹¹ Babylon,¹⁹² North Tarrytown,¹⁹³ Buffalo,¹⁹⁴ Rochester,¹⁹⁵ Hyde Park,¹⁹⁶ Nyack,¹⁹⁷ Hempstead,¹⁹⁸ and Valley Stream.¹⁹⁹ These presumptively valid dispersal ordinances contain similar language dispersing adult uses, usually into industrial zones away from residences. The Towns of Babylon and Hempstead are

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* Amortization provisions have almost universally been upheld. *See, e.g., Caviglia*, 73 N.Y.2d at 560-61, 540 N.E.2d at 224, 542 N.Y.S.2d at 148.

¹⁹¹ *See* CITY OF SCHENECTADY, N.Y., ZONING CODE § 264-91 (1986). Schenectady adds a special permit requirement, and does not provide amortization periods. *Id.*; *see also infra* notes 316-31 and accompanying text.

¹⁹² *See* TOWN OF BABYLON, N.Y., ZONING CODE, art. XXXI §§ 213 - 381 (1988).

¹⁹³ *See* VILLAGE OF NORTH TARRYTOWN, N.Y., ZONING CODE § 62-22.1 (1994).

¹⁹⁴ *See* CITY OF BUFFALO, N.Y., ZONING CODE §§ 511-4, 511-95 (1996). Buffalo adds an "open booth" requirement, a minimum interior lighting requirement, and an adult use permit requirement. *See infra* notes 315-30 and 360-62 and accompanying text.

¹⁹⁵ *See* CITY OF ROCHESTER, N.Y., ZONING CODE, art. XI §§ 115-56, 115-57, 115-88 (1997).

¹⁹⁶ *See* TOWN OF HYDE PARK, N.Y., ZONING CODE §§ 108-2, 108-19(8), 108-21(8), 108-70(F) (1996). Hyde Park adds provisions prohibiting sound equipment making adult uses audible to the public and aesthetic restrictions on adult use signage and the establishments themselves, such as prohibiting "garish colors," visibility of materials inside an adult use from sidewalks and anything but generic signs. *Id.* at § 108-70(F).

¹⁹⁷ *See* VILLAGE OF NYACK, N.Y., ZONING CODE § 59.18 (1996).

¹⁹⁸ *See* TOWN OF HEMPSTEAD, N.Y., BUILDING ZONE ORDINANCE, art. XXXVII, §§ 383 - 385 (1994).

¹⁹⁹ *See* VILLAGE OF VALLEY STREAM, N.Y., LOCAL LAW 4-1994, §§ 99-240 - 243 (1994).

carbon copies of the Islip ordinance, while the Schenectady ordinance adds language to the definition of adult uses on “specified anatomical areas” and “specified sexual activities.”²⁰⁰ Schenectady will levy up to a one-thousand dollar penalty for any violation of its dispersal or permit requirements. Valley Stream is similar to the Islip ordinance, but differs, as does the Babylon ordinance, in the distances required between adult uses and residential, religious or public or educational uses, and the distances between adult establishments themselves. Distances required between adult and other specified uses are between 500 feet and one-half mile.

Hyde Park enacted adult use regulations in 1996 after preparing a report relying on studies conducted in municipalities across the country to assess the impacts adult uses might have on Hyde Park’s rich history and tourist trade.²⁰¹ While similar to other adult use dispersal zoning, Hyde Park states as its purpose:

to preserve the integrity and character of residential neighborhoods and important natural and human resources of the town, to deter the spread of blight and to protect minors from the objectionable characteristics of these adult uses by restricting their proximity to churches, schools, nursery schools, day-care centers, educational institutions, parks, historic and scenic resources, civic and cultural facilities and residential areas.²⁰²

North Tarrytown’s ordinance contains an expanded purpose section detailing the “objectionable” nature of adult business and its desire to prevent concentration, stating that “the unrestrained proliferation of such businesses is inconsistent with existing

²⁰⁰ See TOWN OF BABYLON, N.Y., ZONING CODE § 213-377 - 81 (1987); TOWN OF HEMPSTEAD, N.Y., BUILDING ZONING ORDINANCE § 383 (1993); CITY OF SCHENECTADY, N.Y., ZONING CODE § 264-91(B) (1986).

²⁰¹ See HYDE PARK STUDY, *supra* note 1, at 21-26.

²⁰² TOWN OF HYDE PARK, N.Y., ZONING CODE § 108-19(8)(a) (1996). Purpose statements of this type generally precede the restrictive provisions of the ordinance and express the local legislative intent behind enacting and enforcing the ordinance. Purpose statements must identify the content-neutral factors, namely the negative secondary effects, and the how those effects constitute a detriment to the municipality.

development and future plans. . . in that [adult businesses] often result in influences on the community which increase the crime rate and undermine the economic, moral and social welfare of the community.”²⁰³ After the United States Supreme Court’s decision in *Barnes v. Glen Theater, Inc.*,²⁰⁴ where Chief Justice Rehnquist’s proposition that enforcement of morality could form a proper basis for limiting free expression was supported by only two Justices, any reliance on morality, or use of the term, may be sufficient to spark a constitutional challenge.²⁰⁵ Similarly, Ossining requires that “unless the applicant and all persons having a substantial connection to the proposed adult use, are of good moral character” no adult use license shall issue.²⁰⁶

Hyde Park, like other municipalities adopting dispersal zoning, provides limited exceptions to the restrictions in the Code. The Town Zoning Board of Appeals may, after an application has been filed, waive the restrictive dispersal provisions if: (1) the proposed use will not be contrary to public interest or injurious to nearby properties; (2) an adult use will not be contrary to any program of neighborhood conservation or improvement in either a residential or nonresidential neighborhood; and (3) 51% or more of the people residing, owning or operating a business within the anti-concentration areas sign a petition stating they have no objection to an adult use in a proposed location.²⁰⁷

The City of Buffalo incorporates operational requirements²⁰⁸ and a permit provision²⁰⁹ in its adult use special regulation.²¹⁰ Adult

²⁰³ VILLAGE OF NORTH TARRYTOWN, N.Y., ZONING CODE 62-22.1 (1994). Since 1994, the Village renamed itself Sleepy Hollow.

²⁰⁴ 501 U.S. 560 (1991).

²⁰⁵ *Id.* at 561-63. See also *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989). In *Caviglia*, Judge Simmons stated “The Town acted to correct the effects of adult uses on the community development, *not on its citizen’s moral development*, and though the legislation enacted to accomplish that purpose has an effect on the express component of respondent’s activity that effect is only incidental.” (emphasis added). *Id.* at 557, 540 N.E.2d at 221, 542 N.Y.S.2d at 146.

²⁰⁶ VILLAGE OF OSSINING, N.Y., CODE § 4-65(E)(1) (1995).

²⁰⁷ *Id.* § 108-19(c).

²⁰⁸ See *infra* notes 361-65 and accompanying text.

²⁰⁹ See *infra* notes 316-31 and accompanying text.

²¹⁰ See CITY OF BUFFALO, N.Y., ZONING CODE § 511-95 (1994).

businesses which offer private viewing of “movies, tapes, slides, pictures or live performance[s] of any kind” must allow the vestibule or booth to be totally unobstructed and accessible from the aisle side, while ensuring that the remaining walls are free of openings.²¹¹ A lighting minimum of ten foot candles is also required. The permit section does not detail any permit requirements except providing the name, address and location of the adult establishment, and allows the Director of Housing to demand “such other information . . . [as] requir[ed].”²¹²

The Village of Nyack and the Town of Mount Kisco ordinances contain similar special permit requirements.²¹³ The Nyack Code requires, as the only prerequisite to obtaining a special permit, (1) no more than one adult use on a lot; (2) no adult uses in a residential building; (3) no residences in a building in which an adult use is established; (4) a 500-foot buffer between the lot lines adult uses; (5) a 200-foot buffer between the lot lines of an adult use and any zoning district that permits residential use; and (6) a 200-foot buffer between the lot lines of an adult use and any “church, community center, funeral home, school, day-care center, hospital, alcoholism center or drug treatment center, counseling or psychiatric treatment facility or public park.”²¹⁴ The Mount Kisco code contains similar special permit requirements, substituting a 1000-foot requirement, and adding school bus stops as a buffered use.²¹⁵

New York City, with 177 adult uses, does not require any type of permit or license. Nyack’s code seems to impose, as a condition to obtaining a special use permit, only those conditions dispersing adult uses which many other municipalities impose without requiring a permit. Mount Kisco, on the other hand, requires dispersal but vests the Planning Board with discretion to “take into consideration the public health, safety and welfare and the comfort and convenience of the public in general” before granting the

²¹¹ *Id.* § (A)(2)(b).

²¹² *Id.* § (A)(3).

²¹³ See VILLAGE OF NYACK, N.Y., ZONING CODE § 59-18 (1992); TOWN OF MOUNT KISCO, N.Y., ZONING CODE § 110-30 (1993).

²¹⁴ VILLAGE OF NYACK, N.Y., ZONING CODE § 59-18 (1992).

