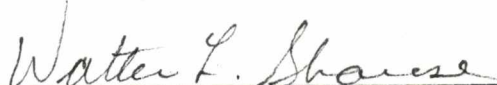
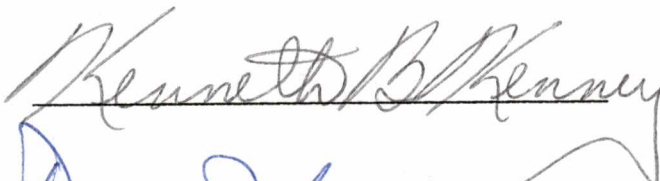
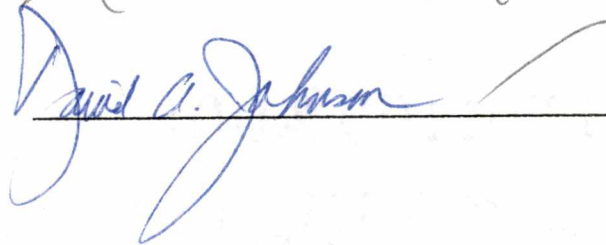


To the Graduate Council:

I am submitting herewith a thesis written by Joseph Christopher Horne entitled "The Zoning of Adult Entertainment Establishments: The Nashville-Davidson County, Tennessee Experience." I have examined the final copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Science in Planning.


Walter L. Shouse, Major Professor

We have read this thesis
and recommend its acceptance:

Accepted for the Council:


Vice Provost
and Dean of The Graduate School

STATEMENT OF PERMISSION TO USE

In presenting this thesis in partial fulfillment of the requirements for a Master's degree at The University of Tennessee, Knoxville, I agree that the Library shall make it available to borrowers under rules of the Library. Brief quotations from this thesis are allowable without special permission, provided that accurate acknowledgment of the source is made.

Permission for extensive quotation from or reproduction of this thesis may be granted by my major professor, or in his absence, by the Head of Interlibrary Services when, in the opinion of either, the proposed use of the material is for scholarly purposes. Any copying or use of the material in this thesis for financial gain shall not be allowed without my written permission.

Signature

Joseph C. Hume

Date

4 November '85

THE ZONING OF ADULT ENTERTAINMENT ESTABLISHMENTS: THE
NASHVILLE-DAVIDSON COUNTY, TENNESSEE EXPERIENCE

A Thesis
Presented for the
Master of Science in Planning
Degree
The University of Tennessee, Knoxville

Joseph Christopher Horne

December 1985

ACKNOWLEDGMENTS

In the course of completing such a work, one receives aid and comfort from a number of sources. Professor Walter Shouse, my advisor, is deserving of my heartfelt gratitude for his time, diligence and good humor. Thanks are also in order for Professor James Spencer. Various and sundry employees of the Metropolitan Planning Commission of Nashville-Davidson County, including Charles Hiehle, Don O'Donniley, Robert Paslay, Lester Marcum, Pat Wray, Jerry Fawcett, Bob Weaver, Bob Eadler, Delores Watson, Cheri Roberts, and Peggy Dillon offered encouragement and sympathy during this process. Lallie Richter and Larry Cockerham offered words of encouragement (four, precisely) and are thanked for such. Mr. Herbert Cox accompanied me where many have feared to tread, and is so thanked. My mother, Mrs. Viola Gentry and my late father were able to offer to me what they themselves could not afford, and I am most grateful. And finally, my wife Leanne pushed me when such was necessary, and dealt effectively with the day-to-day ups and downs. As always, thanks and much more.

ABSTRACT

Adult entertainment establishments are rarely considered a welcome addition to the urban landscape. In addition to strictly moral reasons, adult entertainment establishments have been cited as a contributor to urban blight. Communities have sought to regulate the growth of this multi-million dollar industry, with varying degrees of success, via obscenity proceedings, licensing provisions, moratoria, and nuisance proceedings.

A relative new type of adult entertainment regulation is that of zoning. Zoning for adult entertainment establishments seeks to treat these uses in a manner which takes into account the characteristics of these uses, and integrate them into the community fabric in a relatively harmonious fashion. Two strategies, dispersion and concentration of these uses, have enjoyed wide practice in the United States.

This work documents the experience of Nashville, Tennessee in the regulation of adult entertainment during the years of 1977 through 1984. Not only are regulations reviewed and evaluated, the politics accompanying these regulations are documented as well.

TABLE OF CONTENTS

CHAPTER	PAGE
I. ADULT USE ZONING: AN OVERVIEW	1
Introduction	1
Types of Adult Entertainment Zoning.	2
Adult Entertainment Zoning in Nashville-Davidson County, Tennessee.	4
Research Questions	5
Study Design and Methodology	6
Conclusion	10
II. ADULT USES AND THEIR REPORTED SPILLOVERS	11
Introduction	11
Types of Adult Use	12
Adult Uses and Spillovers.	18
Conclusion	28
III. MEANS OF REGULATING ADULT USES	29
Introduction	29
Methods of Regulating Adult Uses	29
Zoning	40
Implementing Young: A Search for Practicability	58
Conclusion	61
IV. ADULT USE REGULATION IN NASHVILLE-DAVIDSON COUNTY, TENNESSEE, 1977-84	63
Introduction	63
Nashville-Davidson County, Tennessee	64
Regulation of Adult Entertainment Establishments Prior to 1977.	65
1977 Adult Entertainment Zoning Ordinance.	67
Regulation of Adult Uses--1977 to 1984	78
The Case of Classic Cat II	88
1984 Adult Use Zoning Ordinance.	106
Conclusion	111
V. ANALYSIS OF NASHVILLE-DAVIDSON COUNTY ADULT USE ORDINANCES	113
Introduction	113
Criterion One.	114
Summation.	125
Criterion Two.	126
Summation.	132
Criterion Three.	133
Conclusion	145

CHAPTER	PAGE
VI. SUMMARY AND CONCLUSIONS.	146
Introduction	146
Observations and Comments.	146
Recommendations.	151
LIST OF REFERENCES	153
VITA	163

LIST OF TABLES

TABLE	PAGE
1. 1977 Adult Use Zoning Ordinance Percentage of Blocks Available for Adult Uses Nashville-Davidson County, Tennessee.	137
2. 1977 Adult Use Zoning Ordinance, Number and Percentage of Adult Use Sites, Selected Areas of Nashville.	139
3. 1984 Adult Use Zoning Ordinance, Percentage of Block Available for Adult Uses Nashville-Davidson County, Tennessee.	141
4. Comparison of 1977 and 1984 Ordinances, Percentage of Blocks Available for Adult Uses Nashville-Davidson County, Tennessee.	142
5. 1984 Adult Use Zoning Ordinance, Number and Percentage of Adult Use Sites Selected Areas of Nashville	143
6. Comparison of 1977 and 1984 Adult Use Zoning Ordinances Percentage of Adult Use Building Sites Selected Areas of Nashville	144

LIST OF PLATES

Plate One. CC and CF Zoning Districts
Nashville-Davidson County, Tennessee. . . . In Pocket

CHAPTER I

ADULT USE ZONING: AN OVERVIEW

Introduction

Adult entertainment establishments are typically not a welcome entity for a city. The services provided in these establishments, including such sundry variations as "porno shops," "peep shows" and massage parlors (Pratter and Hages, 1980), are generally found to be distasteful, and therefore shunned by a great number of the public. In addition to this public distaste, adult entertainment establishments are considered by many experts to be a source or at least a contributor to blight (Toner, 1977). These sources identify adult entertainment establishments and their environs with increased crime, decreased property values, unsightly storefronts (Harvard Law Review, 1978), business emigration and overall neighborhood degradation (Dow, 1977). Perhaps the best overall summation of a given community's attitude is the words of Nashville-Davidson County's Chief of Police Joe Casey, when he stated, "If I were given the choice, adult entertainment businesses would not be allowed to locate anywhere in Nashville-Davidson County" (Casey, p. 1).

Chief Casey's sentiments notwithstanding, one must examine the other side of the coin. This side of the coin states that adult entertainment establishments need be regulated in a manner that does not impinge upon the rights of the proprietors and patrons held under the First and Fourteenth Amendments to the United States Constitution

(Toner, 1977). Thus, a community is faced with a virtual "balancing act" when regulating adult entertainment establishments, where popular sentiments must be weighed against constitutional principle. Suffice it to say, easy answers are hard to find.

Zoning for adult entertainment establishments is an attempt to strike that balance. Zoning for these establishments ideally treats them as land uses which should be regulated according to valid land use objectives (Pratter et al., 1980). Ultimately, as is the objective of the zoning of all land uses, the overall effect is "to promote the health, safety, morals, or the general welfare of the community" (Mandelker and Cunningham, 1979).

Types of Adult Entertainment Zoning

Since its inception, two patterns of adult entertainment zoning have emerged. The first of these is the concentration of these uses. Under this form of regulation, adult entertainment establishments are restricted to a specific geographic area or zone, and excluded from the remainder. The major example of this type of zoning is Boston and its celebrated "Combat Zone." In this case, the total land area these uses are restricted to is some seven acres (Toner, 1977), and is said to have "legitimize(d) what already existed" (Toner, p. 8). The Interim Report, Entertainment District Study (April 1974) offers a particularly good summary regarding the rationale of this form of adult entertainment regulation:

Containing a majority of the adult entertainment facilities for the entire city in this compact area would facilitate the policing of such activities and would avoid their spread to other areas of the city where they create serious incompatibilities with neighboring land uses or inhibit needed real estate investments. This zone . . . could be avoided by persons who do not care to be subjected to the x-rated enterprises (pp. 26-7).

The second general type of adult entertainment zoning to emerge is that of dispersion. Under dispersion, the technique of required distances is utilized to not only avoid a concentration of these uses, but to allow for distancing from other "sensitive" uses such as schools, churches, libraries, civic centers (Strom, 1977), even residences (Toner, 1977). As observed by Toner:

Planners (had) noted that concentrations of certain uses, including pornographic ones, often result in deteriorating property values, higher crime rates, traffic congestion and depressed neighborhood conditions (p. 2).

Thus, by dispersing these uses geographically, a preservation of the "communal quality of life" can be effected (Friedman, 1977).

The primary example of this form of adult entertainment zoning is Detroit, which uses this technique to disperse these uses in certain commercial and industrial zones (Toner, 1977). It is particularly noteworthy that this type of zoning technique enjoys the affirmation of the United States Supreme Court in the case of Young v. American Mini-Theatres, Incorporated (427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d. 310), albeit with a narrow 5-4 decision (Strom, p. 1).

Since the emergence of these regulatory techniques, it is not surprising to find that variations of these types of zoning have appeared. The next section will discuss just such an instance.

Adult Entertainment Zoning in Nashville-
Davidson County, Tennessee

As noted above, a variation of the two most widely utilized forms of adult entertainment zoning has been developed in Nashville-Davidson County, Tennessee. This variation is a virtual "hybrid" of the dispersal and concentration forms of regulation described earlier. As was the case with dispersion of these uses, required distances exist between adult entertainment establishments, as well as other uses such as schools, churches, residences and dwelling units (Comprehensive Zoning Ordinance, Section 33.50). In addition to these required distances, adult entertainment establishments are restricted to the Commercial Core (CC) and Commercial Core Frame (CF) zoning districts (Comprehensive Zoning Ordinance, Section 32.10). These districts make up Nashville's Central Business District (CBD), an area of approximately two square miles (Fifth Circuit Court Memorandum, 1984). Although this is not a "Combat Zone" in the truest sense (Boston restricts these uses to an area of seven acres), the attributes of Nashville's ordinance resembles somewhat the concept of Boston's concentration approach.

The literature has documented to some extent the desirability of the concentration and dispersion of adult entertainment establishments, both in a legal sense (i.e., Is it a legal form of regulation?) and in a planning sense (i.e., Does it accomplish the planning goals it is purported to achieve?). However, the ordinance which governs Nashville-Davidson County's adult entertainment establishments has

not undergone any sort of systematic study. Not only are the origins largely undocumented, it is not particularly clear whether this ordinance accomplishes the "balancing act" alluded to earlier. In short, does it, in its attempt to negate the influences of blight, overly restrict the ability of these establishments to operate, or for new establishments of this type to commence operation?

Research Questions

In order to examine the legality of any form of adult entertainment zoning, one must refer to the case law that has developed. The various chroniclers have noted that several criteria must be met in order for a given ordinance to accomplish the balance referred to earlier. Included are:

1. Regulations must be motivated by a desire to eliminate the adult entertainment establishments' adverse effects;
2. Adequate factual basis concerning the zoning of the adult entertainment establishments and the zoning's ability to abate the deleterious effects must exist;
3. Regulations would be invalid if they are found to severely restrict First and Fourteenth Amendment rights (Harvard Law Review, 1978).

These criteria are reflective of that "balancing act" referred to earlier. Criterion One and Criterion Two are representative of the planning concerns that adult uses present to a given community. Criterion Three refers to the individual rights which must be protected.

Those rights include those of individuals wishing to operate such establishments, and those wishing to patronize the establishments. All in all, to meet the three criteria would satisfy that balance noted above.

Despite the qualitative nature of the former two criteria, it is believed that the three can be utilized in the context of this case study. This case study will examine the Nashville form of regulation. Two research questions will be examined in the context of this study. The first question is whether or not the Nashville ordinance appears to have met the motivational and factual basis criteria listed above for a legal ordinance (Criteria One and Two). Such should offer considerable insight into the problems and issues confronting a given community in regard to regulating adult entertainment establishments.

The second research question is of a more quantitative nature, and will examine whether or not the Nashville ordinance unduly restricts adult entertainment establishments. This section will examine whether adequate sites exist for these establishments, including those already in existence, and those seeking to commence operation (Criterion Three).

As will be noted, much detail is lacking in the above section. Such, according to Babbie (1979), is not unexpected in an exploratory study such as this. The product anticipated should offer findings that would indicate future study directions concerning the issue of adult entertainment zoning.

Study Design and Methodology

As stated previously, and to sum, it is proposed that a case study of Nashville-Davidson County, Tennessee form of adult entertainment zoning be undertaken. This study is to trace the history of this

ordinance since its adoption, and will examine whether or not, based on the criteria previously listed, that a balance of public and private interests appear to have been met. The study will concentrate upon whether or not the Nashville ordinance appears to be a valid form of regulation, using those criteria and their interpretation as points of comparison. In addition, the utility of this form of regulation for other locales will be a by-product of this process.

Chapter II will examine the adult entertainment industry. Not only will the types of adult entertainment establishments be discussed, but a discussion of the spillovers and/or externalities will take place as well. Much of the above will be accomplished by a review of the literature. The result of this chapter will be an explanation, in part, of why communities feel compelled to regulate these uses.

Chapter III will focus upon the methods by which adult entertainment establishments are regulated. The literature will be examined regarding the strengths and weaknesses of such devices as obscenity laws, nuisance laws, and the licensing of these establishments. In addition, this chapter will examine the emergence of zoning as a technique of regulation. The two forms of adult entertainment zoning, dispersion and concentration, will be addressed in regard to their strengths and weaknesses. In all, the goal of this chapter is to present an overview of adult entertainment regulation, emphasizing most particularly the zoning techniques which are antecedents of the major area of this study.