²¹⁵ TOWN OF MOUNT KISCO, N.Y., ZONING CODE § 110-46 (1993).

special permit.²¹⁶ Buffalo, meanwhile, provides little indication of what the “Director of Housing and Inspections shall require” for an “Adult use permit” applicant.²¹⁷

Permitting and licensing schemes are often problematic because they are subject to three separate standards.²¹⁸ First, they must not be content-based.²¹⁹ Buffalo’s permit provision is arguably content-based because it identifies only adult uses as requiring a permit.²²⁰ Similarly, in Ossining, adult uses are subject to separate permitting requirements in addition to “all other necessary licenses or permits.”²²¹ Second, permitting and licensing schemes must contain procedural safeguards that ensure a prior restraint of protected speech is not effected.²²² The Buffalo Code, as well as the Mount Kisco code seem to violate a cardinal tenet of prior restraint doctrine, which prohibits “unbridled discretion in the hands of a government official or agency.”²²³ Neither code indicates what factors may be taken into account in addition to the expressed dispersal requirements in denying or conditioning a permit. Buffalo gives no indication, while Mount Kisco uses an ambiguous standard derived from “the comfort and convenience of the public.”²²⁴ Similarly, neither provides a “specified brief

²¹⁶ *Id.*

²¹⁷ CITY OF BUFFALO, N.Y., ZONING CODE § 511-95(A)(3)(1994).

²¹⁸ See *Caviglia*, 73 N.Y.2d at 559-60, 540 N.E.2d at 220, 542 N.Y.S.2d at 145 (noting that zoning regulations are “more compatible with free speech values than a licensing scheme which arguably could present opportunities for the improper exercise of discretion.”). *Id.*

²¹⁹ See *Marty’s Adult World, Inc. v. Enfield*, 20 F.3d 512, 515 (2d Cir. 1994); *Barbulean v. Newburgh*, 168 Misc.2d 728, 734, 640 N.Y.S.2d 935, 938 (Sup. Ct. Orange County 1995) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

²²⁰ See *Barbulean v. Newburgh*, 168 Misc.2d 728, 734, 640 N.Y.S.2d 935, 938 (Sup. Ct. Orange County 1995) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

²²¹ VILLAGE OF OSSINING, N.Y., CODE § 4-65 (1995).

²²² See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990).

²²³ *Id.*

²²⁴ Mount Kisco also allows the Planning Board to “impose any such terms and conditions upon the issuance of the special permit required hereunder as it deems appropriate to further the aims of this [adult entertainment uses] subsection.” See TOWN OF MOUNT KISCO, N.Y., ZONING CODE § 110-30(3)(i) (1994).

period” for review of the application²²⁵ or for “expeditious judicial review” of a denial.²²⁶ Third, permitting and licensing schemes, if they survive the first two standards, must limit themselves to proper time, place and manner restrictions.²²⁷

Other municipalities may encounter judicial challenges to their licensing provisions. North Castle contains permit requirements for both “cabarets” and “adult entertainment cabarets.”²²⁸ While the “adult entertainment cabaret” permit requirements primarily seem to rely on distancing provisions, subsection G provides that the adult use “must meet all other regulations of the Town of North Castle.”²²⁹ However, “cabarets” are subject to a much more rigorous permitting process whereby a denial may be occasioned by the “conviction of a crime.”²³⁰ White Plains deems “ineligible” any applicant for a license who is not “a citizen of the United States” or “of good moral character.”²³¹ Port Chester requires undefined “dance halls and cabarets” to obtain a license by providing “evidence satisfactory to the Clerk that adequate security will be provided.”²³² Port Chester also vests the Building Department and the Chief of Police discretion to “recommend for or against” a license, but does not provide any statutory bases for those determinations.²³³ License denials need not be based not on convictions of the applicant, but only on “police reports filed” showing such things as “disorderly premises” and “[l]ocked exit doors when premises are occupied by a person or persons.”²³⁴ Port Chester’s Code does not provide for prompt judicial review in its “Appeals” section.²³⁵

Ordinances that contain bans on indecency or nudity, such as White Plains’ ban on “boisterous [conduct], prof[anity], obscene or indecent language” and “immodest, lewd or suggestive posture or

²²⁵ *Id.* at 227; see also *infra* notes 316-31 and accompanying text.

²²⁶ See *FW/PBS, Inc.*, 493 U.S. at 227.

²²⁷ *Id.* at 223; see also *Marty’s Adult World, Inc.*, 20 F.3d at 514.

²²⁸ TOWN OF NORTH CASTLE, N.Y., CODE §§ 80-2, 80-31 (1994).

²²⁹ *Id.* § 80-32(E).

²³⁰ *Id.* § 80-5(F)(4).

²³¹ CITY OF WHITE PLAINS, N.Y., CODE § 4-4-28(1) (1966).

²³² VILLAGE OF PORT CHESTER, N.Y., CODE § 165-1 (1993).

²³³ *Id.* § 165-1(D).

²³⁴ *Id.* § 165-1(F)(1).

²³⁵ *Id.* § 165-3.

position [while dancing] which in any way tends to corrupt the public morals," are in need of redrafting.²³⁶ White Plains also prohibits nudity in any premise licensed under its cabaret ordinance.²³⁷ Port Chester bans the "expos[ure] [of] the private or intimate parts of his or her body in a public place."²³⁸ North Castle prohibits the appearance of naked or topless persons in businesses licensed under its Cabarets and Adult Entertainment Code.²³⁹ North Castle also prohibits any person to "conduct himself [sic] in an obscene manner [while dancing]."²⁴⁰ Port Chester prohibits "persons to indulge in dancing that may be construed as unrefined, vulgar, suggestive or immoral."²⁴¹ White Plains prohibits immodest, lewd, or suggestive dancing, or entertainment of a "lewd, suggestive, vulgar or immoral type."²⁴²

Bans on erotic expression protected by the First Amendment risk almost certain invalidation if judicially challenged.²⁴³ The Buchanan Code states that "[a]dult entertainment business uses, as defined herein, shall not be permitted to exist in the Village of Buchanan." Buchanan defines adult uses as adult bookstores or video stores, adult drive-in theaters, adult entertainment cabarets, adult motels, adult theaters, massage establishments and peep shows.²⁴⁴ However, Buchanan justifies its presumptively unconstitutional ban because "the establishment of an Adult Entertainment Business Use within the Village would bring it into close proximity to residential zones . . . [and] provision[s] ha[ve] been made in surrounding communities for such uses, and that such need is being met on a regional basis."²⁴⁵ Buchanan neither defines "close proximity," nor does it establish what type of

²³⁶ CITY OF WHITE PLAINS, N.Y., CODE §§ 4-4-7, 4-4-8, 4-4-11 (1923).

²³⁷ *Id.* at § 4-4-9; *see also infra* notes 307-10 and accompanying text.

²³⁸ VILLAGE OF PORT CHESTER, N.Y., CODE § 227-1 (1993).

²³⁹ *See* TOWN OF NORTH CASTLE, N.Y., CODE § 80-19 (1994); *see also infra* notes 307-10 and accompanying text.

²⁴⁰ *Id.* § 80-15.

²⁴¹ VILLAGE OF PORT CHESTER, N.Y., CODE § 254-12(B) (1993).

²⁴² CITY OF WHITE PLAINS, N.Y., CODE §§ 4-4-8, 4-4-11 (1923).

²⁴³ *See* VILLAGE OF BUCHANAN, N.Y., ZONING CODE § 211-11.L(B) (1995).

²⁴⁴ *Id.* § 211.11.L(C).

²⁴⁵ *Id.* at § 211.11.L(A)(4).

regional agreements, if any, have been made meeting the adult use "need."²⁴⁶

Many municipalities have looked to moratoria as a means of halting adult use proliferation while acceptable zoning standards are studied and promulgated.²⁴⁷ Mamaroneck enacted a moratorium on any "adult-oriented" land uses in 1996. Businesses where a "substantial or significant portion" of their trade derives from the "sale, rental or display of sexually explicit merchandise, services, or entertainment and which must, by law, restrict access . . . to persons age 18 or older" are defined as an "adult use."²⁴⁸ Mamaroneck stated as its purpose a moratorium designed:

to provide the Town's staff adequate time to research, draft and propose amendments to the Town Zoning Code that will prevent the unrestricted and unregulated proliferation of 'adult-oriented' businesses, . . . which by their nature adversely impact both their immediate neighborhood as well as their larger community.²⁴⁹

Mamaroneck states in a "findings" section that "[t]he social decline attributable to the establishment of 'adult-oriented' businesses can, however, be controlled and minimized by careful land use planning."²⁵⁰ The moratorium prohibits the "creation, opening and establishment" of any proposed adult use, and remained in effect until September 15, 1996.²⁵¹ Reviewing or accepting applications for adult uses during the time the moratorium was in effect was prohibited.