Chapter IV will examine the history of adult entertainment zoning in Nashville-Davidson County. Particular attention will be

paid to the process that led to the development of this "hybrid" of the two prevalent forms. Official records, newspaper articles and personal interviews will be utilized to examine the origins of this ordinance, and the local political climate which undoubtedly influenced its enactment. The ordinance's history will be traced to the present time, including a recent court ruling which mandated an "adjustment" (Fifth Circuit Court, 1984) and the adjustment passed by Metropolitan Council (Metropolitan Government of Nashville, 1984). This chapter should serve to illustrate the sensitive issues that a controversial subject such as the regulation of adult entertainment establishments brings to the forefront.

Chapter V will compare the Nashville experience under this technique with the criteria listed earlier. Local records, newspaper accounts, and personal interviews will examine as objectively as possible whether the motivation behind this ordinance was due to its adverse effects, or due to some amount of distaste for adult entertainment establishments. In order to do such, the public record will be examined for pertinent information. Local newspapers and magazines will be examined as well. And, as identified, participants in the process will be interviewed for relevant comments. In all, through the examination of such subjective data the author will attempt to ascertain whether or not the local decision-makers were attempting to deal effectively with this issue, or were in the midst of postponing a solution and/or presenting obstacles to such establishments.

Secondly, the public record will be examined to ascertain the extent to which a "factual basis" exists for the ordinance. As with

the previous case, local government records will be examined. Local officials, most particularly those at the Metropolitan Planning Commission, will be interviewed for any additional information they might offer. In all, the examination of the record will see to what extent studies were conducted regarding the blighting influences that are said to accompany adult entertainment establishments.

Not quite so subjective in nature is the number of sites. Again, utilizing local records, detailed analysis of the Central Business District will follow in order to determine the number of sites available for adult entertainment establishments. The existence of required distances from churches, schools, libraries and residences, as well as adult entertainment establishments, will be examined so as to determine the number of sites available. In all, this will occur for both the prior regulation (1000' distance, walking) (Comprehensive Zoning Ordinance Sections 32.10 and 33.50) and the new regulation (500' radius). An analysis will be undertaken to determine the percentage of the Central Business District that is eliminated from consideration as adult entertainment sites by both the previous and present standards. Although it approaches pure conjecture what exactly constitutes a case of "unduly restricting" of adult entertainment establishments, one will be given some indication of just how sizable an obstacle these ordinances have presented adult entertainment establishments in Nashville.

To sum, Chapter V is meant to serve as an extension of Chapter IV by examining specifically the criteria listed earlier. The meeting

of these criteria has been cited as indicative of a given community's ability to strike the balance between legitimate city planning and public concerns, and those of the individual freedoms of expression and that of equal protection. On the basis of these criteria, one will be able to determine whether the make-up of the Nashville ordinance will be found to be practicable by other communities.

Chapter VI will serve to summarize the findings of this study. Those findings will be reviewed, and recommendations of future study will be made.

Conclusion

It is highly doubtful that a conclusive judgment can be made regarding this particular form of adult entertainment regulation. It is believed that a review of one community's experience with its unique method of regulation regarding these uses will shed some light on this "hybrid" regulation and its practicability. If nothing else, perhaps this case study of Nashville's treatment of the issue of regulating adult entertainment will serve as a basis for future study of a more detailed level.

CHAPTER II

ADULT USES AND THEIR REPORTED SPILLOVERS

Introduction

The business of adult entertainment has several variations which are noteworthy. In order to gain insight into the regulation of adult uses, it is believed necessary to briefly describe the types of adult uses. Such an exercise should greatly enhance the ability of those unfamiliar with these uses to envision the environment of these enterprises.

In addition to the above, this chapter will examine the spillovers which are said to accompany adult uses and their environs. For purposes of this work, spillovers are defined as negative effects that are placed on individuals or society at large (Barlowe, 1978). It is these spillovers, real or perceived, that can act as impetus behind the regulation of these establishments. It is believed necessary to cite these so as to understand the various regulations which have been developed in response to these uses.

As a cursory note of foreshadowing, it must be noted that sources describing the operation of adult uses are not particularly prevalent. In addition, those sources found that do so are often of the nature of "popular" periodicals, and thus suffer the defects of such sources, including over-simplification and lack of scholarly documentation. Thus, this section should not be adjudged as a definitive summary of adult uses.

Within the text of this work, the terms adult entertainment and adult uses are used interchangeable. It is hoped that this does not prove too confusing to readers.

Types of Adult Use

Sources typically identify five categories of adult use. These categories include the adult bookstore, the adult movie theatre, the adult coin-operated facility (i.e., "peep show"), the adult cabaret (i.e., "topless"), and the adult physical culture establishment (i.e., massage parlor) (Marcus, 1978). The above noted uses will be profiled in the following section.

The adult bookstore. The term "adult bookstore" is largely self-explanatory. These establishments retail such items as adult books and magazines. According to Wilson, a given store may carry between 200 and 1,000 paperback book titles, and from 100 to 500 separate magazine titles (The Report of the Commission on Obscenity and Pornography, 1970). In addition to the above, sexually-oriented tabloids, calendars, greeting and playing cards, posters, placards, comic books, photo sets, and 8 millimeter motion pictures are often a part of a given store's inventory (Technical Report of the Commission on Obscenity and Pornography, Volume IV, 1970). Finally, it has been observed that sexually-oriented paraphernalia and novelties are a part of the inventory of many of the establishments (Cook, 1978).

It has been estimated that approximately 2,200 of these establishments exist in the United States. Typically these establishments are

found in metropolitan areas having a population in excess of 500,000 people. Geographically, the bookstores tend to be located in central and downtown area (personal observation has noted commercial strip areas as locations as well). To a lesser extent, these uses have been found in neighborhood or suburban shopping centers (The Report of the Commission on Obscenity and Pornography, 1970). The establishments themselves were typically found to contain less than 400 square feet of sales area (Technical Report of the Commission on Obscenity and Pornography, Volume IV, 1970). In addition to this relative smallness, the establishments are not generally well maintained. For instance, in a study of Boston's adult bookstores, it was noted that "virtually no effort to create an attractive, inviting appearance [was made]." Similarly, their exteriors were described as "plain and lack[ing] any adornment" (Technical Report of the Commission on Obscenity and Pornography, Volume IV, p. 111).

According to several sources, the adult bookstore can be a rather lucrative entity. For instance, the report of the 1970 Presidential Commission on Pornography and Obscenity estimated that these establishments accounted for between 75 and 90 million dollars in revenue (p. 17). Recent estimates seem to indicate a definitive growth pattern. Individual establishments in New York City's Time Square are said to gross as much as \$10,000 a day. The Los Angeles Police Department has estimated the annual income for these establishments are 125 million dollars in the city of Los Angeles alone (Cook, 1978). The discrepancy in figures is believed to be indicative of the "underground" nature of the business.

Adult movie theater. This designation belongs to those theaters which show x-rated movies 52 weeks a year ("The Porno Plague," 1976). A recent estimate placed the number of theaters displaying such fare at 780 throughout the United States. These theaters are said to share the showing of some 125 feature films produced annually depicting sexually-oriented matters (Cook, 1978).

The films themselves are said to display a discernable pattern. Poor plotting is strung together by scenes of "endless" sexual activity ("The Porno Plague," 1976). However, a recent development in this art form is the increased attention paid to plot and setting, thus leaving behind a more attractive product (Technical Report of the Commission on Obscenity and Pornography, Volume IV, 1970). Another pattern which has appeared in roughly the same time frame is the featuring of such activities as bestiality, sadomasochism, and children as subjects ("The War Against Pornography," 1985).

Much like the adult bookstores, adult motion picture theaters tend to be located in downtown or central city areas. When several exist within a community, a clustering effect is often noted. The areas these uses are traditionally located in are often, as characterized by one source, experiencing some degree of "accelerated social disorganization" (Technical Report of the Commission on Pornography and Obscenity, Volume IV, p. 227).

The theaters themselves typically have a seating capacity of under 200, as noted by the Technical Report of the Commission on Obscenity and Pornography, Volume IV (1970). The hours of operation

have been characterized as "long," being as much as 16 hours per day (Technical Report of the Commission on Obscenity and Pornography, Volume IV, 1970). Recent personal observations have noted advertisements of 24 hours of operations at these establishments.

The economics of these establishments, as with the bookstores, have been described as lucrative. A recent estimate placed a typical movie budget at \$120,000 ("The War Against Pornography," 1985). One official of the Adult Film Association found that the net return on investment was typically 200% (Cook, 1978). On a national scale, an estimated two million Americans are admitted to those features, yielding an estimated \$500 million dollars in revenue ("The War Against Pornography," 1985). As for the profits of an individual theater, such figures are not so easy to ascertain. One source noted that in many locales, legal fees tend to diminish potential profits heavily (Technical Report of the Commission on Obscenity and Pornography, Volume IV, 1970).

Adult coin-operated facilities (i.e., "peep shows"). The term "coin-operated facility" or "peep show," its more common title, refers to two types of devices. The more predominant type is that of viewing a 16 minute loop of 8 millimeter film through a device resembling a nickelodeon. These films are shown at eight two minute intervals (Cook, 1978). In order to view each succeeding two minute clip, additional coinage ranging from 10 to 25 cents must be inserted into this juke-box like device (Technical Report of the Commission on Obscenity and Pornography, Volume IV, 1970). These machines are either

a part of a large arcade devoted solely to these devices, or are found in the forementioned adult bookstore (Technical Report of the Commission on Obscenity and Pornography, Volume IV, 1970).

A variation of the above exists in some locales, with live performance replacing the film. In these cases, the performance occurs behind a screened glass barrier. The screen is raised and lowered in response to the insertion of money (Casey, 1984).

The Technical Report of the Commission on Obscenity and Pornography, Volume IV (1970) found these establishments to be somewhat larger than the bookstores, on average being approximately 800 square feet in area. As was the case with adult bookstores, the appearance of these establishments are somewhat shabby (Casey, 1984). One source noted that the primary characteristic these establishments seem to share is an attempt to maintain the patron's anonymity (Karp, 1973).

Economically, as was the case with adult bookstores, the "peep show" appears to be quite lucrative. It has been estimated that a given machine can take in from \$75 to \$120 a week, depending on location and quality of film/performance (Cook, 1978). Other sources have estimated that a given machine can take in as much as \$10,000 annually ("The Porno Plague," 1976).

Adult cabaret. Despite its status as "grand-daddy" of adult uses, the literature is largely silent on many details of this use. It appears the burlesque show of the past still exist, but a recent development noted is the inclusion of live sex performances in some locales ("Pornography Goes Public," 1970).

As reported with other adult uses, sources also note the presence of prostitution, drug abuse, and organized crime in the adult cabaret business (Salutin, 1977).

Adult physical culture establishment ("massage parlor"). The final category of adult use to be treated is that of the adult physical culture establishment, or as they are commonly called, massage parlors. At one time, such establishments were said to be largely legitimate enterprises, with licensed physical therapists often being the masseurs. Reportedly, massage parlors are largely considered as "fronts" for prostitution (Velarde and Warlick, 1977).

The massage parlor has enjoyed a seeming proliferation in recent years. For instance, in a recent two year period, the number of massage parlors has risen in New York City from 4 to 76 ("Sexploitation: Sin's Wages," 1973). Ironically, the forementioned transformation from legitimate to questionable practices has been said to have occurred with little note by the press. One source reported that a full year elapsed before the "straight" press became aware of the activities reportedly occurring in these establishments (Velarde et al., 1977).

The physical setting of these establishments have been described as follows:

In downtown business districts, they (massage parlors) are often converted storefronts and cater mostly to the tastes of the nearby military personnel. In residential areas, they can be remodelled homes with a gruff atmosphere of their working class customers. In the suburbs, they are often housed in the local shopping centers complete with decor of the suburbanite bar (Rasmussen and Kuhn, p. 273).

Due largely to the questionable practices which reportedly occur on these premises, it is not particularly clear how profitable these

enterprises are. One source fixed the rates at an average parlor at \$10 to \$15 for an hour massage. This, of course, does not include any sundry services negotiated between the masseuse and their patrons that often fall under the traditional realm of the prostitute (Velarde et al., 1977).

Adult Uses and Spillovers

As noted in the previous section, there are several obvious examples of spillovers from the uses described. This section will attempt to describe what various sources have noted to occur in close proximity to these uses. Those spillovers noted include deterioration of property values, higher crime rates (Toner, 1977), influx of organized crime (Yow, 1981), and overall neighborhood degradation (Dow, 1977).

Prior to an examination of the spillovers, it is believed in order to examine the overall concept of blight. The reason for such an examination is to avoid the perception of a causal relationship between adult uses and the spillovers on behalf of the reader. Rather, it is believed the disciplines of urban economics and geography seem to offer a more comprehensive portrayal of the various interactions that occur among the multiple variables that comprise a given city.

Urban economics, urban geography and blight. The discipline of urban geography seems to offer a reasonable explanation for the existence of many of the spillovers which are said to accompany adult use establishments. The attractiveness of this discipline lies in that it tends to view the noted spillovers as not so much a product of adult uses as it is indicative of a part of the overall concept of

urban blight. Urban geographers here found that:

as the central business area merges into the wholesale and light-manufacturing district or into the slum or rooming house area, there appears the lowest grade of central business uses-- pawnshop, food stores, pool hall and beer garden, burlesque house, automotive supply shop, shoe repair, cheap photographer, and cheap restaurant (Ratcliff, p. 387).

Herbert (1972) referred to areas such as described above as "zones of discord," and noted their proximity to "zones of assimilation." The latter areas are characterized as areas of "slow steady progress." These areas are often host to such uses as specialty shops, car show-rooms, and banks.

Other disciplines, such as the practice of real estate appraisal, offer a sort of "organic" view of urban blight. One appraiser suggested blight is best described in the context of the concept of "neighborhood cycle." Such has been defined as "the life of a neighborhood, usually involving the following stages, varying only in intensity and duration: development and growth; stability; transition and decline" (Boyce, p. 172). Blight is said to be a part of the latter stage, and is accompanied by the spillovers noted earlier (Harper, 1985).

Barlowe (1978) offered a somewhat different explanation of blight and its spread. It was argued that in areas in close proximity to the Central Business District (CBD), necessary repairs and maintenance are often neglected in anticipation of the higher rents a spreading CBD should bring. Whether or not this higher use ever emerges is not guaranteed.

Barlowe went on to note:

Unless strong positive measures are taken in these situations, the usual result is a circle of spreading blight, slums, and urban decay around downtown commercial centers. Individual owners frequently sacrifice rental returns and satisfactions they could have had, although they sometimes find ways of exploiting their situations by acting as slum lords. The real tragedy in these situations involves the transference of social costs to the public, for it is society and the urban community that usually bears the major losses (pp. 188-9).

This section is by no means considered a definitive description of these disciplines' view of blight and/or the spillovers said to accompany adult uses. It was believed both important and necessary to attempt to place these spillovers in context broader than that of adult uses. To do otherwise would lead to the possibly inaccurate assumption that a causal relationship exists between adult uses and the spillovers to be described more fully in the coming section.

Crime. Sources cite areas in proximity to adult uses have particular problems in regard to criminal activity. These include data suggesting higher rates in particular crimes (e.g., prostitution, "sex crimes," alcohol-related offenses, etc.), and data suggesting that the management/operation of adult use establishments are influenced by organized crime interests.

Higher crime rates. According to Cohen (1980) areas in proximity to adult use establishments are said to exhibit a varied lot of criminal activity. Arrests from these areas were found to include such crimes as prostitution, gambling, drunkenness, vagrancy, disorderly conduct, and narcotic related offenses. Cohen went on to state that other, more serious crimes such as homicide, robbery, and

aggravated assault appear to be related to the above noted arrests and areas in which those arrests took place.