Greenburgh enacted a moratorium in 1996, effective for one year, very similar to Mamaroneck. However, Greenburgh expressly recognized adult uses cannot be absolutely prohibited, but sought time to research and draft amendments to their Zoning

²⁴⁶ *Id.*

²⁴⁷ See, e.g., TOWN OF GREENBURGH, N.Y., LOCAL LAW NO. 11/1996 (1996); TOWN OF MAMARONECK, N.Y., LOCAL LAW No. 5-1996 (1996); see also Reporter Dispatch, *Mt. Vernon Delay Risks Suit On Adult Entertainment Zone*, 1998. See also *infra* notes 311-15 and accompanying text.

²⁴⁸ See TOWN OF MAMARONECK, N.Y., LOCAL LAW No. 5-1996 § 1 (1996).

²⁴⁹ *Id.* § 2.

²⁵⁰ *Id.* § 3.

²⁵¹ *Id.* § 4.

Code in order to protect “public safety” and the “nature and character” of the Town.²⁵² Greenburgh recognized the legal conflict, should First Amendment protections be overlooked in an adult use zoning law, and expressly sought to avoid that judicial conflict.²⁵³

Meanwhile, Mt. Vernon has extended its moratorium on adult uses seven times, beginning in August of 1995, to expire on January 12, 1999.²⁵⁴ Although moratoria are legitimate planning tools so long as research and drafting are performed regarding the temporarily prohibited land use, if they can be interpreted as stalling tactics, they can be found invalid.²⁵⁵ When free speech is impacted, moratoria must also conform to time, place and manner requirements.²⁵⁶

Straying too far from well-recognized anti-concentration zoning language may prove problematic. In fact, many adult use ordinances cannot be considered presumptively valid by their terms. Some are recently enacted, while others are decades old. Viewing these types of ordinances emphasizes all the more the importance of a decision like *Stringfellow*'s upholding well-drafted regulations making use of judicially-recognized constitutionally permissible language. New York City's Amendments are an important piece of local legislation of which municipalities should take notice. However, many ordinances, as currently written and if challenged, may not survive judicial scrutiny.

VII. First Amendment Legal Challenges: Adjudicating Local Adult Use Regulations

A. Content-Neutral Land Use Controls

Tensions between protected expression embodied in adult uses and the land use controls used to regulate them have reached both

²⁵² TOWN OF GREENBURGH, N.Y., LOCAL LAW 11/1996 § 3 (1996).

²⁵³ See *id.*

²⁵⁴ See Reporter Dispatch, *Mt. Vernon Delay Risks Suit On Adult Entertainment Zone*, 1998.

²⁵⁵ See *World Stage, Inc. v. Spring Valley, N.Y.* L.J., Mar. 9, 1992, at 34 col. 2 (Sup. Ct. Rockland County).

²⁵⁶ See *id.*; see also *infra* notes 311-15 and accompanying text.

state and federal courts numerous times since *Young v. American Mini Theaters, Inc.* was decided in 1976.²⁵⁷ Content-neutral zoning controls that impose dispersal regulations to prevent clustering successfully withstand First Amendment scrutiny.²⁵⁸ Content-neutrality in adult use zoning is achieved when the ordinance is “justified without reference to the content of the regulated speech.”²⁵⁹

The Court of Appeals decision in *Stringfellow's* is important not only because the affected adult establishments have for decades defined Times Square, but because the high-profile decision upheld “well-entrenched and soundly reasoned” state and federal decisions allowing municipalities to constitutionally regulate the time, place and manner of adult uses.²⁶⁰ In *Stringfellow's*, the court found New York City’s Amendments to be content-neutral because their “predominant purpose”²⁶¹ was removing the negative secondary effects caused by adult uses, and not “a purposeful attempt to regulate speech.”²⁶² In fact, the court found the Amendments’ “only goal” was “ameliorating the consequences of proliferating adult uses,” therefore rejecting appellants’ claims that isolated comments from several City Council members manifested an improper motive to eliminate protected expression.²⁶³ The court noted it previously addressed the issue of alleged improper motive and concluded a zoning ordinance cannot be invalidated “simply because one or more legislators sought to suppress protected

²⁵⁷ See Martin A. Schwartz, *Zoning Out Free Expression*, N.Y.L.J., Apr. 21, 1988, at 3. Schwartz states that adult entertainment operators have prevailed less than 20% of the time usually where dispersal zoning was upheld under a time, place and manner analysis. See *id.*

²⁵⁸ See Brief for Respondent at 38 n.19, *Stringfellow's v. City of New York*, 91 N.Y. 2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (1998).

²⁵⁹ *Caviglia*, 73 N.Y.2d at 556; 540 N.E.2d at 217, 542 N.Y.S.2d at 141.

²⁶⁰ See Armentano, *supra* note 8.

²⁶¹ *Renton*, 475 U.S. at 48.

²⁶² *Stringfellow's*, 91 N.Y.2d at 397, 694 N.E. at 407, 671 N.Y.S. at 414 (quoting *Caviglia*, 73 N.Y.2d at 557). As the *Stringfellow's* court noted, the “predominant purpose” language from *Renton* and the “purposeful attempt standard from *Caviglia* are not significantly different. *Id.*

²⁶³ *Id.* See also *Renton*, 475 U.S. at 48. In *Renton*, the Court, quoting *United States v. O'Brien*, stated: “What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . .” *Id.* (quoting *O'Brien*, 391 U.S. at 383-84).

expression [and that it] is the motive of the Legislature, not individual legislators, that is controlling.”²⁶⁴

Studies conducted by the Times Square Business Improvement District, the Chelsea Action Coalition, the Department of City Planning and other municipalities, compiled and analyzed by the City Planning Commission, provided sufficient evidence of the City’s purpose for enacting the Amendments according to the court.²⁶⁵ Findings such as deflated rates of property value growth, increased crime, patterns of criminal complaints, negative impacts on surrounding businesses and negative perceptions of areas containing adult uses were recognized by the court as satisfying the nexus required between the negative effects adult uses create and the purpose supporting their regulation. The court departed a degree from precedent by fortifying the legitimacy of “non-empirical” anecdotal evidence, adding to that category “reported experience,” but adding the caveat that such evidence is particularly telling “in the proper context,” and when it is “extensive and indicative of a clear relationship between adult uses and urban decay.”²⁶⁶

Under the New York State constitutional principles stated in *People ex rel. Arcara v. Cloud Books, Inc.*, a zoning ordinance implicating First Amendment freedoms must be “no broader than needed to achieve its purpose.”²⁶⁷ That necessity is similar to the federal constitutional standard requiring an ordinance to be “narrowly tailored to affect only those uses shown to produce the unwanted secondary effects.”²⁶⁸ The *Stringfellow’s* court held that the Amendments “protect only those communities and community institutions that are most vulnerable to [adult use] adverse impacts.”²⁶⁹ Appellants challenged the narrowness of the Amendments by insisting that a less restrictive method should have

²⁶⁴ *Stringfellow’s*, 91 N.Y.2d at 397, 694 N.E.2d at 407, 671 N.Y.S.2d at 414.

²⁶⁵ See *Stringfellow’s*, 91 N.Y.2d at 400, 694 N.E.2d at 417, 671 N.Y.S.2d at 416.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 397, 694 N.E.2d at 415, 671 N.Y.S.2d at 414 (quoting *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d at 558).

²⁶⁸ *Id.* (quoting *Renton*, 475 U.S. at 52).

²⁶⁹ *Stringfellow’s*, 91 N.Y.2d at 400, 694 N.E.2d at 417, 671 N.Y.S.2d at 416.

²⁶⁹ *Id.*

been employed by the City.²⁷⁰ Based on the administrative record, the court concluded the City Planning Commission “reasonably determined that the listed alternatives would not adequately address problems it sought to ameliorate.”²⁷¹ CPC’s “listed alternatives” included restricting only new adult uses, regulating only adult use business signs and more aggressive law enforcement tactics aimed at controlling the increased criminal activity documented as attendant to adult uses.²⁷² Even if the “no broader than needed” test means the “least restrictive means” must be implemented to achieve zoning that comports with the First Amendment, the court in *Caviglia* quoted *United States v. Albertini*,²⁷³ stating the “least restrictive means” test requires only “a substantial government interest that would be achieved less effectively absent the regulation.”²⁷⁴ As in *Caviglia*, the Court of Appeals found the City’s adult use regulations “the most appropriate means to address its substantive problems.”²⁷⁵

Appellants also argued the Amendments were broader than needed because they did not distinguish among different types of adult businesses. The court rejected this argument on several grounds. It relied on its own precedent stating “[t]he validity of a statute . . . is not to be determined from its effect in a particular case, but upon its general purpose and its effect to that end.”²⁷⁶ The court affirmed the CPC’s finding that “all of the adult uses which would have been covered by the proposed regulations have been shown to produce adverse secondary effects [and] . . . [n]othing in the studies or in the public testimony justifies distinctive treatment of any adult use.”²⁷⁷ Respondents pointed out in their brief that no other adult use zoning ordinance excluding “upscale” adult

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² See generally CPC REPORT, *supra* note 24, at 57-58.

²⁷³ 472 U.S. 675 (1983).