Several cities offer evidence in support of the above findings. A 1983 study of adult use establishments conducted by the Metropolitan Development Commission of Marion County, Indiana (Indianapolis) found, over a five year period that major crimes occurred at a 23% higher rate in study areas with at least one adult use establishment than study areas of similar types without such uses. Furthermore, the study areas with the one adult use establishment exhibited a 46% higher crime rate than Indianapolis as a whole. In addition, these data were further specified by examining rates of sex-related crimes. In this case, the control areas were found to have a rate of 26.2 per 10,000 in the case of sex-related crimes, versus a rate of 46.2 per 10,000 in the study areas. Concerning this latter observation, the author noted, "If the ratio of sex-related crimes was the same as that established for major crimes between the control areas and the study areas . . . we would expect a sex-related crime rate of 32.3" (p. ii).

Other cities have reported similar findings. Fayetteville, North Carolina, in June of 1979, reported the city-wide crime rate had dropped 11% since the previous year. However, in the downtown district incorporating the adult use establishments, the overall crime rate had actually increased 7.5% over the previous year (Yow, 1981).

The relationship between certain crimes and adult uses seemed to be well-documented as well. This is particularly apparent upon examining the literature in regard to the massage parlor and prostitution. One chronicler stated:

We expect that, as the evidence accumulates around the country, it will become clear that America now has a complex form of quasi-legalized form of sex-for-money and they are at a large and growing scale (Rasmussen et al., p. 292).

Another source quoted a masseur's assessment of her trade as follows:

"'If you're giving straight massages you might as well be on welfare'" (Verlarde et al., p. 212).

The evidence noted above must be qualified; it all appears to be quite circumstantial and could quite possibly be due to other factors left untested. The statement that a causal relationship exists between adult uses and higher crime rates is premature. However, the authors of the Indianapolis study offered this summation:

the best professional judgement available indicates overwhelmingly that adult entertainment businesses--even a relatively passive use such as an adult bookstore--has a serious negative effect on their immediate environs (Metropolitan Development Commission of Marion County, Indiana, p. iii).

Organized crime. Sources vary as to the extent, if any, that organized crime influences the management and operation of adult use establishments. The Report of the Commission on Obscenity and Pornography (1970) found the following:

There is a greater likelihood that persons with some background of conflict with the legal system will be found among 'adult' bookstore proprietors. This is not the same, however, as being an adjunct or subsidiary of 'organized crime.' At present, there is insufficient data to warrant any conclusion in this regard (p. 19).

Still other sources are not so equivocating, calling organized crime a "growing presence" in virtually all facets of adult entertainment ("The Porno Plague," 1976).

If the latter premise is accepted, it appears that a contributor to organized crime's presence is the uncertain legal status of the

adult use industry. One source noted that distribution of adult films across state lines seemed to have been taken over by elements of organized crime out of fear of prosecution ("The Porno Plague," 1976). This is further reiterated by the following:

What worries law enforcement people these days--state and local police, and the FBI--are the unmistakable sign of organized crime's growing interest in the porno business. What really opened the industry to [organized crime] was the increasingly difficult time legitimate operators had in determining what was legally obscene and what was not (Cook, p. 87).

Strom found adult entertainment's attractiveness for elements of organized crime to be based as follows:

Due to the tremendous demand for sexually-oriented materials and services, which gives the industry its enormous profitability and subsequent resilience to suppression The probable effects are merely encouragement of more organized crime control of the industry and a raising of the ultimate costs to customers of sexually-oriented goods and services (Strom, p. 20).

Organized crime's main interest has been fixed by sources as that of real estate. It was found that potential adult use sites are often leased by organized crime figures. In turn, these properties are subleased to operators of adult use establishments. The value of this practice is thought to lie in the belief that adult uses can afford higher rents than other businesses which might be interested in a given site (Cook, 1978).

Comments of local police officials seem to support the above analysis. Chief of Police Joe Casey of Nashville-Davidson County, Tennessee found that the operation of the adult use industry in his domain to be an "organized and concerted effort" (Casey, p. 2).

Chief Casey noted that in the past several years, elements of the adult use industry were occasioned with a successful adult bookstore bombing and a nearly successful bombing of a topless dancing club. In the case of the latter, it was predicted that a city block would have been a part of this explosion (Casey, 1984).

Despite the above allegations, it is far from certain to what extent organized crime is involved in the adult use industry. Best available evidence seems to indicate its presence does exist, as it seems to in countless other enterprises. Whether or not it exerts greater or lesser influence in this industry as compared to other industries is conjecture at this time.

Property values. Another spillover cited often by chroniclers is the negative influence adult uses appear to have on surrounding property values. It has been noted by one expert that "the presence or mere perception that these activities (i.e., adult uses) exist will reduce property values and discourage upkeep of adjacent housing" (Spencer, p. 6).

However, studies documenting the above conclusion are not great in number. Marcus (1978) found that "the ratio of tax arrears to tax assessments for the Times Square/Theater District area (a noted adult use concentration) was two and one-half times greater than for all of Midtown (Manhattan) in 1975. In 1972 it had been only twice as great" (p. 9). Furthermore, the author noted a decline in sales tax revenue and a greater than city-wide decline in retail jobs.

The City of Indianapolis study seems to be the most significant examination of this issue. In order to develop adequate data, the City of Indianapolis and Indiana University collaborated on a national survey of real estate appraisers in 1982. Some 1,527 surveys were distributed, with 507 of them returned for analysis. The goal of this survey was to determine a "best professional opinion" as to the effect adult uses might have on the property values of the surrounding areas. In addition to the above, the City of Indianapolis, using local real estate data sources, sought to ascertain the potential impact of adult use establishments on residential properties lying within 1,000 feet of selected adult use establishments (Department of Metropolitan Development of Marion County, Indiana, 1984).

The conclusions of the Indianapolis study and survey, in regard to real estate values, are as follows:

1. Although the housing base within the Study Areas was of a distinctly higher value than that of the Central Areas, its value appreciated at only one-half the rate of the Central Areas and one-third the rate of Center Township as a whole during the period 1979-1982;
2. Pressures within the Study Areas caused the real estate market within their boundaries to perform in a manner contrary to that within the Central Areas, Center Township and the County. In a time when the market saw a decrease of 50%, listings within the Study Area actually increased slightly;

3. As a result, twice as many houses were placed in the market at substantially lower prices than would be expected had the Study Area's market performance been typical for the period of time in question;
4. The great majority of appraisers (75%) who responded to a national survey of certified real estate appraisers felt that an adult bookstore located within one block would have a negative effect on the value of both residential (80%) and commercial (72%) properties. Fifty percent of those respondents foresaw an immediate depreciation in excess of 10%;
5. At a distance of three blocks, the great majority of respondents (71%) felt that the impact of an adult bookstore fell off sharply so that the impact was negligible on both residential (64%) and commercial (77%). At the same time, it appears that the residual effect of such a use was greater for residential than for commercial properties;
6. In answer to the survey question regarding the impact of an adult bookstore on property values generally, 50% felt that these would be a substantial-to-moderate negative impact, 30% saw little or no impact, and 20% saw the effect as being dependent on factors such as predominant values (property and social) existing in the neighborhood, the development standards imposed on the use, and the ability of an existing commercial code to buffer the impact from other uses (pp. ii-iii).

The author of this study, in summation, found that:

while the statistics assembled and analyzed in this study should not be construed as proving that adult businesses cause the negative impacts illustrated herein, an obvious variable in each instance of comparison is their presence (p. iii).

Other noted effects. Sources have noted other purported effects of adult uses, although in a somewhat less documented fashion. To follow is a brief summary of those purported effects.

The existence of adult use establishments in a given area have been cited as a barrier to capital investment or redevelopment of a given area. One source noted that no major capital reinvestment had occurred in the Times Square/Theater District area of New York City, a notorious concentration of adult use establishments, since 1965. Whereas the author noted other contributing factors in this instance, it was noted that "the negative image created by the increasing concentration of adult entertainment uses did nothing to contrast these economic indicators" (Marcus, 1978).

City leaders in Fayetteville, North Carolina expressed sentiments much the same as those previously listed. City officials seemed to fear loss of potential investment, using the example of the concern expressed by a prospective industry representative when he noted open prostitution in the adult use district of Fayetteville (Yow, 1981).

Others have argued these uses, when concentrated, can yield an erosion of the sense of community pride and value. In a recent paper in regard to adult uses in Nashville-Davidson County, Tennessee, the author found that:

the fear of encountering such experiences (the adult use establishment and/or its patrons) eats away at the sense of community, at a feeling of safety in shared values and social norms. To be used fully, and to be stable over time, the community needs to protect the institutions which reflect those shared values. Churches, schools, colleges, and libraries are public places that house and sponsor society's values. They are used by both sexes and all ages. Their free use by that broad cross section of society would be impeded by close proximity to adult entertainment (Spencer, pp. 9-10).

Clor, in his article "Public Morality and Free Expression" (1977) found the following to be true in regard to the concept of erosion of the sense of community:

It is true that these considerations are not susceptible of scientific proof, but that does not mean they can be ignored . . . the crucial problem of contemporary America is more a declining sense of community than a decreasing amount of free speech . . . and there can be little doubt that one of the major elements contributing to or detracting from the sense of community is the moral and aesthetic atmosphere which prevails in public places. If we did not think that this were important, we would not spend so much effort and money on urban and public beautification (pp. 1311-2).

Conclusion

This chapter sought to accomplish two objectives. First, it sought to present a brief overview of the elements making up the universe of adult uses. Second, it sought to describe the spillovers that seem to accompany these uses. It is believed that the above section should offer adequate insight into the nature and environs of the adult use industry, and serve as background for the coming chapter regarding the methods of regulating these uses.

CHAPTER III

MEANS OF REGULATING ADULT USES

Introduction

In response to the problems listed in the previous chapter, it is not surprising that communities seek to regulate adult use establishments. The methods vary as much as the uses they seek to regulate. This chapter will review those methods, and their advantages and disadvantages.

Methods of Regulating Adult Uses

Prosecution under obscenity statutes. The United States Supreme Court, in the case of Roth v. United States (354 U.S. 476), held that materials which are considered obscene do not enjoy any protection under the First Amendment (Kaminer, 1980). Hence, those involved in the trade of adult uses which can be proven to be obscene are subject to criminal sanctions (Strom, 1977).

Two problems seem to accompany prosecution under obscenity statutes. The first of these has to do with defining "obscenity." The current standard is based on a 1973 Supreme Court decision, Miller v. California (413 U.S. 15). Material is deemed obscene when "'the average person, applying community standards, would find . . . as a whole, appeals to the prurient interest; and material that 'take as a whole, lacks serious artistic, political, or scientific value'" (Kaminer, p. 243). The above definition has led one source to state that "the

crime of obscenity has quite an elusive nature, stemming from the necessarily subjective and indefinable nature of such concepts as . . . 'community standards'" (Strom, p. 12-3).

In addition to the problem of applying the above standard, the doctrine of "prior restraint" must be taken into consideration. Prior restraint has been defined as "censorship that prevents the utterance from occurring rather than attempting to punish the speaker after the speech" (Shapiro and Tresolini, p. 363). In practice, this is said to mean that:

effective, generalized enforcement of obscenity laws is not possible without violating the very basic prohibition of prior restraint. Every single book, magazine or film must be proven to be obscene in an individualized judicial proceeding before it may be enjoined. This makes it almost impossible for the government to take any generalized action against businesses that regularly deal in pornography (Kaminer, p. 243).

Thus, any injunction must be directed against a specific work, at which time it is up to a court to determine its obscenity, or lack thereof (Strom, 1977). In accordance with the above, an individual shop cannot be closed until every item on the premises is declared obscene by the court (Kaminer, 1980).

Considering the obstacles noted above, it is not surprising to find that the literature does not speak highly of this method of regulation. Obscenity trials, according to one source, tend to be "long, costly, and unpredictable," and at best, a "piece meal" approach to the problem (Kaminer, p. 544). Others have noted that these prosecutions tend to be "sporadic, arbitrary and subject to the whims of the enforcers" (Rist, p. 12) Due to these factors, when this

approach is used, prosecution is often of a "showcase" nature, and the prosecutors seek maximal penalties for the "deterrent effect" it might have (Strom, 1977).

Due largely to the costs involved, others have questioned the desirability of this method. As one source noted, "For every pornography prosecution, there is a failure to prosecute a case of violent crime. It's not only why pornography, it's why pornography instead of violence" (Morgan, p. 30). Such an attitude is undoubtedly fed by the notion held by many that pornography is a "victimless crime" (Strom, 1977). Finally, the record is fraught with the examples of establishments closed one day, and open the next, minus the offending material. Thus, futility is often the attitude of those involved in these cases ("The Porno Plague," 1976).

Perhaps Strom sums it best:

Even where obscenity convictions are successfully obtained and upheld, prosecutors and local authorities may find themselves subject to criticism for the inordinate expense to taxpayers and burden upon public resources which such proceedings entail, especially where there is a public perception that other law enforcement activities of higher priority are being neglected (p. 13).

In addition to this analysis, others have found when:

a law is perceived to lack a legitimate rationality or justification for its repressive measures through a comparison to personal experience then that law tends to lose its desired effect to guide and curb the prescribed behavior (Rist, p. 11).

Nuisance. Nuisance has been defined as "the assertion of something in the nature of a negative interest--the interest of an adjoining or nearby property owner in not being adversely affected by the misuse

of the land in question" (Wright and Weber, p. 17). It has been suggested this could prove to be successful policy to deal with the spillovers of adult use establishments.

One chronicler argued for the policy in the following manner:

The bookstore or theater inflicts certain costs on the surrounding neighborhood; the common law rules of nuisance shifts those costs back to the adult enterprise and makes it treat them as costs of doing business. This shift makes the adult business less profitable, and probably makes pornography more expensive to consumers and outlets less available to producers (Harvard Law Review, p. 1565).

Thus, the injury in question would not be the speech, be it protected or unprotected, but the effects those users have on their neighbors. Such costs, it was noted, must be "specific" and "tangible," and must not be a speculative assertion about general effects these users have on their neighbors (Harvard Law Review, 1978).

The policy is favored by many due to the leeway it offers in its utilization (Rist, 1975). If injury is found to exist, damages in the form of financial remuneration can be paid to those injured while remaining in business. Or the business can alter its appearance or eliminate the practices which have been found to be offensive. All in all, the business would be able to seek out an "efficient" solution, having now an "economic" incentive to do so (Harvard Law Review, p. 1565).

An example of how a nuisance injunction might be obtained is in the case of a state declaring a house of prostitution as a nuisance. An injunction could be obtained against a use of this nature under the power of equity to prevent injury to the health and morals or to suppress criminal activity injurious to the health and morals of that

community. A court, given proof of the above, then could deal with the nuisance by shutting down the use, fining the proprietors for damages, or a combination thereof (Strom, 1977).

Moral abatement laws exist in many states. These laws are targeted at adult bookstores and theaters. If obscene material is found to be on the premises, after a hearing, the establishment can be closed down for a length of time, typically a year. This establishment can be reopened prior to the end of that period upon posting a cash bond. This bond can be forfeited if the obscene material is found again on the premises (Trachtman, 1983).