²⁷⁴ *Caviglia v. Town of Islip*, 73 N.Y.2d 544, 559, 540 N.E.2d 215, 228, 542 N.Y.S.2d 139, 147 (quoting *Albertini*, 472 U.S. 680, 689 (1985)).

²⁷⁵ *Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 228, 542 N.Y.S.2d 139, 147.

²⁷⁶ *Stringfellow’s*, 91 N.Y.2d at 402, 694 N.E.2d at 418, 671 N.Y.S.2d at 417 (quoting *Rochester v. Gutberlett*, 211 N.Y. 309, 316 (1914)).

²⁷⁷ *Id.* (quoting CPC REPORT, *supra* note 24, at 60).

establishments had been cited by appellants.²⁷⁸ Furthermore, federal courts have rejected arguments alleging infirmity based on lack of distinction among adult uses, stating “[s]o long as [the ordinance] affects only categories of business reasonably believed to produce at least some of the unwanted secondary effects, [a municipality] ‘must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.’”²⁷⁹

A final, and most important, issue concerning the availability of alternative sites to which adult uses may permissibly relocate was decided by the court in favor of the City. *Caviglia*, where the same issue was adjudicated, provided the test used in *Stringfellow's*. Under that test, adequate alternative sites exist pursuant to adult use zoning when “ample space [is] available for adult uses after the rezoning,” and there is “no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential customers.”²⁸⁰

The *Stringfellow's* court incorporated a number of factors used by federal courts in determining the adequacy of relocation sites. First, under *Renton*, allowable existing land uses from “raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by highways and roads,” were found to be compatible with relocating adult uses.²⁸¹ Next, the court emphasized that commercially occupied land and undeveloped land not for sale or lease cannot be automatically deemed unavailable as a potential relocation site.²⁸² Profitability of adult businesses in their new locations is not a determinative factor in alternative site analysis,²⁸³

²⁷⁸ See Respondent's Brief at 50, *Stringfellow's v. City of New York*, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (1998).

²⁷⁹ *ILQ Investments, Inc. v. Rochester*, 25 F.3d 1413, 1418 (8th Cir.), cert. denied, 513 U.S. 1017 (1994) (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71); see also *Mitchell v. Comm'n on Adult Entertainment Establishments*, 10 F.3d 123, 1389 (3d Cir. 1993).

²⁸⁰ *Stringfellow's*, 91 N.Y.2d at 402, 694 N.E.2d at 419, 671 N.Y.S.2d at 418 (quoting *Caviglia*, 73 N.Y.2d at 555, 560).

²⁸¹ *Stringfellow's*, at 402, 694 N.E.2d at 418, 671 N.Y.S.2d at 417.

²⁸² *Id.*

²⁸³ See *Renton* at 53 (1986). In *Renton*, the Court emphasized that “speech-related businesses” were to be given no special distinction in the real estate market, and in fact “must fend for themselves” in that arena. *Id.* at 54. Furthermore, such businesses need not be assured they will receive alternative sites at bargain prices, or in prime locations. *Id.* at 53. An adult use zoning

but the court found it must inquire into the “physical and legal availability” of alternative sites and “whether those sites are part of an actual business real estate market.”²⁸⁴ “Actual business real estate market” considerations include: (1) their accessibility to the general public; (2) the surrounding infrastructure; (3) the pragmatic likelihood of their ever becoming available; and (4) the site’s suitability for generic commercial enterprises.²⁸⁵ The court noted these considerations “dovetail[ed] nicely” with state constitutional requirements set forth in *Caviglia*.²⁸⁶

Eighty-four percent of the City’s 177 adult businesses will be forced to relocate to a City-estimated seven percent of the City’s total land area providing at least 500 potential relocation sites for adult uses.²⁸⁷ The court found these facts decisive of an adequate initial showing that alternative sites existed for all 177 adult businesses.²⁸⁸ However, appellants provided the affidavit of a land-use planner which alleged that many of the sites accounted for as being available alternatives by the City were in fact unavailable because they housed long-term occupants such as government and public utility facilities.²⁸⁹ The appellants’ affidavit discounted land and land uses such as industrial areas, undeveloped land, waterfront property, warehouse areas and parking lots. As the court pointed out, however, state and federal courts have explicitly recognized such uses as potential relocation sites.²⁹⁰ Moreover, the court faulted appellants’ affidavit for failing to explain whether the sites it deemed available were insufficient.²⁹¹ In essence, the affidavit, while finding inconsistencies with the availability of some of the land the City counted as sufficiently available, did not seriously call into question the City’s alternative site calculations,

regulation, however, must not effectively deny an adult business a “reasonable opportunity to open and operate” within the boundaries of the municipality so regulating that land use. *Id.* at 54.

²⁸⁴ *Stringfellow’s*, 91 N.Y.2d at 402, 694 N.E.2d at 419, 671 N.Y.S.2d at 418.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 403, 694 N.E.2d at 419, 671 N.Y.S.2d at 418.

²⁸⁸ *Id.*

²⁸⁹ See *Stringfellow’s* 91 N.Y.2d at 403, 694 N.E.2d at 419, 671 N.Y.S.2d at 418.

²⁹⁰ *Id.* at 404, 694 N.E.2d at 419, 671 N.Y.S.2d at 418.

²⁹¹ *Id.*

and therefore did not provide a basis for the court to find an improper restriction on adult business patrons.²⁹²

The adequacy of alternative locations available to adult businesses after dispersal zoning takes effect is currently a significant issue.²⁹³ While the general scheme of dispersal zoning has been repeatedly approved by both federal and state courts, the question of how close *Renton's* five percent of total land figure is to the absolute baseline of permissible available land has been heavily debated. Reliance on extra-municipal studies and anecdotal evidence that establish a government interest are, at this point, well recognized by municipalities, as is the prohibition against targeting the content of adult uses.²⁹⁴ A number of recent cases have examined closely the question of how few alternative sites are too few to satisfy the First Amendment.²⁹⁵

²⁹² *Id. Caviglia* held as indicia of the adequacy of alternative sites whether the total number of adult uses would decline or fewer potential customers would be able to patronize adult establishments due to rezoning. See *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 560, 540 N.E.2d 215, 224, 542 N.Y.S.2d 139, 148 (1989).

²⁹³ The last prong of the *Renton* test is currently the most controversial element of dispersal-type adult use zoning. See James D. Lawlor, *Adult Uses: How Few Are Too Few?*, PLANNERSWEB (visited March 10, 1998) <<http://www.webcom.com/~pcj/columns/plaw.html>>. Lawlor notes that "[m]ost local governments are by now sufficiently well versed in the requirements of the substantial government interest test." *Id. Renton* held that 520 acres, or about five percent of the total land area of the town, was sufficient to satisfy alternative avenues of communication. See *Renton*, 475 U.S. at 53. The Court further held that "the respondents must fend for themselves in the real estate market, on equal footing with other prospective purchasers," thus foreclosing any potential "economic impact" argument. *Id.* at 54.

²⁹⁴ See generally Lawlor, *supra* note 293.

²⁹⁵ See, e.g., *Alexander v. Minneapolis*, 928 F.2d 278, 282-84 (8th Cir. 1991) (holding that ordinance allowing adult uses 6.6 percent of the total area of the town to relocate satisfied the *Renton* test); *North Avenue Novelties, Inc. v. Chicago*, 88 F.3d 441, 445 (7th Cir. 1996) (holding that the First Amendment does not mandate any minimum percentage and rejecting petitioner's claim that the ordinance's roughly one to three percent of land made available to adult uses was unconstitutional); *Young v. Simi Valley*, 977 F.Supp. 1017, 1022 (C.D. Ca. 1997) (holding that based on a 9th Circuit determination that three potential adult use sites within a town was unconstitutionally, four sites allowed by the Simi Valley ordinance were also too few); *Town of Wayne v. Bishop*, 210 Wis.2d 219, 565 N.W.2d 201 (Ct. App. 1997) (holding that Wayne effectively

The court summarily dispensed with appellants' remaining claims in *Stringfellow's*. Regarding the one-year amortization period, the court noted that not only did the Amendments contain a hardship extension, but appellants did not take advantage of that potential relief and were thus in no position to argue that the amortization period constituted a due process violation.²⁹⁶ The Court of Appeals upheld a one-and-one-quarter to five-and-one-quarter-year amortization scheme in *Caviglia*, stating there that when amortization provisions reasonably allow business owners to recapture their investments, they will be upheld.²⁹⁷ The court found not vague the "substantial portion" language, defining what constitutes an adult business, based not only on its sufficient specificity, but the fact that many federal courts have upheld similar zoning language.²⁹⁸

Stringfellow's is an interesting decision based not so much on its application of law to facts, but on the application of law to a land use dispute involving a famous cultural icon. Times Square will be forever altered aesthetically by the Amendments the court upheld. This in itself is a testament to a municipality's ability pursuant to its police power to manage the character and aesthetics of a community. If New York City can reconfigure one of the most well-known crossroads in the world at the local level, then any municipality anywhere should be able to similarly control its destiny. But municipalities must always be aware of the tensions created when zoning impacts First Amendment freedoms. With

banned adult uses by implicitly not designating alternative sites); *but see* *Saddle Brook v. A.B. Family Center, Inc.*, 307 N.J. Super. 16, 704 A.2d 81 (App. Div. 1998) (holding that a New Jersey State law requiring a 1,000-foot buffer zone between adult uses, which effected a total ban in Saddle Brook, was not unconstitutional because the law did not recognize municipal boundaries, and adult uses could locate outside those boundaries).