However, when nuisance action is contemplated against a bookstore or other activity in which protected speech is at question, the issues are not so clear-cut. A court must then balance the damages against the uses' neighbors versus the possible impingement upon possibly protected speech (Harvard Law Review, 1978). In order to do so, a hearing must occur in order to determine whether or not the practices in question are obscene (Strom, 1977). For instance, the Georgia State Supreme Court, in Sanders v. State (231 Ga. 608, 203, SE 2d 153 [1974]), struck down the closure of an adult bookstore under a nuisance provision (Trachtman, 1983).

In addition to the above noted weakness, other criticisms have been noted in the concept of using nuisance to abate adult uses. One source argued that the awarding of damages would restrict First Amendment rights of both the producers and consumers. The awarding of damages would make it more expensive to publish a work, show a film,

or to pay the rent. The increased cost, it is reasoned, when passed on to the consumer would, by virtue of price, restrict access by making it too expensive for some to acquire (Harvard Law Review, 1978).

Furthermore, it has been noted that certain situations are particularly unsuitable to regulation by nuisance law. For instance, it was noted in certain situations, adult use establishments might already be located in areas characterized by such adverse elements as crime, low property values, and unsightly storefronts. In cases such as this, it was argued, it would be rather difficult to demonstrate any damages the adult use might have on its environs (Harvard Law Review, 1978).

It has been noted that nuisance law may present other drawbacks as well. One source noted that such actions are "likely to exacerbate the tendency of adult uses to locate in the marginal or declining areas of the cities--areas that need the most protection against adverse influences, however nebulous" (Harvard Law Review, p. 1568). It was argued that nuisance action, or the threat of, could well have the effect of pushing adult use establishments into areas that are least likely to be damaged, and those least likely to bring nuisance action against adult uses (Harvard Law Review, 1978).

Finally, a recent federal court case, Universal Amusements v. Vance (587 F2d. 15th Cir., 1978]: aff 48 LW 4273), does not seem to bode well for nuisance action that does not restrict itself to traditional nuisance action. Several jurisdictions have initiated nuisance action on the basis of obscenity violations. In the above

cited case, the court found such amounted to a prior restraint on speech, and is only actionable when "tangible" damages could be proven (Kaminer, 1980). Trachtman (1980), in his analysis of this technique, found nuisance action to be "a prior restraint on presumptively protected speech, unjustified by any extraordinary and compelling state interest . . . [the nuisance action] is too blunt an instrument to withstand this scrutiny" (p. 1520).

Moratoria. Some jurisdictions, most notably in California, have chosen moratoria as a means of controlling adult use establishments, albeit a temporary means. Under moratoria, cities have a stated policy of not issuing a building permit for adult use establishments in order to allow for time to study the effects of such (Aver, 1981-2). In the California regulations which were reviewed in one study, these study periods typically last for four months, but can be extended up to two years (Aver, 1981-2).

Moratoria are said to be needed in order to allow time for study and enactment of zoning proposals. One jurisdiction, LaMirada, California stated the rationale behind their utilization of this policy as follows:

There is a need to study and determine approximate standards of proximity of 'adult businesses' to residential areas, hospitals, schools, parks, and public buildings as well as standards of noise and traffic (Aver, p. 307).

Those utilizing moratoria are confronted with maintaining a balance between First Amendment rights and legitimate planning concerns. It is noteworthy that on at least two occasions moratoria of this sort

have been found to be unconstitutional in two unpublished opinions (Aver, 1981-2).

Moratoria have been cited for possible abuses. Aver (1981-2) pointed out that a community, while a moratorium is in effect, could compile a list of sites where permits for adult use establishments had been applied for in the recent past. When the zoning regulations for adult use establishments are drawn, the regulations could be designed so as to prohibit adult uses on those sites at which the permits requests were filed. In addition:

It is more likely, however, that by the time the moratorium period expires the entrepreneur will have had time to change plans due to economic necessity or because the land will have been sold. Therefore, the moratorium can effectively limit the establishment of any new adult business (p. 308).

Moratoria, on the whole, are a stop-gap method of dealing with the regulation of adult uses. Not only are their effect temporary, moratoria have no power to regulate pre-existing establishments. When one considers the fact, as noted previously, that their constitutionality is uncertain, their power to deal effectively must be considered minimal.

Amortization of nonconforming uses. Some jurisdictions have sought to use the practice of amortizing nonconforming adult use establishments as a means of regulation. The practice of amortization is based, according to Wright and Webber (1978), on "the idea that the useful economic life of nonconforming structures can be estimated to the point that the use must cease within a district after a given number of years" (p. 148).

Several jurisdictions, including New York City (Marcus, 1978) have contemplated the use of this mechanism. By definition, such a practice would only deal with pre-existing establishments, and therefore would not be particularly effective in dealing with future sitings of adult use establishments. Thus, it would follow that such would have no influence on future siting decisions, and would best be used in conjunction with an ordinance that has existing adult use provisions (Fee, 1977).

Licensing. Licensing has been used in some jurisdictions to regulate adult use establishments. Typically, these are utilized in regard to the regulation of massage parlors and cabarets. Due to the doctrine of prior restraint, licensing is not considered a practicable form of regulation for adult theaters and bookstores (Strom, 1977).

Licensing varies from jurisdiction to jurisdiction, and varies according to use. For instance, licensing ordinances governing cabarets and massage parlors are typically designed to keep those with criminal records out of the business, as well as regulating operating hours (Strom, 1977). One community required the following from prospective massage parlor operators:

1. Payment of \$50 fee to cover cost of background investigation;
2. No prior sex offense convictions;
3. Acquisition of business license;
4. He/she must be fingerprinted, and record of such must be kept on file at local police department (Verlarde et al. p. 218).

In addition, the masseuses in the same community had to meet an eight-point series of requirements including fees, health examinations, background check and proof of schooling in the practice of massage (Verlarde et al., 1977). Practices such as these have been referred to as "sizable regulatory barriers" to the operators of massage parlors (Toner, p. 2).

These practices have, however, met with criticism. Toner (1977) noted:

In their zeal to protect themselves from undesirable uses communities placed arbitrary restrictions on legitimate businesses. Furthermore, many communities confused the licensing processes with land use regulations by putting development standards into the licensing ordinance. Finally, exorbitant license fees were clearly punitive and bore little relation to the actual cost of the process or the public cost of the use (Toner, p. 2).

In addition, it was found that by and large, any device, including licensing, that granted broad discretionary powers to local officials in determining whether or not an adult use could a given site could be declared invalid by a court (Weinstein, 1982).

Miscellaneous devices. There are several other devices which have been utilized to a lesser extent. These will be briefly explored. All share the distinction that limited information is available about them.

Liquor licensing. Under the Twenty-First Amendment, the states have the power to regulate the sale of liquor within their boundaries. Some communities have chosen to use this power to deny liquor licenses to adult uses, most particularly in the case of cabarets or nude dancing establishments (Fee, 1977).

This practice has been upheld in at least one United States Supreme Court case, California v. LaRue (49 U.S. 109 [1972]). In this case, the Supreme Court found that a community could prohibit sexually explicit entertainment "where (it) fosters documented anti-social behavior" (Fee, pp. 467-8). In a subsequent case, Clark v. City of Fremont (377 F. Supp. 327, 342, [D, Neb. 1974]) it was found that, when applying LaRue, nude dancing or nudity per se could not be banned where alcohol is served without demonstrable community costs (Fee, 1977).

The practicability of liquor licensing as a means of regulating adult use establishments is largely unknown. It is not believed to be particularly effective in regulating bookstores, massage parlors, or theaters for obvious reasons. In addition, it would have little or no influence on siting decisions of these establishments.

Fees. Fees have been used in conjunction with and in the absence of licensing ordinances. Their existence have been fixed to the provision of extra services in response to spillovers which are said to accompany adult use establishments. For instance, Santa Maria, California requires a \$500 "security deposit" in order to provide for extra police and vehicles when granting a nude establishment permit. Falls Church, Virginia assesses a \$5,000 special tax from operators of massage parlors ("Keeping a Rein on Sex Businesses," 1978).

Again, it is not clear just how effective these measures are. It has been noted by at least one chronicler that the fees are less

than a comprehensive approach, and often these fees are said to bear little relation to the "costs" the uses are said to affect (Toner, 1977).

Selective enforcement. The above title refers to efforts some communities have pursued in response to adult use establishments. Policies of selective enforcement are said to include the enforcement of building, fire, and safety codes, at adult use establishments. Such tactics have been dismissed as "harassment," serving only to force the operator into compliance with those codes (Strom, 1977). In addition, others have found that such a policy could have the effect of increasing organized crime's control of the industry while failing to regulate these establishments in a meaningful fashion (Pratter et al., 1980).

Zoning

The final means of adult use regulation to be examined, and the primary focus of this paper is that of zoning. Zoning has had a long history in planning. This section will examine the two prevalent forms of zoning that have developed in recent years in response to the growing presence of adult uses.

Zoning has been defined as "the division of a municipality into districts for the purpose of regulating the use of private land" (Babcock, p. 416). It derives its legitimacy from the Supreme Court decision of Euclid v. Ambler Realty Company (272 U.S. 365). In this case, it was found that a variety of use, height, and area restrictions within a municipality is permissible. The validity of this form of

regulation is based on the police power, which allows regulation in order to protect a community's health, morals, safety or general welfare (Wright and Weber, 1978).

New uses are not uncommon in the history of zoning. Since its inception, zoning has had to deal effectively with such developments as billboards, shopping centers, drive-ins, mobile homes, skateboard parks, fast food restaurants and discotheques. Zoning has had to respond to each of these, with varying degrees of success (Marcus, 1978).

It is believed to be a valid presumption that adult use establishments can be categorized as a new use. Although it is difficult to generalize upon the rationale prompting the zoning regulation of adult uses, the following is perhaps as good an explanation as can be found:

in recent years a growing recognition of the inability of judges to distinguish what is obscene from what is not, as well as considerable public indignation at the growth of pornographic land uses and their adverse impact on surrounding land values, have led to attempts to regulate pornography through restrictive zoning (Marcus, p. 1).

Two types of adult use zoning are widely utilized in the United States presently. Those types are to be reviewed in future sections.

Concentration zoning. Concentration zoning seeks to restrict adult uses to a specific geographic area of a community while restricting those uses from other areas of the community. At this writing, two major cities, Boston and Seattle, utilize variations of this form of adult use zoning ("Crackdown on Porn," 1977). The following sections will review this form of zoning as practiced in Boston.

Boston. Boston is not unlike cities of similar size in some respects. One of these similarities is that it is populated by a series of uses that can be described as adult in nature. "Honky tonk" bars, art cinemas, pinball arcades, night clubs, cabarets, and adult bookstores have all been identified as operating in Boston. These operations were said to share "an offense to the sensibilities of many segments of the community" (Boston Redevelopment Authority, p. 25).

The uses described above had become, due to a number of considerations, concentrated in and around the Scollay Square area of Boston. In the late 1950's, renewal activities dispersed these uses from the Scollay Square area. However, presumptively due to lack of follow-up steps, reconcentration did occur in another location (Marcus, 1978). By the mid-1960's, adult uses developed in addition to these previously noted, including topless bars and adult movie theaters. The area that these and the previously noted uses had become reconcentrated became known as the "Combat Zone." As noted by Marcus (1978), only a "handful" of the adult uses in Boston were not in this area.

As for the Combat Zone itself, it was found to comprise approximately two city blocks of Boston (Spencer, 1984). Illegal activities, such as prostitution, gambling and the selling/displaying of "hardcore" books and films, were said to be present in this area (Marcus, 1978). Notable decay in the buildings in this area was pointed out by chroniclers as well (Toner, 1977). Furthermore, city officials were said to be fearful that these uses and their accompanying spillovers would spread to other areas (Marcus, 1978).

In 1974, in response to these concerns, the Boston Redevelopment Authority released the Entertainment District Study. This study noted that the then present policy of adult use regulation allowed those uses as a matter of right in most business, and in manufacturing and industrial zones. At the same time, these uses were forbidden in residential and local business districts. The report went on to contend that any renewal efforts in the combat zone to upgrade its image must be able to deal with the "confusion about the future effects of adult activities on existing neighborhoods" (p. 26).

The study went on to recommend that adult uses be restricted largely to the combat zone. The study argued:

Containing a majority of the adult entertainment facilities for the entire city in this compact area would facilitate the policing of such activities and would avoid their spread to other areas of the city where they create serious incompatibilities with neighboring land uses or inhibit needed real estate investments. This zone . . . could be avoided by persons who do not care to be subjected to the x-rated enterprises (pp. 26-7).

This outcome was to be affected by permitting adult uses as a matter of right in the Business Entertainment (B-E) District, an "overlay" district. In the remainder of Boston, adult uses were either expressly forbidden or a conditional use. In the case of the latter, a public hearing was to be held before the Zoning Board of Appeals prior to the awarding of a business permit. Such a hearing "would give local resident and business groups the opportunity to object to and probably prevent the establishment of x-rated activities in their neighborhoods" (pp. 27-8).

The zoning text amendment was only a part of the overall Entertainment District Study. In addition, the combat zone was to be treated to a series of improvements geared to upgrade the zone's image. Included in the improvements were the repair of streets and sidewalks, special lighting, and the redesign of storefronts. In addition, two parks were completed, as well as a program for sign removal and design review. It was noted, "All in all, the Redevelopment Authority expected the program to produce a relatively healthy neighborhood, albeit one characterized by pornographic uses" (Toner, pp. 7-8). Others including the Director of the Redevelopment Authority, hoped for more drastic results, as characterized by the following statement: "Within a year or so, the term 'Combat Zone' will be a thing of the past" (Toner, p. 2).

Lessons from Boston. Since the legitimization of the Combat Zone in 1974, Boston has been studied by urban planners and other professionals in order to ascertain the desirability of this form of adult use zoning. Advocates and critics can be found of this form of zoning, and this section will briefly review those arguments.

Toner (1977) noted that one desirable quality of this approach was, at least in Boston's case, it legitimized what already existed. Further, "instead of trying to chase them (adult uses) off to another location, or worse, to pretend that they did not exist--the city adopted special land use regulations to control what existed" (p. 8).

Others have argued that Boston's zoning scheme allowed the fixing of the costs of policing and traffic controls. Such is due to the

community's ability to examine just what amount of police protection is necessary to accomplish an adequate level of service in the area of concentrated adult uses ("Keeping a Rein on Sex Businesses," 1978).

Other advantages have been noted in the concentration of adult uses to a specific geographic area. Those include:

1. Like uses treated alike;
2. Control over both the total growth of pornographic uses and the development of new uses;
3. Apparent constitutionality (Toner, 1977).

The latter is thought to be particularly noteworthy. At this writing, this zoning scheme has no known court challenge.

Criticisms of concentration zoning of adult uses center primarily on the criminality that Boston has experienced in the Combat Zone. Sources have noted that while concentration might aid the policing of the area, such concentration could very well overburden the police (Harvard Law Review, 1978). Crime rates within the Combat Zone have risen since 1974 (Pratter et al., 1980), particularly in the categories of prostitution and street crime. It was proposed this was due, in the words of one source, "to criminals sensing some immunity there" (Strom, p. 7). To sum, the Technical Report of the Commission on Obscenity and Pornography, Volume IV, (1970), noted the following:

Traffic in drugs, prostitution and stolen goods are believed to prevail and/or who thrive in an atmosphere of borderline and prohibited activities--the derelict, alcoholic, prostitute, pimp, and fast-buck artist. The crime rate in the Combat Zone is one of the highest in Boston (p. 104).

Others have objected not to the concentrating of these uses in Boston, but to the renewal program that accompanied this zoning scheme. Such has been likened to a "subsidy of sex businesses" (Toner, p. 8). This renewal program, as noted earlier, was an attempt to improve the Combat Zone's appearance.

Adult uses have been said to be "elbowing" out conventional businesses located in the Combat Zone ("Keeping a Rein on Sex Businesses," 1978). It has been hypothesized that the competition between adult and non-adult uses in a confined area would yield a situation where landowners could receive higher than normal rents. Those most able to pay those higher rents would, in all likelihood, be the adult uses. Thus, it would follow that the area could have a near exclusive population of adult uses (Toner, 1977).

It has also been suggested that the constitutionality of concentration zoning is not without doubt. The restriction of adult uses to one, specific geographic area has been said to "substantially burden access" to the adult uses to that section of the population who wish to patronize them (Strom, 1977). Michaud, in Loyola Law Journal (1976), seemed to share this argument when he noted that "this (concentration zoning) could easily be viewed as creating a significant restriction of access to adult theaters" (p. 1085).

As noted earlier, Boston and Seattle are the only known major cities that utilize this form of concentration zoning. The Fayetteville, North Carolina experience may offer an interesting illustration of a given community's reaction to this form of zoning. In 1979,

Fayetteville found itself in a position of wanting to regulate adult uses for many of the same reasons previously noted. As in Boston, the adult uses were confined to one area of the city, and the Fayetteville Planning Board believed it was in order to use an approach similar to that of Boston's (Yow, 1981).

At the hearing before the Fayetteville City Council, opposition arose for several reasons. Area businesses feared that the spillovers that appeared to be a part of adult uses would infringe upon their businesses. The local police, most notably the Chief of Police, did not appear enthusiastic about the proposed zoning. In his words, the Chief did not want "'to commit his officers to a free-for-all zone'" (Yow, p. 38). Finally, citizens complained the proposal only "condoned and endorsed" the businesses, rather than controlling them (Yow, p. 38).

The Fayetteville City Council chose not to follow the recommendations of the Planning Board, opting instead for an alternate form of adult use zoning. Although it is difficult to generalize from one community's experience, Yow (1981) offered the following observation:

It is obvious that a council is politically susceptible to charges that it is condoning sex businesses when it approves concentration, no matter what recommendation it receives from its advisory bodies (p. 40).

Dispersion of adult uses. The second type of zoning regulation for adult uses is that of dispersion. In general, this type of zoning prevents the geographic concentration of adult uses by dispersing the uses throughout selected zoning districts within a community. Via

the device of required distances (e.g., 1,000 foot radii), adult uses are prevented from locating in near proximity of each other. In addition, this type of zoning also employs required distances between adult uses and selected other sensitive uses, such as churches, schools, libraries, and parks (Zoning and Planning Law Report, 1977).

It is most noteworthy that this type of adult use zoning has been upheld as a legitimate form of regulation by the United States Supreme Court in Young v. American Mini-Theaters (427 U.S. 50 [1976]). For that reason, it is believed necessary to trace briefly the history of Detroit's form of adult use zoning. In addition, a review of the criteria that emerged as a result of this case will be examined as well.

History of adult use zoning in Detroit. The adult use zoning ordinance of Detroit is said to have grown out of anti-Skid Row activities undertaken by that city. In 1962, after the removal of certain blighted properties, the City of Detroit enacted an anti-Skid Row ordinance. The ordinance was based on the observations of local officials who noted that rundown areas seemed to share a concentration of certain uses. These uses included bars, pawn shops, and public lodging facilities (Toner, 1977). Also included were pool halls, second hand stores, shoeshine parlors, and taxi-dance halls (Steward, 1976). It was reasoned that by placing locational restrictions upon these uses would serve to avoid their concentrating, and thus would inhibit the blighting influences thought to stimulate the growth of Skid Rod (Marcus, 1978).

Marcus (1978) noted that city officials were pleased with the progress this ordinance seems to have made in regard to dispersing these uses. In 1972, after a period of observation, the City of Detroit amended the anti-Skid Row ordinance to include adult bookstores, adult motion picture theaters, and adult mini-theaters. The uses and "specified sexual activities" are defined below:

Adult Book Store

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Adult Motion Picture Theater

An enclosed building with a capacity of 50 or more persons used for presenting material having as a dom[sic] presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below) for observation by patrons therein.

Adult Mini Motion Picture Theater

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), for observation by patrons therein.

For the purposes of this Section, 'Specified Sexual Activities' is defined as:

1. Human Genitals in a state of sexual stimulation or arousal;
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And 'Specified Anatomical Areas' is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Group "D" Cabaret

A cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers (Detroit Municipal Zoning Ordinance, 1972).

The inclusion of these additional uses was explained as follows:

Detroit claimed it adopted the zoning ordinances in question upon the advice of urban planners, sociologists, and real estate experts, who believed that the concentration of 'adult' businesses in an area tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere (Stewart, p. 394).

Specifically, the adult uses noted earlier could not, without special waiver, locate within 1,000 feet of any two regulated uses, or within 500 feet of a residential dwelling or rooming house (Marcus, 1978). In the case of the latter, this could be waived by petitioning the neighborhood, and obtaining permission of 51% of those neighbors (Toner, 1977). It has been contended that this ordinance would not so much limit the public's access to these uses as it was an effort to deal effectively with a deteriorating neighborhood in a creative fashion (Michaud, 1976).

Not surprisingly, others did not view this ordinance quite so favorably, most notably those operating adult use establishments. By March 1976, the anti-Skid Row ordinance had found its way to the United States Supreme Court (Toner, 1977). Prior to that, lower courts had ruled in a conflicting manner. In Nortown Theater, Inc. v. Gribbs (373 F. Suppl. 363 [E. D. Mich. 1974]), the Federal District Court invalidated the 500 foot distance requirement, noting that the city had not shown "a compelling state interest" in separating adult uses

from dwelling units. Such would, in the Court's opinion, yield "'almost a total ban'" of adult uses in most all areas of the city (Strom, pp. 23-4). However, the Court did uphold the 1,000 foot distance requirement between adult uses, noting testimony depicting adult uses' deleterious effects on its environs. Such effects were, in the Court's opinion, substantial enough to offset the "slight" burden placed upon the First Amendment rights of the plaintiffs, and would not unduly limit the ability to locate an adult use within the city (Strom, 1977).

The findings of this case were then appealed to the Sixth Circuit Court of Appeals. The findings of this case, American Mini-Theaters, Inc. v. Gribbs (518 F.2d. 1014 [6th Cir. 1975]), invalidated the 1,000-foot distance requirement. The Court found the city could regulate the location of uses under its zoning powers, but it could not regulate adult theaters or bookstores in a more stringent manner than other bookstores or theaters. Citing the First (freedom of expression) and the Fourteenth (guarantee of equal protection) Amendments, the Court noted that "it (Detroit) could not single out adult movies and bookstores on the basis of their presumptively protected content for more restrictive treatment" (Strom, pp. 24-5).

Young v. American Mini-Theaters. American Mini-Theaters, in their brief before the Supreme Court, argued three points. It was contended:

1. The ordinance was vague to the point that it was violation of the Due Process Clause of the Fourteenth Amendment;
2. The ordinance amounted to a prior restraint on protected communication and therefore violated the First Amendment;
3. The ordinance, by classifying theaters on the basis of the content of these exhibitions was violative of the Equal Protection Clause of the Fourteenth Amendment (Stewart, 1976).

The vagueness argument was said to be based on the lack of standards for determining when material is "characterized by emphasis on specific sexual activities" (Land Use Law and Zoning Digest, p. 12). Such is particularly of note in the case of movies, and how much activity in a given movie would yield that "emphasis" on specific sexual activity and thus would be considered an adult movie (Friedman, 1977). This vagueness and the lack of guidance characterized above were said to act as a prior restraint because "the owner has no guidelines on which to base decisions concerning the content of the material he shows or might even where he might locate and when a waiver from the 1,000-foot regulations may be obtained" (Land Use Law and Zoning Digest, p. 12).

Attorneys for the City of Detroit argued the ordinance was adopted in response to the problems that various experts had noted when adult and other uses become concentrated in one area. It was argued that the concentration of adult uses seemed to produce lowered

property values, increased crime, and neighborhood emigrations. In all, it was argued that the ordinance represented a reasonable attempt to protect neighborhoods from blighting influences (Stewart, 1976).

In a 5-4 decision, the Supreme Court rejected all of American Mini-Theaters arguments. On the issue of vagueness, the Court found such vagueness as displayed in ordinance regarding the amount of "emphasis" on "specific sexual activities" was not within the concern of the plaintiff since he clearly fell within the domain of the ordinance. Specification of the standards of the ordinance would, in the Court's view, occur in further cases (Strom, 1977).

Also rejected was the argument that the ordinance amounted to a prior restraint upon the plaintiff. Despite the ordinance's imposition of licensing and locational restrictions on adult uses, the market for adult uses is "essentially unrestrained" (Land Use Law and Zoning Digest, 1976). Theaters in general, it was noted, were subject to licensing and locational restrictions as well, and these have not been viewed as a prior restraint. The ordinance, it was found, did not limit the number of adult uses, only their location (Zoning and Planning Report, 1977).

The final ground upon which the Supreme Court upheld the ordinance has more to do with the First Amendment as it does zoning. According to Turchi (1983), the Court seemed to state that adult uses, although not obscene under Miller v. California, are deserving of less constitutional protection than other forms of expression. In this case, it "marked the first instance in which the Court assigned

relative values to different kinds of constitutionally protected speech" (p. 515). In justification of assigning values to speech, the Court found that:

The classification of the theaters is not unreasonable since it is related to preservation of the urban environment. Only theaters exhibiting material with the specified content has been found to contribute to the deterioration of the city's neighborhoods. The plaintiffs' First Amendment rights are not violated by the mere fact the content of their exhibitions is the principal criterion subjecting them to the ordinance's restrictions (Dow, p. 483).

In summation, commentators have found that :

Young stands for the proposition that content-based regulations of adult materials are permissible if they do not lead to total suppression of speech and if they serve some significant state interest not related to the government's appraisal of the message expressed (Turchi, p. 515).

That state interest, as noted earlier, is the preservation of neighborhoods. Any infringement on the First Amendment rights of the theater owners or their patrons, when compared with the preservation of neighborhoods, is "incidental" (Gold, 1977).

What is noteworthy for planners is Justice Lewis Powell's concurring opinion. Justice Powell joined the majority opinion in the rejection of the arguments of vagueness and prior restraint. Justice Powell did not, however, agree with the distinctions drawn by the plurality between types of speech. Rather, he held that "the (zoning) ordinance was a proper exercise of the city's police power which effectively would meet the encroachment of urbanization upon the quality of life of its citizens (Stewart, p. 398).

Due to the closeness of the decision (5-4), it is necessary to review the dissents as well. The dissenters did not agree with

the majority's contention that adult uses were entitled to less protection than other forms of expression (Land Use Law and Zoning Digest, 1976). In addition, the majority was accused of "riding roughshod over cardinal principles of the First Amendment law which require the time, place, and manner regulations that affect protected expression be content neutral" (Zoning and Planning Law Report, pp. 11-12).

The dissenters were also highly critical of majority's treatment of the vagueness issue. The dissenters illustrated a scenario of an operator of a movie theater that periodically offered explicit movies, but by and large offered a more general fare. Under the majority opinion, it was argued, that owner would have to determine, among other matters, whether or not his movie was a part of those under this ordinance, and would then be subject to the distance requirements as well. Strom went on to note that:

Since miscalculation in any of these evaluations would risk subjecting the exhibitor to fines or a jail sentence, the cumulative effect of these elements of uncertainty would be to burden and discourage the exhibitor from showing any material within the 'gray area' of the ordinances possible coverage, thus adding an element of impermissible prior restraint to the defect of vagueness (Strom, p. 33).

The advantages and disadvantages of dispersion. It appears, much more so than in the case of concentration zoning, that the dispersion of adult uses by zoning is an accepted practice. At this writing, the cities of Atlanta, Atlantic City, Galveston, Kansas City and Minneapolis are among the cities utilizing this form of zoning (Aver, 1982-3). Despite its prevalence, this form of zoning

has its disadvantages as well as advantages. This section will examine the advantages and disadvantages of dispersion zoning.

Toner (1977) noted the zoning of adult uses in general has the practical effect of removing a good deal of emotionalism that seems to accompany the issue of adult uses. Toner found that:

It (zoning) removes the emphasis from the adult uses. It even goes beyond this in relating the adult uses to a variety of other uses and their combined community effects--the skid row effect (p. 6).

Others have noted that, at least in Detroit, dispersion of adult uses by zoning has appeared to accomplish their goals. It was noted that since 1972, the year of the ordinance's passage, only 10 adult uses have attempted to locate in Detroit. Of those 10, only 3 were able to comply with the provisions of the ordinance (Marcus, 1978). Although these findings are probably not in the spirit of the Young decision, it is an attribute many municipalities might find to be agreeable when faced with a proliferation of adult uses.

Despite the previous assertion, others have begged to differ on the point of whether this form of zoning limits the overall number of adult uses. Toner (1977) noted that by allowing adult uses in a range of zoning districts, the potential number of uses have the potentiality of being "unlimited." Given such, this would seem to indicate that careful consideration need be exercised in order that a municipality still maintained some degree of influence over the adult use industry.

Dispersion zoning has found a wide degree of acceptance from a wide range of interested parties. It was found that:

the zoning approach appears further enhanced by the fact that it has received support from a wide range of the political spectrum, from liberals to conservatives; even voices within the sex-related industry have indicated their willingness to cooperate and operate within zoning controls (Strom, p. 7).

Dispersion zoning is not without weaknesses either. As noted earlier, one advantage dispersion zoning has been said to have over concentration zoning is that crime of various types seem to be prevalent in areas of concentration. One chronicler noted that such may not necessarily be the case:

Dispersing adult businesses might alleviate crime by helping to eliminate disreputable neighborhoods, or it might only siphon crime into additional areas. Similarly, deconcentration may only cheapen more neighborhoods, and make it more difficult to keep children away from adult enterprises (Harvard Law Review, p. 1564).

In a recent article regarding the politics of adult use zoning in Fayetteville, North Carolina, the author noted similar findings. Local officials, the author noted, feared that dispersal zoning would expose additional areas of city to adult uses, and their perceived effects (Yow, 1981).

Political liabilities are a problem as well. In many communities, zoning adult uses is tantamount to a community condoning or approving such uses (Strom, 1977). Even in cases of acceptance of this form of regulation, such acceptance may only last as long as the adult uses are restricted to "the other side of town" (Strom, p. 43).

Toner (1977), in his analysis of the Detroit ordinance, noted that when conditional use provisions are a part of the ordinance, the administrative costs of that ordinance increase. In the case of

Detroit, case-by-case analysis must occur in order to determine whether or not the applicant will be in compliance with the ordinance. Such an administrative process is said to be "burdensome" both to the city and the applicant.

An attribute of dispersion zoning which makes it unpredictable is that it is tied to the geography of the community. For instance, given the particular mix of uses and the required distances required between certain uses, the factual circumstances of each case varies. Such variance tends to make it difficult to ascertain whether or not a given ordinance is valid (i.e., does the ordinance allow for an adequate number of adult use sites?). Thus, a community cannot merely model its adult use zoning ordinance after another community's ordinance, and expect its validity to be without question (Aver, 1982-3).