²⁹⁶ See *Stringfellow's*, 91 N.Y.2d at 405, 694 N.E.2d at 420, 671 N.Y.S.2d at 419.

²⁹⁷ See *Caviglia*, 73 N.Y.2d at 561, 540 N.E.2d at 224, 542 N.Y.S. at 148. The court in *Caviglia* further stated that reasonableness was to be determined "by examining all the facts, including the length of the amortization period in relation to the investment and nature of the use." *Id.* Amortization periods are presumptively valid unless the business owner demonstrates the loss suffered outweighs the public benefit gained by the municipality's exercise of police power. *Id.*

²⁹⁸ *Stringfellow's*, 91 N.Y.2d at 405, 694 N.E.2d at 420, 671 N.Y.S.2d at 419.

adult use zoning, the lines are clearly drawn. Wide-spread community opposition to adult businesses and their negative secondary effects are easily identifiable and quantifiable. The most significant contribution *Stringfellow's* made to adult use regulation was its elevation of anecdotal and reported experience commentary. In a sense, the deck is stacked against adult uses because citizens' First Amendment rights to speak out against adult uses are consolidated with a municipality's right to zone for the health, safety and welfare of its public.

Otherwise, *Stringfellow's* follows obediently both federal and state precedent allowing the regulation of adult uses. While the City's efforts at creating a substantial record justifying the Amendments without reference to expression found in adult uses should be applauded, municipalities around the country, especially after *Stringfellow's*, should be able to couch any distaste for adult use content in quality of life terms.²⁹⁹ As the court in *Stringfellow's* recognized, there are countless examples of adult use dispersal zoning both in municipal codes and in court records. The court was presented with a clear ordinance based in part on the zoning it had upheld in *Caviglia*, and an impressive factual record prepared by the City Planning Commission. The court used the CPC Report as an opportunity to distinguish zoning backed by nothing more than extra-municipal studies from ordinances drafted after preparation of a municipality's own studies, which may or may not take into account other studies. This may turn out to be significant in future adult use zoning litigation where an adult use owner/plaintiff claims to be unfairly regulated by an ordinance created without the preparation of any independent study.

B. Other Challenges to Adult Use Zoning

Absolute bans on adult uses are arguably the easiest to challenge in court on First Amendment grounds. Bans are generally in the form of public indecency statutes which proscribe public nudity or lewd conduct.³⁰⁰ Where bans on nudity are targeted at specific

²⁹⁹ See Schwartz, *supra* note 257 at 3.

³⁰⁰ See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991). However, a plurality in *Barnes* ruled that a total ban on all nudity was constitutionally permissible because the government's interest in maintaining welfare and

locations such as adult businesses or other licensed premises, an impermissible infringement on protected First Amendment expression results because dancers convey their protected erotic message through nude dancing.³⁰¹ Similarly, bans that prohibit an overly broad amount of conduct inclusive of expression protected by the First Amendment are unconstitutional.³⁰² Bans may be effectuated by enacting restraints on conduct that incidentally burdens free expression, such as the public nudity statute at issue in *Barnes*.³⁰³ However, bans are generally not favored by courts as a way of controlling adult uses.

Where municipalities are troubled by the prospect of adult uses, moratoria may be used to temporarily halt new adult businesses in certain areas. Generally, where moratoria are reasonable in scope and time, courts will find them valid zoning tools.³⁰⁴ However, where moratoria effectively ban free expression embodied in certain land uses such as adult businesses, they violate principles of permissible time, place and manner restrictions.³⁰⁵ The purpose of moratoria in a zoning context is to enable municipalities time to study, revise or enact legislation while maintaining the status quo

morals of society furthered by the ban outweighed incidental burdens on protected nude dancing where pasties or lingerie could be worn by dancers and the erotic message's integrity could be maintained. *Id.* at 569. While eight of the nine Justices held that nude dancing was a protected form of speech, only three agreed that morality was a proper government interest justifying burdens on protected speech. *Id.* at 561-63.

³⁰¹ See *Nakatomi Investments, Inc. v. Schenectady*, 94 F. Supp. 988, 999-1000 (N.D.N.Y. 1997) (holding that banning topless dancing based on a "distasteful erotic message" was unconstitutional).

³⁰² See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

³⁰³ However, as seen in *Barnes*, a statewide ban, or municipality-wide ban for that matter, on public nudity is problematic, as well as impermissible under some state constitutions with expanded free expression protections. See *Triplett Grille, Inc. v. Akron*, 40 F.3d 129 (6th Cir. 1994) (stating that interpreting *Barnes* was like "reading tea leaves").

³⁰⁴ See *World Stage, Inc. v. Spring Valley*, Mar. 4, 1992 N.Y. L.J., at 34 col. 2 (Sup. Ct. Rockland County) (citing *Matter of Golden v. Planning Bd.*, 30 N.Y.2d 359 (1972), *cert. denied*, 409 U.S. 1003 (1972)).

³⁰⁵ See *World Stage, Inc. v. Spring Valley*, Mar. 4, 1992 N.Y. L.J., at 34 col. 2 (Sup. Ct. Rockland County); *Schneider v. City of Ramsey*, 800 F.Supp. 815, 823 (D. Minn. 1992).

as planning proceeds toward a comprehensive plan.³⁰⁶ But moratoria, which either directly or incidentally affects free speech and expression, are subject to the same scrutiny as zoning laws that regulate land uses embodying protected speech. Thus, the predominate purpose of a moratorium must not be to control the content of regulated material, but to serve a substantial government interest and be narrowly tailored to achieve that interest. Reasonable alternative avenues of communication must also be allowed for.³⁰⁷ A moratorium that places an outright or effective ban on adult uses will likely be invalidated. Furthermore, an adult business existing at the time a moratorium is enacted and later found to be unconstitutional may be able to collect damages, under federal or state civil rights laws, caused by forced closure to avoid criminal prosecution.³⁰⁸

Many adult use regulations contain licensing or permitting provisions. Licensing provisions are generally not part of a local zoning ordinance, while special permits, special exceptions or nonconforming use permits are zoning tools. However, special permits are obtained pursuant to procedures similar to licenses and are therefore subject to similar prior restraint challenges.³⁰⁹ In order for licensing or permitting schemes to escape prior restraint classification amounting to censorship of protected speech, they

³⁰⁶ See *World Stage, Inc.*, Mar. 4, 1992 N.Y. L.J., at 34 col. 2.

³⁰⁷ *Schneider v. City of Ramsey*, 800 F. Supp. 815, 823 (D. Minn. 1992).

³⁰⁸ *Id.* at 823-824. In *World Stage, Inc.*, the Supreme Court, Rockland County, found a 180-day moratorium had the "immediate effect" of an unconstitutional taking, although only declaratory relief was given by the court because petitioner was not deprived of all economic use. See *World Stage, Inc.*, Mar. 4, 1992 N.Y. L.J., at 34 col. 2.

³⁰⁹ See generally *Freedman v. Maryland*, 380 U.S. 51 (1965); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990); 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988 (4th Cir. 1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995); *Grand Britain, Inc. v. Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *Specialty Malls of Tampa v. Tampa*, 916 F. Supp. 1222 (M.D. Fla. 1996); *Barbulean v. Newburgh*, 168 Misc.2d 728, 640 N.Y.S.2d 935 (Sup. Ct. Orange County 1995); *Marcus v. Henrietta*, 207 A.D.2d 1026, 616 N.Y.S.2d 845 (4th Dep't 1994); *Islip v. Caviglia*, 141 A.D.2d 148, 532 N.Y.S.2d 783 (2d Dep't 1989), *aff'd*, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215 (1989).

must not allow unlimited discretion on the part of the issuing official or agency,³¹⁰ and must provide procedural safeguards.³¹¹

Specifically, licensing and permitting provisions have been challenged for lacking narrowly drawn standards by which local governments may approve or deny permits.³¹² Licensing and permitting standards that are not “narrow, objective and definite” are likely to be found unconstitutional as prior restraints engendered by unlimited discretion allowing ad hoc or subjective judgments.³¹³ For example, licensing and revocation standards that allow consideration of whether an adult business owner has shown “an inability to operate or manage a sexually oriented business in a peaceful or law abiding manner” have been found impermissibly vague and vesting too much discretion in those authorized to enforce the standard.³¹⁴ Language in a provision that required

³¹⁰ See generally *FW/PBS, Inc.*, 493 U.S. at 225-26 (licensing schemes which dispose “unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship”) (citations omitted); *11126 Baltimore Blvd.*, 58 F.3d at 996 (failure to impose adequate standards for officials to apply in rendering licensing decisions may create a prior restraint); *Barbulean*, 168 Misc.2d at 738-45, 640 N.Y.S.2d at 942.