Implementing Young: A Search for Practicability

The aftermath of any given Supreme Court decision is the search for implementing the findings of the Court. The aftermath of Young is no different in that manner. This section will examine what has been learned from both legal commentators and Young's progeny.

Commentators have examined Young and its progeny in order to determine the steps a given community might concern itself when adopting this type of zoning. Failure to do so could leave a community in the position of having its zoning ordinance invalidated. Certain criteria have emerged since the Young decision. Included are:

1. Regulations must be motivated by a desire to abate adult uses' adverse impacts, and not by a distaste for the use itself;
2. Legislation must not overtly restrict First Amendment rights;
3. The municipality must be able to demonstrate an adequate factual basis for the existence of the ordinance in question (Harvard Law Review, 1557-9).

These criteria will be examined in more detail below.

In the case of Criterion One, this has to do with what appears to be the motivation for choosing this sort of regulation. Commentators have noted that a community's hostility to this type of speech (or use) is insufficient justification for this type of regulation. For instance, in the case of Avalon Cinema Corporation v. Thompson (667 F.2d 659 [8th Cir. 1981]), a North Little Rock, Arkansas adult use zoning ordinance was invalidated at least partly on the grounds that the ordinance was not enacted until the community learned of a coming adult theater (Aver, 1982-3). In Entertainment Concepts, Incorporated v. Maciejewski (631 F.2d, 497 [7th Cir. 1980]), an adult use ordinance was invalidated because it sought to, via zoning, prohibit the only adult theater in that community (Aver, 1982-3).

According to the article "Zoning and the First Amendment" in the Harvard Law Review (1978), the market for adult uses must be essentially unrestrained. This is said to be the crux of Criterion Two. According to this article:

A majority (in the Young decision) thus seemed to agree that pornography zoning would be unconstitutional if the total number of pornography outlets and the number of potential customers who could conveniently patronize them did not remain approximately the same (p. 1558).

Aver (1982-3) argued this amounts to a test of economic viability, noting at the same time that the Young decision did not address the specific issue of economic viability. Aver goes on to cite several cases since the Young decision that are illustrative of this issue. In Purple Onion, Incorporated v. Jackson (511 F. Supp. 1207 [N.D. Ga. 1981]), a dispersion ordinance was challenged on the grounds that economically feasible sites were not available under the ordinance. The Court, in invalidating the ordinance, "cited such factors as unsuitability for retail or commercial use and nonaccessibility to automobile traffic suggests that an ordinance which primarily restricts adult uses to commercially non-viable sites would not be upheld" (pp. 302-3). Similarly, in Alexander v. City of Minneapolis (531 F. Suppl. 1162 [D. Minn. 1982]) the court, after hearing evidence that a successful adult use site must be located in close proximity to pedestrian and vehicular traffic, invalidated an ordinance which failed to permit such access. However, in Baciardanes v. City of Galveston (514 F. Suppl. 975 [S.D. Tex. 1981]), the court found, despite the pre-emption of a number of "economically viable" sites and the findings in the Young decision, adult uses would not be exempt from certain economic burdens.

Aver went on to conclude that:

even under Young the constitutionality of an ordinance should not be determined without at least considering the issue of commercial viability. The court must look beyond whether a particular ordinance allows adult businesses to locate in many sites because if those sites are not commercially viable, adult businesses will not locate there resulting in a limitation upon protected speech (pp. 303-4).

Criterion Three maintains that a municipality must demonstrate a factual basis for the ordinance in question. Again, Young's progeny is the guidance that must be considered. In Linmark Associates, Incorporated v. Township of Willingboro (431 U.S. 85 [1977]), the court examined whether or not the ordinance would abate the deleterious effects it purported it would (Harvard Law Review, 1978). In Keego Harbor Company v. City of Keego Harbor (657 F.2d. 94 [6th Cir. 1981]), an ordinance was invalidated due to lack of factual support of blight and traffic difficulties noted prior to enactment (Aver, 1982-3). In a case cited earlier, Avalon Cinema Corporation vs. Thompson, the ordinance in question was invalidated due to, in part, the fact that the municipality failed to demonstrate a history of blight due to adult uses (Aver 1982-3).

The question that remains is what sort of record should be compiled by a municipality when adopting this sort of ordinance. Reliability of the evidence, according to one commentator, is of utmost importance. An orderly, systematic gathering of the factual basis should be made by officials not subject to political pressures. This would seem to indicate that an outside consultant of some type would be best suited for the gathering of such a record (Harvard Law Review, 1978).

Conclusion

This section sought to outline the various methods used to regulate adult uses. Included in these was that of zoning, the primary focus of this effort. As much as the subjective results allow, this

section has attempted to briefly examine the practicability of adult use zoning.

The coming sections will attempt to move from the general to specific. To be examined is the history of adult use zoning in Nashville-Davidson County, Tennessee. The fact that the adult use zoning in Nashville is a rather unique blending of the practices of concentration and dispersion make it the more interesting topic to study. Such an exercise should be illustrative of a community's attempt to grapple with goals which in many minds are mutually exclusive.

CHAPTER IV

ADULT USE REGULATION IN NASHVILLE-DAVIDSON COUNTY, TENNESSEE, 1977-84

Introduction

This section will examine one municipality's approach to the regulation of adult use establishments. It is unknown whether or not the experience of Nashville-Davidson County, Tennessee offers any amount of generalizability as far as other communities' experiences are concerned. However, it is believed that this case study will offer considerable insight into the practical considerations of adult use regulation by zoning. Such insight should be of value to planners faced with the sensitive subject of regulating adult use establishments.

The time period to be examined in this chapter is 1977 to the present. The year 1977 was chosen for the very arbitrary reason that that year marked the year of Nashville's adoption of adult use zoning. The history of this form of regulation will be traced, as well as other regulations pertaining to adult uses, through 1984.

The geographic focus of this study will be the area of Nashville known as "Lower Broadway." This area contains the vast majority of the enterprises that are classified as adult use establishments and has been identified by a number of sources (and in the minds of many) as the area most affected by adult uses. Further, for reasons to become more obvious in the coming pages, the experiences of the establishment known as "The Classic Cat II" will be examined in depth. Its role in the overall history of adult use regulation in Nashville is thought to be pivotal, and must be examined.

Nashville-Davidson County, Tennessee

Nashville-Davidson County, Tennessee, was founded on Christmas Day, 1779. Its development as a commercial and transportation hub was enhanced by its location on the Cumberland River, and by its status as northern terminus of the Natchez Trace, the famous roadway leading to the Mississippi River (Metro Planning Commission, 1981).

Given its status as state capital, it is not surprising that Nashville's economy was first largely tied to governmental activity. In addition, Nashville served as a regional center for the large agricultural area of Middle Tennessee and Southern Kentucky. The post-Civil War era found Nashville as the location of several religious publishing companies. In addition, the founding of such institutes of higher learning as Fisk University and Vanderbilt University led many to refer to Nashville as the "Athens of the South" (Metro Planning Commission, 1981).

Into the Twentieth Century, other enterprises developed in Nashville. Most noteworthy of these was that of insurance. Two of this nation's largest companies, National Life and Accident Insurance Company and Life and Casualty of Tennessee, are located in Nashville. In addition, the music recording industry is of importance to the economy of Nashville. This importance is underscored by the nickname of "Music City, USA." A recent estimate found that 50% of all United States "single records are recorded in Nashville. This, and the presence of the Grand Ole Opry, a weekly

country music forum, has helped to nurture a growing tourist industry (World Almanac, 1983).

Since 1962, Nashville and Davidson County have shared a common government. The "metropolitan," or "consolidated" form of government, excepting several independent "satellite" communities, serves the entire county of 533 square miles. At this writing, Nashville's population is 477,811 (World Almanac, 1983).

Nashville has had an active planning department since 1931. As did many other agencies of this era, the Metropolitan Planning Commission (MPC) initially confined itself to the areas of zoning and subdivision regulations in its early years. Gradually, its influence expanded to include the planning functions that have become widespread in their utilization in the United States (Metro Planning Commission, 1981). In addition, the MPC staff has been credited by at least one source with supplying technical and strategic advice to proponents of metropolitan form of government prior to the successful 1962 referendum (Hawkins, 1966).

Regulation of Adult Entertainment

Establishments Prior to 1977

After the successful 1962 referendum and the subsequent re-organization of the city and county governments into a single government, the MPC staff was charged with much of the coordination of this process. Not the least task among these was the development of the Comprehensive Zoning Ordinance (COMZO). Prior to adoption of COMZO, the old city and

county had separate zoning ordinances governing their respective former jurisdictions. The Comprehensive Zoning Ordinance, in many ways, reflected the complexity of the consolidation of the two governments. The Comprehensive Zoning Ordinance was not officially adopted until 1974, some 12 years after the successful referendum (Deep, 1985).

Within the text of the original zoning ordinance, adult use establishments were not distinguished from other commercial uses, such as nightclubs. This was reportedly due to several factors. At that time, few establishments falling within the categories listed earlier existed in Nashville at the time of the zoning ordinance adoption in 1974. In addition, other laws already "on the books" were used to regulate existing adult use establishments. Included was the restriction of adult bookstores to a specific area, obscenity statutes and anti-prostitution statutes (Deep, 1985).

For the purposes of this study, the restriction of adult bookstores to a specific area is worthy of further elaboration. The ordinance restricted these uses to area bounded by Jefferson Street to the north, the Cumberland River to the east, and the Inner Loop (U.S. Interstate 40) to the south and west, a rough approximation of the CBD and its surrounding neighborhoods. The statute, adopted in 1973, made it unlawful for "any person, firm, corporation or association to establish, operate or maintain a bookstore or any other retail or wholesale establishment" restricting its attendance to adults to operate outside the area delineated above. This statute was not considered a part of the zoning ordinance, and violation of such was to be treated as a misdemeanor (Metropolitan Code, Section 29-1-4.1).

In addition, after the adoption of zoning, the Metro Council passed an ordinance regarding the regulation of massage parlors. In 1976, the Metro Council passed an ordinance regarding massage parlors. The ordinance was a licensing provision, setting forth a schedule of fees, informational requirements for both the applicant and his employees, and outlined a series of prohibited acts. In the case of the latter, prohibited behavior included the touching or exposition of "erogenous areas" by either the masseur/masseuse or patrons, and massage by persons of the opposite sex. In addition, a series of exemptions were included. The exemptions were designed to avoid interference with the act of massage in conjunction with medicinal purposes (Metropolitan Code, Section 29-1-42.1).

Within the context of the Comprehensive Zoning Ordinance, massage parlors were treated under the activity type of "general personal services" (Marcum, 1984). Under the terms of the ordinance, massage parlors could operate in multiple residential and office (MRO), office parking (OP), commercial services (CS), commercial general (CG), commercial core frame (CF), and commercial core (CC) districts (Comprehensive Zoning Ordinance, Section 32.10). As these districts comprise six of the nine commercial zones, it is believed to be a reasonable judgment that these uses enjoy rather broad areas in which to locate and operate.

1977 Adult Entertainment Zoning Ordinance

According to Richard Harrison (1985), Zoning Examiner, Metro Department of Codes, there were approximately 18 establishments in

1977 which could be classified as adult uses. All but three were located in the Central Business District. The emergence of these uses in areas outside the Central Business District seemed to act as an impetus for the adoption of zoning as a means of regulation.

Lower Broadway. By and large, these uses were found on the section of Broadway Street known as "Lower Broadway" to citizens of Nashville. This roadway, running from the Cumberland River west until it becomes State Route 100 ("Memphis-Bristol Highway"), has a notable place in the history of Nashville. The area has been singled out for its distinctive Victorian-style architecture ("Rich History Runs Through Old Street," 1983). As one newspaper account noted:

Lower Broadway once was considered a proud historical sector of the old city, and many a family piled into automobiles on Sunday and traveled this route to the banks of the Cumberland River. During the week, thriving automobile dealerships and retail furniture stores, as well as groceries, hardware and dry goods establishments and drugstores, catered to the thousands of daily shoppers (Hilman, p. 1).

In the 1920's, one business group adopted the following slogan: "If it's in Nashville, it's on Broadway" ("Opry Move Not Death Knell for Broadway After All," p. 2).

The decline of Lower Broadway has been blamed on business migration to the suburbs. One long time retailer noted that by 1960 the automobile dealers began leaving, with the furniture businesses departing by 1970 (Hilman, 1980). This situation was thought to be exacerbated by the relocation of the Grand Ole Opry from the Ryman Auditorium (one block north of Broadway on 5th Avenue) to the

suburbs ("Opry Move Not Death Knell for Broadway After All," 1983).

One newspaper account noted:

The shoppers who remain, and the remaining retailers who sell to them, vanish by 6 P.M. each day. And when the daytime downtown population disappears to its suburban homes, the streets are turned over to prostitutes, pornographic shops, peep shows and beer taverns where the rootless, restless, desperate ones remain into the night (Hilman, p. 4).

Mary Anne Eanes, project director for the Broadway Revitalization Committee, noted that by the middle 1970's "'businesses began to abandon the street; the appearance of the area really dropped. There was no link to bring people to Broadway, and the negative perception of the area really emerged'" (Opry Move Not Death Knell For Broadway After All, p. 2).

This negative perception appears to consist of both physical and social dimensions. The physical dimensions are said to be declining businesses, including tourist and retail establishments, underused and vacant buildings, and the existence of adult use establishments, including adult movie theaters, adult bookstores, and live sex shows (Hilman, 1980). Prostitution, both male and female, vagrants, alcoholics (i.e., "skid row residents") and the availability of drugs have been cited as the social features contributing to this negative perception (Thompson and Sherbourne, 1977).

The adoption of the Adult Entertainment Zoning Ordinance.

According to the sponsor of the 1977 ordinance regulating adult entertainment establishments, then Councilman Fred Lowry, his interest in regulating these uses began with the siting of an adult bookstore

in his district (Lowry, 1985). His district, the Twenty-Second Councilmanic District, is located in West Nashville in the Charlotte Pike area, and is a lower-middle to middle class neighborhood. Charlotte Pike itself is dominated by strip commercial type of development. It was in the midst of this strip commercial development that the above noted adult bookstore commenced operation.

According to Lowry, he previously had not been particularly interested in the regulation of these uses. After all, the uses had been largely restricted to the Central Business District. However, the opening of the adult bookstore brought about a heightened interest in the regulation of these uses. Lowry, and Reverend Clifford Dobbs of the Charlotte Pike Church of Christ were most interested in removing this use from the area. However, the Comprehensive Zoning Ordinance at that time had no provisions treating adult bookstores or other adult establishments in a manner which would restrict their locating outside of the Central Business District. Lowry and Dobbs reportedly organized a public meeting in response to this bookstore, and from this meeting organized a chapter of "Citizens for Decency Through Law," an anti-pornography group (Lowry, 1985).

As a result of this, Lowry became interested in developing a form of regulation that would prevent the additional sitings of these uses. Per Lowry, he was contacted by Mayor Richard Fulton's office about the possibility of his sponsoring an anti-pornography ordinance before the Metro Council. Lowry was reportedly told by the mayor's office that the proposed ordinance was based on an ordinance that had

been recently declared constitutional by the United States Supreme Court, and would serve to prevent additional uses from locating in suburban areas of Nashville. At the same time, Lowry noted, the ordinance was to be framed in such a matter to avoid "flooding" the downtown area with adult uses (Lowry, 1985). Lowry agreed to sponsor the proposed ordinance, and such was introduced in the Metro Council on August 2, 1977 (White, 1977).

That proposed ordinance was, in fact, based on the Detroit Anti-Skid Row Ordinance (Deep, 1985). The text of that ordinance reads as follows:

SECTION 1. That Substitute Ordinance No. 73-650, Section 12.10, is hereby amended by adding the following definitions to said section:

Adult entertainment shall mean any adult book store, adult motion picture theater, adult mini-motion picture theater, or any commercial establishment which for a fee, or incidentally to another service, presents material or exhibition distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical areas' as defined below for observation by patrons therein.

Adult Book Store shall mean an establishment having as a substantial or significant portion of its stock in trade books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas', as defined below, or an establishment with a segment or section devoted to the sale or display of such material.

Adult Motion Picture Theater shall mean an enclosed building with a capacity of 50 or more persons used for presenting material having as a dompresenting [sic] material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas', as defined below, for observation by patrons therein.

Adult Mini-Motion Picture Theater shall mean an enclosed building with a capacity for less than 50 persons used

for presenting material depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas', as defined below, for observation by patrons therein. 'Specified Sexual Activities' is defined as:

1. Human genitals in a state of sexual stimulation or arousal.
2. Acts of human masturbation, sexual intercourse or sodomy.
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

'Specified Anatomical Areas' is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

SECTION 2. Section 13.61 of said Ordinance is hereby further amended by the addition at the end of said section the following words:

- (Z) Activity type, adult entertainment:
 Include the provision of entertainment which is characterized by display, sale, or exhibition of any picture, motion or otherwise, or any printed material or
 any live exhibition which is characterized by an emphasis on matter depicting, describing, exhibiting or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' or observation by patrons therein.

SECTION 3. The Metropolitan Zoning Ordinance Section 32.10 is further amended by the addition under the category commercial activities the following:

Adult entertainment - CF, CC.

SECTION 4. The Metropolitan Zoning Ordinance shall be further amended by placing at the end of Chapter 3, Section 33, the following words:

Section 33.50. No establishment classified under adult entertainment shall be located within one thousand feet of any church, school ground, college campus, residence, dwelling or rooming unit, or any branch of the Metropolitan Public Library, or any other place of business classified under the category 'Adult Entertainment.' However, this section may be waived upon the presentment to the Director of Codes Administration a validated petition requesting such waiver, which petition shall be signed by the petitioner and fifty-one percent (51%) of those persons owning, residing or doing business within 1,000 feet of the proposed location. The petitioner shall be responsible

for collecting these names and shall subscribe to an affidavit attesting to the fact that the petition was circulated and that the petitioner witnesses the signatures on the petition and that the same were affixed to the petition by the person whose name appeared thereon. The affidavit shall also list the names and addresses at which contact was attempted and no contact was made.

The Director of Codes Administration may adopt, with the approval of the Mayor, rules and regulations which further implement this waiver procedure.

SECTION 5. This ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it (Metropolitan Council Bill, 77-649).

Comparison of Detroit and Nashville ordinances. There are several differences between the Detroit ordinance and the Nashville ordinance. For instance, in the Nashville proposal, the specified uses are restricted to the Commercial Core (CC) and Commercial Core Frame (CF) Districts. This area is approximately two square miles in area, comprising the CBD and its environs (Deep, 1985), and, as noted earlier, contained a majority of the adult uses existing in Nashville in 1977.

In addition, while Detroit and Nashville shared the dispersion distance of 1,000 feet, there are differences in how these uses are dispersed. For instance, the Detroit ordinance does not allow an adult use to locate within 1,000 feet of two other "regulated" uses (Detroit Municipal Zoning Ordinance, 1972). The Nashville proposal called for adult use not to locate within 1,000 feet walking distance of another regulated use.

Another noteworthy difference was the regulated uses. As noted earlier, the uses that the 1,000 foot dispersion rule applied to in

Detroit included Adult Motion Picture Theaters, Adult Mini-Theaters, Adult Bookstores, Cabarets, Bars Serving Liquor or Beer, Hotels or Motels, Pawnshops, Pool and Billiard Halls, Public Lodging Houses, Second-hand Stores, Shoe Shine Parlors, and Taxi Dance Halls (Detroit Municipal Zoning Ordinance, 1972). The proposed Nashville ordinance called for the dispersion to occur between a somewhat different class of uses and included Churches, School Grounds, College Campus, Residences, Rooming or Dwelling Units, Branch of Public Library, Adult Entertainment Establishments (Metropolitan Council Bill 77-649).

Two other distinctions regarding the Nashville proposal need to be noted as well. The first of these is regarding the absence of massage parlors from this proposal. As noted earlier, these uses are subject to a licensing requirement as well as the locational restrictions governing all uses under the classification of "general personal services." In addition, per the Comprehensive Zoning Ordinance, the existing adult entertainment establishments if in violation of the proposed ordinance, would become a "nonconforming use" (Comprehensive Zoning Ordinance, Section 52.10) and could be continued as such as long as these uses were not discontinued (Comprehensive Zoning Ordinance, Section 52.70), or destroyed (Comprehensive Zoning Ordinance, Section 52.60).

The passage of the 1977 adult entertainment ordinance. Under the Metro Charter, any proposed ordinance must pass three readings before Metro Council in order to become law (Metropolitan Code, Section 3.05). In addition, any amendment to the zoning ordinance

must be referred to the Metro Planning Commission for its recommendation prior to passage (Comprehensive Zoning Ordinance, Section 104.12).

As noted earlier, the ordinance was introduced and passed on first reading on August 2, 1977 (White, 1977). It was then returned to the Metro Planning Commission for its recommendation. In its August 24, 1977 meeting, in a 5-1 vote, the Metro Planning Commission chose not to recommend passage of this ordinance. According to Farris Deep, then Executive Director of the Metro Planning Commission, the Planning Commission did not want to go on record in support of the ordinance out of fear it (the Planning Commission) would be perceived as endorsing adult uses (Deep, 1985). Newspaper accounts of the proceedings seem to reflect this reluctance. One commissioner noted that the effect of this ordinance would be to "'further identify downtown as a place where these activities are permitted to exist'"; another commissioner was quoted as saying, "'There's no historical evidence that this will work,'" and it could very well serve to worsen the existing situation ("Panel Disapproves Adult Store Restrictions," p. 1).

The Metropolitan Planning Commission, in its letter to the Metropolitan Council, explained its decision as follows:

The Metropolitan Planning Commission does not recommend passage, it appearing that there is no historical evidence that the proposed ordinance would be adequate to regulate the activity, and further, that any approval of the ordinance could be construed as endorsing the activity in the community and particularly in the CBD (Metropolitan Planning Commission, Resolution 77-630).

The practical effect of the Metro Planning Commission's failure to recommend this proposal was that instead of a simple majority for

passage in Metro Council, it would now require a two-thirds vote for passage (Metropolitan Code, Section 18.02).

The Metro Planning Commission was not alone in its opposition to this proposal. Merchants in the Lower Broadway area were opposed to the waiver section of the proposed ordinance. The waiver provision was reportedly feared because many believed that a proliferation of adult uses would occur because the adult uses could "gang up" and obtain the permission of 51% of the affected properties. Thus, the adult uses could very well cluster as a result of the waiver provision. For instance, one merchant noted that in his area, with a high concentration of adult uses, the 51% provision could be invoked quite easily, leading to area being "swamped" with adult uses ("Porno Zoning's Validity Questioned," p. 1977).

Farris Deep, then Executive Director of the Metro Planning Commission, questioned whether or not the Metro Council had the authority, under state law, to enact the waiver provision. According to Deep, such authority as this waiver is, in effect, a variance. Such power was said to belong to the Zoning Board of Appeals. As noted by Deep, "'It's zoning by referendum, and that's not right'" ("Porno Zoning Validity Questioned," p. 1).

Finally, the Nashville morning newspaper, The Tennessean, came out in opposition to the proposal as well, due largely to the waiver provision. In an August 15, 1977 editorial, the attractiveness of the measure was noted, but it was contended that the experience of other communities had been "mixed" thus far. Curiously enough, the

editorial seemed to ignore the similarity of the Detroit ordinance, and focused upon the experience of Boston and its "Combat Zone." Moreover, the editorial took exception to the waiver provision, noting that "with the concentration of 'adult entertainment' in that area (Lower Broadway), waivers could become commonplace, and each waiver would make the next one easier and more likely" ("Porno Zoning Measure Appears Likely to Backfire," p. 6).

In the face of such opposition to the waiver provision, supporters of the proposed ordinance chose to amend. The amendment removed the 51% waiver provision, instead placing the authority to grant variances with the Zoning Board of Appeals (Metropolitan Council Substitute Bill, 77-649). This amendment was introduced in the September 6, 1977 Metro Council meeting, and was passed on second reading by a 31-4 vote. Opposition to the amended proposal now seemed to be based on the fact that these uses were to be restricted to the downtown area. One inner-city councilman voted against the bill because, in his words, "'People are saying that porno shops are all right for downtown. If they are too good for the people of West Nashville, they're too good for people who live downtown--black people and poor people.'" Another councilman noted that "'We are saying to these people downtown, 'Gentlemen, we approve of what you are doing as long as you do it downtown'" (Bill Restricting Adult Bookstores, Movies Advanced, p. 41).

On September 20, 1977, the Substitute Ordinance passed third reading by a vote of 31-1. Councilman Lowry, in his motion for passage, called the bill under consideration "'a good bill and a fair

bill,'" and in addition, he stated, "'If this ordinance passes, they (adult uses) can't come into your district'" (Adult Store Restrictions Approved, pp. 1,20). On September 22, 1977, Mayor Fulton signed the substitute ordinance into law (Metropolitan Council Substitute Bill, 77-649).

Regulation of Adult Uses--1977 to 1984

In addition to the 1977 Adult Use Zoning Ordinance, Nashville officials chose to utilize other measures to regulate adult uses. This section will examine the various tactics and document their successes and shortcomings. During the time frame specified above, Nashville had at its disposal several types of regulations to augment the newly adopted zoning provisions. Included were safety and health codes, obscenity statutes, and liquor and beer licensing. Finally, the role of the 1977 Adult Use Zoning Ordinance will be examined as well.

As a note of foreshadowing, it is believed necessary to note a symbolic gesture upon Mayor Richard Fulton's part that may or may not be indicative of his attitude toward adult uses. On January 24, 1978, an estimated 1,200 people turned up an anti-pornography march through the Lower Broadway area. At a speech prior to this march, Mayor Fulton referred to adult uses as "'undesirable,'" and promised, per newspaper accounts, to "'clean up'" Lower Broadway (West, 1978). Fulton, at that time, noted that through the Codes Administration, Health and Fire Departments many adult uses had been put out of

business in the past year, and promised such would continue ("1,200 Stage Lower Broadway Porno Protest," 1978).

Fire, safety and health codes. During the same time period that the Metro Council was dealing with the issue of adult use zoning, the Fulton Administration sought to increase the fire code standards for one particular adult use, the "peep show." The subsequent bill called for an increase in the number of exits, improved lighting, and the construction of booths made of non-flammable materials ("City Plans Curb on Peep Shows," 1977). The text of the bill was as follows:

All business establishments showing films or staging and showing live entertainment to patrons on an individual booth-by-booth, or individual room-by-room basis, shall be subject to the following:

- (1) All walls, partitions, and doors shall be of either non-combustible material or material of not less than one hour fire-resistant time rating.
- (2) All furniture, furnishings, rugs and carpets shall be of a fabric or material with a flame spread rating of seventy-five (75) or less, according to the A.S.T.M.E. 84 Test.
- (3) Each room or booth shall have not less than thirty (30) square feet of floor area for each occupant.
- (4) All aisles shall not be less than fifty (50) inches in width, and no such aisle shall have a dead end.
- (5) Each room or booth shall have at least two (2) lighted exits within the constant and unobstructed view of the occupant or occupants, which exits shall lead directly to the outside of such business establishment.
- (6) There shall be no locks on doors in rooms or booths which would prevent a person from entering or leaving said room or booth.
- (7) All electrical equipment shall be grounded and no electrical receptacles or outlets shall be serviced by extension cords.
- (8) The light level throughout each booth, room and aisle shall not be less than 1.0 footcandle measured at the floor level. Said lights shall be placed not less than three (3) feet above the floor level (Metropolitan Code, Section 7-1-9).

In addition, newspaper accounts note several instances where Metro inspectors conducted "surprise" inspections. The first of these concerned Scarlet O'Hara, a nightclub located in Madison, a Nashville suburb. This nightclub, while not licensed to offer adult entertainment, met considerable opposition due to a fear that such would be eventually offered. After a stormy public hearing, it was reported that Mayor Fulton had ordered fire, code, and health inspectors to make sure all applicable standards were met ("New Club Inspections Timing Hit," 1979).

In February 1984, both Departments of Codes and Public Health conducted inspections of adult use establishments on Lower Broadway. Mayor Fulton's office denied that these inspections were a coordinated move on their part ("Lower Broadway Adult Shops Dealt Double Punch," 1984). It was later learned that these inspections had been requested by the Broadway Revitalization Committee, the committee charged with the redevelopment of Lower Broadway. The condition of six establishments was termed by one inspector as "'dirty and deplorable'" ("Broadway Checks Asked by Revitalization Panel," 1984). Ultimately, it was reported, that the conditions were corrected, and business continued as usual ("Adult Business Now 'Up to Par,'" 1984).

Obscenity statutes. In addition to state obscenity statutes, Nashville had a series of laws that can be loosely categorized as obscenity statutes, that were either in effect or enacted during the 1977 to 1984 time frame. This section will briefly review those statutes.

In October 1976, a law was adopted which forbade the "display of indecent publications" where minors could view them (Metropolitan Code, Section 29-1-41.5). The practical effect of this ordinance was that several grocery stores were found in violation of terms of the law, and their managers arrested. According to newspaper reports, after a period of declining magazine sales, sales once again picked up. This turn of events was said to be due the vagueness of the law, and the reluctance of Metro Police to enforce the law as a result of that vagueness ("Adult Book Sales Bouncing Back," 1977).

In April 1978, an "Anti-Nude Dancing Law" was enacted (Metropolitan Code Section, 29-1-34). This law made it illegal "to expose any private parts of the anatomy in a commercial establishment, and subjects the owner or operator of a business featuring nude or semi-nude dancing to fines" up to fifty dollars (\$50) ("Anti-Nude Dancing Law Passed by Metro Council," 1978). This law was enacted in response to the prior dancing law's recent invalidation due to vagueness ("Fulton Signs Anti-Nude Dancing Law," 1978).

Within several days of the law's passage, Metro Police began enforcement of the law. One raid yielded 19 arrests for violation of the terms of the law ("Nightclub Raids Net Dancers," 1978). However, these and other arrests were overturned in January of 1979 when it was found that the law went "beyond constitutional boundaries and improperly regulates protected forms of expression" ("Metro's Lewdness Law Ruled Out; Nudity to Return," 1979). The law was later amended to remove the invalid phrase "is calculated to appeal to the prurient

interest of the viewing audience," inserting instead "appeals to the prurient interest of the average person" (Metropolitan Council Bill 79-1213).

In addition to the continued enforcement of the above amended law, obscenity prosecutions periodically took place in Nashville. Most noteworthy of these was a massive raid of adult use establishments and massage parlors in March 1983. From the raid, 150 individuals were arrested on charges including prostitution, operating illicit businesses, and crimes against nature ("Massive Porno Raid," 1983). However, due to procedural errors committed by prosecutors, many of those charges were later dropped (Hudgins, 1983).