³¹¹ See *Freedman*, 380 U.S. at 58-60 (articulating the three-part procedural safeguard test repeatedly used adult use cases analyzing prior restraints).

³¹² Challenges to the narrowness of discretionary standards in licensing and permitting schemes may create corollary void for vagueness and improper time, place and manner challenges. See *Barbulean*, 168 Misc.2d at 739, 640 N.Y.S.2d at 944. In *Barbulean*, the court held that “[p]recision of regulation must be the touchstone” with regard to enumerated standards governing issuance of permits so that citizens may have fair warning and act accordingly. *Id.* at 740-41, 640 N.Y.S.2d at 945. The City of Newburgh had promulgated twelve standards to which the Zoning Board of Appeals was to give consideration “among other things [or] to any or all [of the standards] as they may be appropriate.” *Id.* The court found that the factors did not restrict or control unfettered discretion by the Board, nor did they limit the ability to make ad hoc decisions which could breed censorship. *Id.* at 744-45, 640 N.Y.S.2d at 948.

³¹³ See *Barbulean*, 168 Misc.2d at 742, 640 N.Y.S.2d at 947 (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969)); see also *Marcus*, 207 A.D.2d at 1026-27, 616 N.Y.S.2d at 676; *Caviglia*, 141 A.D.2d at 166, 532 N.Y.S.2d at 1026.

³¹⁴ See *East Brooks Books*, 48 F.3d at 227 (holding that the provision provided “no criteria” to determine what was meant by “necessitating action by law enforcement officers” or “a “demonstrated inability” to operate an adult business).

“good moral character,” was also found to vest excessive discretion in those authorized to issue permits.³¹⁵

Procedural safeguards fall into three categories. First, “any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained.”³¹⁶ Second, a quick and direct avenue to judicial review of the decision must be available.³¹⁷ And third, the official or agency suppressing protected speech by refusing the license or permit bears the burden of going to court, and bears the burden of proof once in court.³¹⁸ Regulations must provide for issuance decisions, inspections,³¹⁹ administrative appeals and judicial review

³¹⁵ *Barbulean*, 168 Misc.2d at 744, 640 N.Y.S.2d at 947 (quoting *Bayside Enters. v. Carson*, 450 F. Supp. 696, 707 (M.D. Fla. 1978)).

³¹⁶ *FW/PBS, Inc.*, 493 U.S. at 227 (quoting *Freedman*, 380 U.S. at 58-60).

³¹⁷ *FW/PBS, Inc.*, 493 U.S. at 226 (citing *Freedman*, 380 U.S. at 58-60). Prompt judicial review in a zoning context has been held to not merely mean review of final administrative decisions via a common law writ of certiorari, but as a guarantee of judicial review upon within the licensing or permitting scheme upon denial of a license or permit. *See also East Brooks Books*, 48 F.3d at 225 (holding that combined administrative and judicial delays of five months via non-statutory judicial review was impermissible); *11126 Baltimore Blvd.*, 58 F.3d at 1001 (holding that three and four months before judicial review is unacceptable, while sixty days is acceptable, and that, while the circuits are split as to whether common law judicial review is adequate under *Freedman*, *FW/PBS, Inc.* did not weaken *Freedman*'s prompt judicial review requirement); *Grand Brittain*, 27 F.3d at 1070-71 (upholding as meeting the “specified brief period” requirement an Amarillo, TX ordinance providing direct and immediate access to the district court and also requiring a licensing decision within eleven days, re-inspection within three working days, and issuance of a license within a day after correction of any deficiencies in an application).

³¹⁸ *FW/PBS, Inc.*, 493 U.S. at 227. However, the Court in *FW/PBS, Inc.* reasoned that the third prong of *Freedman* need not be applied in the case at bar because the ordinance was content-neutral and that the adult use owner had a business interest in obtaining judicial review, thus the third prong was not essential to protect free expression. *Id.* at 229-30. Only three Justices joined in this opinion, thus leaving the continued application of the third *Freedman* prong subject to speculation. *See 11126 Baltimore Blvd.*, 58 F.3d at 996 n. 12. The Court in *FW/PBS, Inc.* deemed the first two prongs of *Freedman* “essential.” *FW/PBS, Inc.*, 493 U.S. at 228.

³¹⁹ In *FW/PBS, Inc.*, the Court invalidated an ordinance which made adult use licenses contingent on health, fire and building inspections yet did not provide a time frame within which those inspection were to be carried out, and furthermore required the owner of the business to contact the respective agency for an inspection appointment. *See FW/PBS, Inc.*, 493 U.S. at 227.

to occur in a reasonable amount of time because indefinite delays result in prior restraints which suppress protected speech.³²⁰ Courts have held that 150 days is an unreasonable amount of time for a zoning permit or license decision to be made.³²¹

Furthermore, licensing and permitting schemes, whether part of a zoning ordinance or not, must contain procedural safeguards even if the remainder of the ordinance contains valid time, place and manner restrictions on adult uses.³²² Zoning restrictions that prescribe otherwise constitutionally valid time, place and manner controls on adult businesses must nevertheless comply with the procedural safeguards in *Freedman v. Maryland*.³²³ Therefore, zoning regulations containing dispersal and other requirements that also subject adult uses to permits must contain narrow, objective

³²⁰ Courts have struggled with how to determine a "reasonable period of time." *11126 Baltimore Blvd.*, 58 F.3d at 997 (quoting *FW/PBS, Inc.*, 493 U.S. at 228). Generally, courts will examine the type of license or permit to be judged by local governments and the hardship imposed on the applicant. See *11126 Baltimore Blvd.*, 58 F.3d at 997. The Fourth Circuit has held that "the determination concerning the licensing or zoning of an adult bookstore . . . entails a scrutiny of a greater variety of factors." *Id.*; see also *East Brooks Books*, 48 F.3d at 224-26.

³²¹ See *11126 Baltimore Blvd.*, 58 F.3d at 997.

³²² In *FW/PBS, Inc.*, the Court reversed the 5th Circuit's holding that the *Freedman* procedural safeguards withstood a constitutional challenge by being less important where procedures regulate a commercial enterprise's "ongoing commercial conduct." *FW/PBS, Inc.*, 493 U.S. at 222 (quoting *FW/PBS, Inc. v. Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988)). The Court made clear that otherwise valid zoning restrictions which require either licenses or permits must be analyzed as a prior restraint to determine whether the issuing body possesses unchecked discretion, and whether the *Freedman* procedural safeguards have been met. See *11126 Baltimore Blvd.*, 58 F.3d at 995 (quoting *FW/PBS, Inc.*, 493 U.S. at 227-28).

³²³ 380 U.S. 51 (1965). Contrary to the arguments of Chief Justice Rehnquist and Justice White in *FW/PBS, Inc.*, the *Freedman* procedural safeguards apply to licensing or permitting schemes standing alone or contained within zoning regulations, although the scheme may be part of the overall time, place and manner restrictions. See *11126 Baltimore Blvd.*, 58 F.3d at 996. Licensing or permitting requirements deemed prior restraints may be severed from the remaining ordinance if the ordinance, by its terms, allows for severability. See *FW/PBS, Inc.*, 493 U.S. at 230.

and definite procedural standards for determining whether a permit should issue.³²⁴

Where an adult use becomes a non-conforming use under a recently enacted zoning regulation, many municipalities offer amortization periods as part of the adult use controls. In New York, there is a presumption that amortization periods are valid unless the owner can demonstrate that the loss caused by the zoning is so substantial that it outweighs the public benefit gained by the exercise of police power in enacting the ordinance.³²⁵ Where owners have vested rights in property they are being zoned out of, amortization periods allowing recoupment of investment in the property will be upheld if the period is reasonable.³²⁶ Amortization periods from ninety days to five-and-a-quarter years have been upheld.³²⁷ Furthermore, challenges to amortization periods where statutory hardship extensions allow further recoupment opportunity will be discounted where advantage has not been taken of the extensions.³²⁸

C. Overbreadth & Vagueness Challenges

Generally, overbreadth challenges go to the precision of a statute and vagueness challenges take issue with a statute's clarity. These types of challenges have attacked the language of both zoning and

³²⁴ A narrow exception to this is where an ordinance requires a special permit when any land use changes from retail to entertainment. See *Marty's Adult World v. Enfield*, 20 F.3d 512 (2d Cir. 1994). In *Marty's*, the court held that because the ordinance did not target businesses required to obtain permits by their content, the provision did not constitute a licensing scheme and was therefore not subject to the *Freedman* procedural requirements. *Id.* at 515. The zoning district in which the adult use existed could itself be considered an "alternative" location for purposes of time, place and manner analysis under *Renton* because the town could not deny a permit based on the content of the adult use applicant. See *id.*

³²⁵ See *Cavaglia*, 73 N.Y.2d at 561; *Northend Cinema, Inc. v. Seattle*, 90 P.2d 1153, 1159-60 (Wash. 1978).

³²⁶ See *id.*; see also *Brookhaven v. FPD Tavern Corp.*, 226 A.D.2d 625, 641 N.Y.S.2d 387 (2d Dep't 1996).

³²⁷ See *Northend Cinema* 90 P.2d at 1156; *Cavaglia*, 73 N.Y.2d at 560-61.

³²⁸ See *Stringfellow's*, 91 N.Y.2d at 385, 694 N.E.2d at 414, 671 N.Y.S.2d at 413.

non-zoning adult use controls. In *Schad v. Borough of Mt. Ephraim*,³²⁹ a local zoning ordinance prohibited “live entertainment” anywhere within the borough.³³⁰ The owner of an adult bookstore, which also featured live nude dancers behind glass, challenged the ordinance as overbroad.³³¹ The Court agreed with the owner by finding that the total exclusion of live entertainment impermissibly banned non-obscene nude dancing protected by the constitution.³³² The Court reasoned further that no secondary effects were shown supporting any contention that nude dancing establishments contributed disproportionately to negative effects.³³³

Courts have upheld language in adult use zoning regulations, which has appeared with regularity after *American Mini Theaters, Inc.* was decided. In *ILQ Investments, Inc. v. Rochester*,³³⁴ the court found not vague language defining adult bookstores as committing a “substantial or significant portion” to pornography.³³⁵ The court found not overbroad language defining adult establishments as “characterized by an emphasis” on sexually explicit activities, noting that such language has been widely used since the Supreme Court’s decision in *American Mini Theaters, Inc.*³³⁶

Non-zoning restrictions having impacts on adult businesses have been challenged as overbroad and vague. In *Doran v. Salem Inn*,

³²⁹ 452 U.S. 61 (1981).

³³⁰ *Id.* at 76-77.

³³¹ *Id.* at 68.

³³² *Id.* at 72-73.

³³³ *Id.*

³³⁴ 25 F.3d 1413 (8th Cir. 1993).

³³⁵ *Id.* at 1419 (8th Cir. 1994) (stating that “substantial portion” language is widely used in the United States Code); *see also Stringfellow’s*, 91 N.Y.2d at 385, 694 N.E.2d at 414, 671 N.Y.S.2d at 413. (quoting *ILQ Investments* and upholding “substantial portion” language as not vague when used to define commercial establishments as adult businesses); *but see Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987) (affirming an injunction against the County where it was challenged on vagueness grounds based on showing only one adult film rendering the theater an adult business because no secondary effects could justify enforcing the ordinance on a theater presenting a single showing of an adult film).

³³⁶ *ILQ Investments, Inc.*, 25 F.3d at 1419; *see also Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153, 1157 (Wash. 1978).

Inc.,³³⁷ the Supreme Court found that a local ordinance prohibiting a female from appearing “in any public place” with uncovered breasts was overbroad because it did not limit its ban on nudity to bars that featured topless dancing.³³⁸ Therefore, because non-obscene nude dancing is protected under the First Amendment, the broad sweep of the ordinance warranted injunctive relief for the bar owner.³³⁹ In *Looker’s, Inc. v. City of Syracuse*,³⁴⁰ the court found not overbroad a city zoning ordinance stating that “no person shall appear within the city in a state of nudity.”³⁴¹ The court found not vague the definition of “strippers” because the meaning was clear from the ordinance as a whole.³⁴²

Adult business owners have challenged “touching” ordinances as vague and overbroad.³⁴³ “No touch” ordinances have been upheld as neither vague nor overbroad where the challenge has been to the potential criminalization of unintentional touching.³⁴⁴ In *Hang On, Inc. v. City of Arlington*,³⁴⁵ the City made it a criminal offense for an employee to touch a customer while the employee was “in a state of nudity.”³⁴⁶ Customers likewise committed a criminal offenses if they touched employees in a state of nudity.³⁴⁷ The topless bar challenged the ordinance on overbroad grounds because it criminalized casual or inadvertent touching, and on vagueness grounds because the ordinance did not define “touches.”³⁴⁸ The Fifth Circuit determined that “intentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself.”³⁴⁹ Similarly, patrons of topless establishments

³³⁷ 422 U.S. 922 (1975).

³³⁸ *Id.* at 933.

³³⁹ *Id.*

³⁴⁰ 813 F. Supp. 133 (N.D.N.Y. 1993).

³⁴¹ *Id.* at 143-45.

³⁴² *Id.*

³⁴³ See *Hang On, Inc. v. Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995).

³⁴⁴ *Id.* at 1254-55; see also *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (upholding similar no-touch restrictions for the purpose of preventing prostitution, drug dealing and assault).

³⁴⁵ 65 F.3d 1248 (5th Cir. 1995).

³⁴⁶ *Id.* at 1251.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 1253.

possess no First Amendment right to touch or tip dancers³⁵⁰ and waitresses, bartenders and hostesses in topless bars enjoy no First Amendment right to work in the nude.³⁵¹ The court rejected the topless bar's overbreadth challenge by holding it did not burden more speech than necessary and was correctly based on the "substantial interest in preventing the demonstrated likelihood of prostitution."³⁵²

D. Non-Zoning Controls of Adult Businesses

A variety of non-zoning adult use controls have been implemented by municipalities, and as with zoning regulations, have been challenged on First Amendment grounds. Non-zoning controls are those that do not use locational restrictions on commercial establishments, but rather utilize a municipality's police power to protect public safety through public health, nuisance, and liquor regulations. Non-zoning controls, like zoning regulations, are permissible where they seek to regulate the time, place and manner of adult uses.³⁵³

Non-zoning controls fall into three broad categories. The first are operational controls. These may include "open booth"³⁵⁴

³⁵⁰ *Id.* at 1253-54.

³⁵¹ *Id.*

³⁵² *Id.* at 1255 (quoting *KEV, Inc. v. Kitsap County*, 793 F.2d 1053, 1061 n.11 (9th Cir. 1986)).

³⁵³ See *Matney v. Kenosha*, 86 F.3d 692, 695, 696 (7th Cir. 1996) (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). *Matney* cited *Ward*, which in turn relied upon the time, place and manner analysis in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *Clark* was relied upon by the *Renton* Court in upholding adult use zoning regulations, which additionally relied on *Schad* for the proposition that the zoning restriction be narrowly tailored to further the substantial government goal in mind. See *Renton*, 475 U.S. at 50-52. Courts have recognized that the time, place and manner tests in *O'Brien* and *Clark*, and thus in *Ward* and *Renton*, are virtually the same. See *East Brooks Books*, 48 F.3d at 226 (citing *Clark*, 468 U.S. at 298); see also *Doe v. Minneapolis*, 898 F.2d 612, 616 (8th Cir. 1990); *Mitchell v. Delaware*, 10 F.3d 123, 131 n.7 (3d Cir. 1993). Therefore, the time, place and manner analysis is virtually the same with regard to either zoning or non-zoning controls of adult uses.

³⁵⁴ Open booths are a type of fully enclosed booth used for viewing peep shows which have been defined as "[a] theater which presents material in the form of live shows, films or videotapes viewed from an enclosure for which a

requirements, limits on hours of operation and contact between patrons and topless or nude performers. The second category is based on a state's power to enforce nuisance regulations. The third category derives from a state's power under the Twenty-First Amendment to regulate the sale of intoxicating beverages. All three categories have been challenged on First Amendment grounds that they are content-based, that the regulations are not based on significant government concerns or that they are not narrowly tailored to further a substantial government interest.

Generally, operational controls will be upheld pursuant to a municipality's police power to protect public health and welfare. A long line of cases has upheld "open booth" requirements.³⁵⁵ However, because the New York State Constitution has been found to incorporate more expansive protection of free expression, especially in the arts, open booth requirements have been successfully challenged as being broader than necessary to further government's substantial interest in preventing the spread of AIDS and other diseases.³⁵⁶ Similarly, "touching" restrictions have

fee is charged and which excludes any minor by reason of age." TOWN OF HYDE PARK, N.Y., ZONING CODE § 108-2(B)(4) (1996). An open booth requirement usually states "[e]ach booth shall be totally accessible to and from aisles and public areas of the [adult] establishment" and further that "[a]ccess to a booth shall be unrestricted by doors, locks or other control-type devices." CITY OF BUFFALO, N.Y., ZONING CODE § 511-95(A)(2)(a) (1994).

³⁵⁵ An "open both" requirement is one which forces an adult use operator providing booths for viewing erotic videos or isolated dancers to maintain one side of the booth open and facing a lighted public aisle. See *Matney*, 86 F.3d at 694-95. These regulations have been consistently upheld as valid time, place and manner restrictions. See, e.g., *Minneapolis*, 898 F.2d at 617; *Bamon v. Dayton*, 923 F.2d 470, 474 (6th Cir. 1991); *Mitchell*, 10 F.3d at 144.

³⁵⁶ See *Time Square Books, Inc. v. Rochester*, 223 A.D.2d 270, 274-77, 645 N.Y.S.2d 951 (4th Dep't 1996). *Times Square Books* court held that under *Arcara*, the New York Constitution requires regulations to be no broader than necessary to achieve government goals, unlike *Ward* which held that, under the federal constitution, the government need not adopt the least restrictive means in order to effectuate a narrowly tailored restriction. See *Ward*, 491 U.S. at 798-99; *Times Square Books*, 223 A.D.2d at 276-77, 645 N.Y.S.2d at 955. The court in *Times Square Books* found that, given the paucity of facts presented by the City that (a) less restrictive alternatives to open booths would be any less effective in meeting their objectives and (b) that high risk sexual contact actually occurred in the closed booths, the closed booth requirements were broader than necessary to meet the goals of preventing AIDS and other diseases. *Id.*

consistently been upheld.³⁵⁷ The purpose of such controls focuses on the threat of AIDS and other sexually transmitted diseases as being negative secondary effects of adult uses, and thus subject to limitation or proscription.³⁵⁸ No First Amendment right exists to touch or fondle an erotic dancer, nor does an “expressive privacy right” exist to view erotic materials in commercial adult establishments.³⁵⁹ Restrictions on hours of operation have also been upheld as valid time, place and manner regulations.³⁶⁰

The second and third categories are state-employed controls on adult uses. Nuisance actions have been used by states to close adult uses when the use presents an unreasonable interference with a common right in the form of a significant threat to public

However, the court acknowledged that virtually every open booth requirement challenged had been upheld. *Id.* at 273-74, 645 N.Y.S.2d at 953. Furthermore, that their decision was only a showing of the likelihood of success on the merits supporting a temporary injunction. *Id.* at 278, 645 N.Y.S.2d at 958.

³⁵⁷ “Touching” restrictions are generally challenged on First Amendment grounds in cases by owners of adult establishments featuring live performances. See *KEV, Inc.*, 793 F.2d at 1055. While the court in *KEV, Inc.* did not specifically hold that touching between patrons was not protected by the First Amendment, it did hold that such a restriction only served as an incidental burden on any erotic message being conveyed between patron and dancer or vice versa. *Id.* at 1061-62. However, the Fifth Circuit has held that “patrons have no First Amendment right to touch a nude dancer.” *Hang On, Inc.*, 65 F.3d at 1253. The court in *Hang On, Inc.* upheld an ordinance prohibiting all “touching” between patrons and employees, although the ordinance was limited by Texas law requiring a culpable mental state, thus exculpating patrons or employees whose touching was incidental. *Id.* at 1254-56.

³⁵⁸ With reference to the time, place and manner analysis, operations restrictions must not be directed at the content of the speech based on “disagreement with the message it conveys.” See *Matney*, 86 F.3d at 696 (citing *Ward*, 491 U.S. at 791). The purpose of open booth and touching restrictions, however, are usually found to be valid based on a stated purpose to control unwanted secondary effects such as AIDS, prostitution, and unsanitary or unhealthy conditions. See *Matney*, 86 F.3d at 696; *Minneapolis*, 898 F.2d at 617; *Bamon*, 923 F.2d at 473-74; *Mitchell*, 10 F.3d at 140.

³⁵⁹ See *Matney*, 86 F.3d at 698-99; *Minneapolis*, 898 F.2d at 615 n. 11; *Bamon*, 923 F.2d at 474.

³⁶⁰ In *Mitchell*, the Third Circuit upheld restrictions on an adult businesses’ hours of operation which allowed them to operate twelve hours per day for six days a week (10 a.m. to 10 p.m.), excluding Sundays and official holidays. See *Mitchell*, 10 F.3d at 139.

health.³⁶¹ States have attempted to use their authority under the Twenty-First Amendment to restrict topless and nude dancing where alcohol is served. While the Supreme Court has recognized that states have absolute power under the Twenty-First Amendment to regulate the “times, places and circumstances under which liquor may be sold,”³⁶² thus effectively permitting bans on topless dancing where alcohol is served, New York courts have held that statutory bans on topless dancing by the New York State Liquor Authority under its Twenty-First Amendment power are prohibited by the New York State Constitution.³⁶³

Both zoning and non-zoning controls are subject to selective enforcement challenges. Selective enforcement is the application of an otherwise impartial law with “an evil eye and unequal hand.”³⁶⁴ In *People v. Hempstead Video, Inc.*, the owners of an adult bookstore claimed selective enforcement when the town imposed a sixty-day moratorium on issuing mercantile permits to adult businesses.³⁶⁵ The defendant continued to operate its adult business and was issued criminal summonses imposing fines on an almost daily basis.³⁶⁶ The defendant claimed the infrequently-used

³⁶¹ See *Preate v. Danny's New Adam & Eve Bookstore, Inc.*, 155 A.2d 119 (Pa. Commw. Ct. 1993) (upholding a preliminary injunction forcing a bookstore containing video viewing, or peep booths, to close because illegal sexual activity that led to the spread of AIDS and other diseases occurred on the premises); *But see* *People ex. rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 558, 503 N.E.2d 492, 495, 510 N.Y.S.2d 844, 847 (1986) (holding that under the New York State Constitution, a public nuisance action seeking an injunction to close a bookstore in which illegal sexual activity was witnessed was not proved by the state to be “no broader than needed to achieve its purpose,” and thus denied).

³⁶² *Bellanca*, 54 N.Y.2d at 233 (quoting *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981)).

³⁶³ See *Bellanca*, 54 N.Y.2d at 235-36; see also *Jay-Jay Cabaret, Inc. v. N.Y.*, 164 Misc.2d 673, 629 N.Y.S.2d 937 (Sup. Ct. N.Y. County 1994) (invalidating a “six-foot rule” by holding that the State Liquor Authority lacked general statutory authority to promulgate the no-fault rule which would be prima facie violated by a “topless dancer standing within [six] feet of a blind patron” (emphasis in original)).

³⁶⁴ *People v. Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at col. 3 (Justice Ct. Village of Valley Stream 1994), *appeal denied*, 87 N.Y.2d 922, *rev'd on other grounds*, N.Y. L.J., Nov. 22, 1995. (2d Judicial Dep't Nassau County 1995) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1885)).

³⁶⁵ See *People v. Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at col. 3.

³⁶⁶ *Id.*

mercantile permit law had been enforced with both an “evil eye and an unequal hand.”³⁶⁷ The court found, *inter alia*, that showing non-enforcement of others similarly situated and the “conscious exercise of some selectivity in enforcement” is insufficient to prove selective enforcement.³⁶⁸ Furthermore, unequal enforcement may be justified by “police resources . . . the seriousness of the violation, and effective deterrence.”³⁶⁹ Courts have found that proving a selective enforcement claim is difficult because the unequal enforcement must be based on a “constitutionally impermissible standard or arbitrary classification.”³⁷⁰

VII. Conclusion

Addressing community, business and real estate concerns regarding urbanization and blight may be accomplished through land use controls directed at the source of the negative secondary effects. However, land use restrictions may implicate free speech and expression. In the adult use context, the struggle becomes one between presumptively constitutional land use restrictions based

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Hempstead Video, Inc.* N.Y. L.J., Dec. 29, 1994, at col. 3; *see also* *LaTrieste Restaurant and Cabaret Inc. v. Port Chester*, N.Y. L.J., Nov. 28, 1994 at 2, col. 3; *Looker's*, 813 F. Supp. at 148 (holding that although the City's enforcement of its zoning code against a topless and nude dancing club was “laughable” and “baffling,” it could not find selective enforcement of the code because each citizen would receive the same treatment under the code and that the club's delayed opening was its own decision and not the result of discriminatory enforcement of zoning codes); *But see* *Saddle Brook v. A.B. Family Center*, 704 A.2d 81, 84 (N.J. 1998) (affirming a lower court's finding that technical violations of site plan and signage ordinances “were of no concern to the municipality but for the defendant's desire to sell adult books, videos and related goods”).

³⁷⁰ *Hempstead Video, Inc.* N.Y. L.J., Dec. 29, 1994, at col. 3 (quoting 303 *West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693, 389 N.E.2d 815, 818, 416 N.Y.S.2d 219, 223 (1979)).

* Steve McMillen has resided in New York City for ten years and is a third-year law student at Pace University School of Law in White Plains, New York. He would like to thank Professor John Nolon and the Land Use Center, Jessica Lenora Clarke and his parents, Stan and Sue McMillen, for their continuous, genuine and much-needed support throughout the writing process and law school experience.

on municipalities' police power to protect the health, welfare and safety of a community and First Amendment freedom of speech and expression guarantees. Many cases have addressed this struggle and courts have concluded that land use controls that impose reasonable time, place and manner restrictions on adult uses do not impermissibly burden free speech or expression. With the decision in *Stringfellow's*, municipalities in New York now have a clear guide as to constitutionally permissible land use regulations of adult uses, and the appropriate language and evidentiary requirements for those regulations. While the drastic effects New York City's zoning will have on such iconoclastic areas as Times Square may be unpopular to many long-time City residents, many others see the demise of adult businesses in Times Square as a success story. Regardless of personal opinion, there exists for New York municipalities with obsolete adult use zoning ordinances, or none at all, an opportunity to draft adult use regulations using the much publicized New York City model upheld in *Stringfellow's*.

*Steve McMillen**