Beer and liquor licensing laws. At the time of the adoption of the adult use zoning ordinance, Nashville had regulations covering two classes of alcoholic beverages--liquor (Metropolitan Code, Section 5-2-3) and beer and beverages containing less than 5% alcohol by volume (Metropolitan Code, Section 5-1-1). Each class of beverage was subject to permit conditions, distance requirements from certain types of uses (churches, schools, parks, residences, day care centers and nurseries), and provisions for suspension and revocation of permits for violations of certain prohibited acts. Liquor stores had an additional requirement limiting the total number of stores based on population density (Metropolitan Code, Section 5-1-33).

In 1980, the Tennessee General Assembly enacted a law which required any establishment serving liquor to surrender their liquor license if nude dancing was allowed upon the premises (Tennessee Code

Annotated, Section 57-152--57-164). In response to this law, several establishments, rather than discontinuing nude dancing, chose to surrender their liquor license to the Alcoholic Beverage Commission, the enforcer of liquor law in the State of Tennessee (Hall, 1980).

In July 1980, the Metro Beer Permit Board requested that Metro Council pass a similar law regarding the serving of beer in establishments offering nude dancing (Shoulders, 1980). The ordinance that ultimately became law reads as follows:

Sec. 5-1-34. Standards of conduct on premises of licensees.

(a) In addition to the other duties imposed by the metropolitan beer permit board by the Metropolitan Code of Laws, it shall be the duty of said board to enforce the provisions of this section and revoke or suspend the beer permit of any person, firm, corporation, syndicate or association, upon notice and hearing, for violation of the provisions of this section.

(b) The following acts or conduct have been declared contrary to public policy by the General Assembly of the State of Tennessee when such activities take place upon premises licensed by the alcoholic beverage commission, pursuant to T.C.A. sections 57-152 through 57-164; and the same are hereby declared to be against the public policy of the Metropolitan Government of Nashville and Davidson County, and, therefore, no beer permits shall be held at any premises where such contract or acts are permitted.

- (1) To employ, use or allow any person in the sale or service of beer or like alcoholic beverages in or upon the premises of a permittee while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva, or genitals.
- (2) To employ, use or allow the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in subdivision (1).
- (3) To encourage or permit any person on the premises of a permittee to touch, caress or fondle the breast, buttocks, anus or genitals of any other person.

- (4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

(c) Acts or conduct on premises licensed by the alcoholic beverage commission pursuant to T.C.A. sections 57-152 through 57-164 have been deemed contrary to public policy by the General Assembly of the State of Tennessee, and are hereby declared against the public policy of the Metropolitan Government of Nashville and Davidson County; and, therefore, no beer permit shall be held at any premises where such conduct or acts are permitted. Live entertainment is permitted on premises of a permittee except that

- (1) No permittee shall permit any person to perform acts of or acts which simulate:
 - a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
 - b. The touching, caressing or fondling of the breast, buttocks, anus or genitals.
 - c. The displaying of the pubic hair, anus, vulva or genitals.
- (2) Subject to the provisions of subdivision (1) hereof, any entertainer who is employed in whole or in part by the permittee to dance at such permittee's premises shall perform only upon a stage at least eighteen (18) inches above the immediate floor level and removed at least six (6) feet from the nearest patron.

No permittee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No permittee shall permit any person to remain in or upon the premises who exposes to public view any portion of his or her genitals or anus.

(d) The following acts or conduct have been declared contrary to public policy by the General Assembly of the State of Tennessee when such activities take place upon premises licensed by the alcoholic beverage commission, pursuant to T.C.A. sections 57-152 through 57-164; and the same are hereby declared to be against the public policy of the Metropolitan Government of Nashville and Davidson County; and therefore no beer permit shall be held at any premises where such conduct or acts are permitted. The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

- (1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
- (2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

- (3) Scenes wherein a person displays the vulva or the anus or the genitals.
- (4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above (Metropolitan Code, Section 5-1-34).

The practical effect of this ordinance, in layman's terms, was to force dancers to wear "G-string and pasties" ("Nude Dancing Target of Metro," 1980).

In addition to this measure, the Metro Beer Board found itself involved in the regulation of adult uses in several instances. Newspaper accounts report of incidents in 1979 and 1980 where clubs either offering or thought to be operating as adult use establishments were denied beer permits by the Metro Beer Board. Those establishments included the Penthouse and Scarlett O'Hara's. In the case of the Penthouse, the license was revoked due to an alleged misrepresentation of the identity of the club's owner (Metropolitan Code, Section 5-1-23.3[e]), and the loitering of two intoxicated individuals on the premises (Metropolitan Code, Section 5-1-23.3 [E]). This, in addition to violations of the zoning ordinance (the operation of an adult use outside the proper zoning classification), reported led to its eventual closure ("Penthouse Has Further Law Troubles," 1979).

The case of Scarlett O'Hara's is a different matter. This nightclub, as noted earlier, was located in the Madison area of Nashville, and featured clothed "go-go" dancers. Reportedly, the community feared that nude dancing would be the natural progression of the "go-go" dancing. At a Beer Board meeting in December of 1979, Scarlett O'Hara's

owners were denied a beer permit after a public hearing. The actions of the Beer Board were explained by the Acting Chairman in the following manner: "We think they will violate the zoning regulations by allowing nude dancing" (Pomeroy, p. 1). In a subsequent appeal to Chancery Court, the Beer Board's decision was overturned. Chancellor Robert Brandt, in finding that the evidence did not support the Board's action, noted that "'the Beer Board can act illegally and irresponsible as it pleases, knowing the court will have to hear the entire case again and rule on the permit.'" In short, the Chancellor noted he was weary of "acting as the Beer Board" (Pigott, p. 20).

Zoning regulations. After the passage of the 1977 Adult Use Zoning Ordinance, an attempt was made to further restrict the potential number of sites. In late 1977, an amendment to the newly passed ordinance was introduced, adding "parks" to the list of uses which required distances of 1,000 feet between adult uses and members of that list ("Ordinance Would Reduce Downtown Porno District," p. 1977). The amendment was deferred on second reading before Metro Council, and was never reintroduced (Zoning Bills Log of Metropolitan Planning Commission).

A survey of local newspaper articles from the specified time period found three instances where the Adult Use Ordinance was challenged. The nightclubs challenging the adult use ordinance included the Jolar Cinema ("Adult Cinema Suit Challenges Proximity Rule," 1979), the Patch 2 ("Nightclub to Appeal Ruling of Zoning Board, 1980) and the Penthouse. The most prominent of these involved

the Penthouse, for it was the only case in which a court ruled on the constitutionality of the adult use ordinance.

The Penthouse was located in suburban Nashville in an area zoned Commercial General (CG). Reportedly, exhibitions of nude women and female boxing matches took place on the premises. Metro Codes Department petitioned the Chancery Court to enjoin the owners of the Penthouse from offering adult entertainment in a zoning district not zoned for such ("Metro Asks Court to Stop Penthouse's 'Entertainment,'" 1979).

The Court found that the Penthouse did offer adult entertainment on its premises. The question before the Court was whether Nashville could regulate adult uses in the manner in which it did. The Court noted that under the terms of Young v. American Mini-Theaters (427 U.S. 50, 49 L.Ed. 2d. 310, 96 S. Ct. 2440 [1976]), municipalities could regulate adult uses. The Court noted that even though Nashville had chosen an approach the opposite of that examined in the Young decision, it was within the scope of the Young decision to concentrate those uses within a particular area of the city (Chancery Court, Case No. 79-1845-III). In addition, the court noted that Seattle, Washington chose an approach similar to that of Nashville's, and that approach had been upheld by the Washington State Supreme Court.

In summation, it was noted that:

This court concludes that the Metro ordinance in question as applied to the defendants (Penthouse), constitutes reasonable regulation. This ordinance does not prohibit the defendants from exercising their First Amendment rights; it only restricts where those rights may be exercised. The defendants may still offer their enterprise in a large part of Nashville. It is unlikely that the potential audiences will be inconvenienced to any significant extent by the zoning ordinance's application (pp. 5-6).

It is considered most interesting that the following statement was a footnote within the memorandum announcing the decision:

There was a suggestion at trial that the 1,000 foot restriction in the ordinance, combined with the CF and CC restriction, will have the effect of a complete ban in Nashville. There is no evidence to support that suggestion, however (p. 6).

As noted earlier, the Penthouse closed down shortly after this ruling ("Once Booming Penthouse Closes," 1980).

The Case of Classic Cat II

Perhaps the establishment most representative of the regulation of adult uses in Nashville is the Classic Cat II. The experience of this establishment is believed not only as illustrative of the regulation of adult uses, but contributed to the demise of the 1977 Adult Use Zoning Ordinance. The aim of this section is to examine the experience of the Classic Cat II, reviewing the events that ultimately culminated in the overturning of the 1977 ordinance and the imposition of the substitute ordinance in 1984.

Classic Cat II. The Classic Cat II was in operation at 602-610 Broadway in 1977, the year of the Adult Use Zoning Ordinance's adoption. Its fare has been described as that of a traditional "burlesque" or nude dancing establishment. The Classic Cat II has been said to be somewhat more explicit than the traditional burlesque establishment. According to Richard Harrison, Codes Examiner for the Metro Department of Codes, the Classic Cat II offered such acts as "grinding," simulated sex acts, and instances of audience participation (Harrison, 1985).

At the time of the enactment of the 1977 Adult Use Zoning Ordinance, no distinctions were made between the adult uses which occupied legal sites under the terms of the ordinance and those which occupied non-conforming sites. In the case of the Classic Cat II, it was later found its site at 602-610 Broadway was non-conforming (West, 1985). Under the terms of Comprehensive Zoning Ordinance, non-conforming uses could generally continue as long as they were not destroyed (Section 52.60), discontinued or terminated (Section 52.70).

A review of local newspapers indicate the Classic Cat II was the subject of attention by various departments of Metro Government. In 1978, four dancers at the Classic Cat II were charged with indecent exposure. During the same incident, several customers and employees were arrested for public drunkenness ("4 Exotic Dancers Arrested; New 'Offensive' Indicated," 1978). This was reported as leading to a request by Metro Police to the Metro Beer Board for the revocation of the Classic Cat II's beer license ("Club Beer License Revocation Asked," 1978). As a result of this request, the Beer Board suspended the Classic Cat II's license for 60 days on April 10, 1978. The Beer Board based their decision on the Classic Cat II's violation of permit requirements barring the loitering of intoxicated individuals and a misrepresentation of the identity of the establishment's owner ("Classic Cat Beer License Suspended," 1978). A rehearing yielded a reduction of the suspension to 30 days (Thomas, 1978). A subsequent appeal to Chancery Court not only restored the Classic Cat II's beer license, but yielded a decision to strike down the loitering provision noted

above. This decision was based on "vagueness" of the provision ("Judge Rules Drunk Loiter Law Illegal," 1978). Ultimately, the Tennessee State Supreme Court overruled the Chancery Court, and reinstated the 30 day suspension of the Classic Cat II's beer license ("Rehearing Denied for Classic Cat," 1979).

In 1979 the Classic Cat II's problems were not only with the departments of Metro Government. On August 30, 1979, a bomb weighing between three and four hundred pounds was found in an automobile parked beneath the Classic Cat II. The device, disarmed some 20 minutes before it was set to detonate, was estimated to have the capacity of destroying three city blocks (Lewis and Sherbourne, 1979). Police officials, at that time, speculated that the bomb was an attempt to put the Classic Cat II out of business. The primary suspects were reportedly individuals associated with the Penthouse, a nightclub which ironically was opened the day of the attempted bombing ("Agents Eye Possible Competition Link in Club Bomb," 1979). This theory was later confirmed by the conviction of the owner of the Penthouse Club for the attempted bombing of the Classic Cat II. Interestingly, that individual is the ex-husband of the proprietess of the Classic Cat II ("Baldwin Sentenced to Seven Years," 1984).

In July of 1980, after the Tennessee General Assembly passed a law banning the serving of liquor in establishments featuring nudity, the Classic Cat II's management turned over its liquor license to the Alcoholic Beverage Commission. This act allowed the Classic Cat II to continue to feature nude dancing. It was, according to newspaper

accounts, the intention of the management of the Classic Cat II to allow "brownbagging," the practice of patrons bringing their own liquor, with mixers ("set-ups") to be served by the establishment ("Classic Cat Gives Up Liquor, Has Beer, Nudity," 1980). Several days later (July 23, 1980), two employees of the Classic Cat II, including the manager, were arrested for allowing "brownbagging" on the premises ("Two Arrested for Allowing Liquor Inside Club," 1980). Ultimately, the Beer Board suspended the Classic Cat II's beer license for two weeks for allowing liquor on the premises (Zimmerman, 1980).

It is noteworthy that it was during this time period that Metro Council adopted an ordinance similar to that of the state's, banning the sale of beer on the premises of establishments allowing nudity ("Nude Dancing Target of Metro," 1980). Due to the passage of this ordinance, the Classic Cat II no longer served beer, in its stead serving beverages containing less than 5% alcohol by volume. This practice allowed the Classic Cat II to continue to operate as an adult use (Harrison, 1985).

The relocation of the Classic Cat II and the challenge to the 1977 Adult Use Zoning Ordinance. In December of 1982, the owner of the Classic Cat II, Ms. Elizabeth Ann Martin, was notified by the Metropolitan Development and Housing Agency (MDHA) that the property upon which it was sited was to be acquired for the purpose of demolishing the building in order to commence construction of a hotel and convention center complex (Fifth Circuit Court, Complaint).

In addition to a hotel and convention center complex, this \$168 million project provided for a parking garage and retail development. Under the terms of the Urban Development Action Grant (UDAG), MDHA was the agency responsible for assembling the properties necessary for the project, and assuring that all affected landowners were dealt with fairly in the accompanying eminent domain proceeding. Such included the payment of moving costs of those forced to move (Fletcher, 1982).

Pursuant to the above, the Classic Cat II was notified in February of 1983 by MDHA to vacate their site. In addition, MDHA submitted to the Classic Cat II a list of 10 properties available for their relocation. It was found under the terms of 1977 Adult Use Zoning Ordinance that none of the 10 properties recommended were in compliance with the 1,000 foot distance requirement specified earlier. According to the complaint later submitted to the Tenth Circuit Court, the proprietess of the Classic Cat II investigated the availability of other "legal" sites under the terms of 1977 ordinance, and

Discovered that there was not a single parcel available for lease or purchase within the CF and CC zone districts to which its business could be relocated which did not violate at least one or more of the restrictions contained within Section 33.50 of the Metropolitan Code (Fifth Circuit Court, Complaint, pp. 2-3).

The management of the Classic Cat II chose to relocate on a site at 126 8th Avenue North. This site is located on property abutting the rear property of Hume Fogg High School, clearly within 1,000 feet walking distance. Not surprisingly, the reaction to this siting was not positive. The principal of Hume Fogg High School called the

relocation a "distraction" to his students, and predicted that the establishment could contribute to delinquency (Mulgrew, 1983). A representative of the Metro Department of Law, in comments to The Nashville Banner, noted that the new site was too close to Hume Fogg High School under the terms of the Comprehensive Zoning Ordinance, and adult entertainment could not occur on the premises. In addition, under the section of the zoning ordinance governing nonconforming uses, due to their relocation, the Classic Cat II no longer enjoyed its previous status as a nonconforming use ("Classic Cat Cannot Move Near School," 1983).

On April 26, 1983, the Classic Cat II's representatives applied for a permit to operate an adult entertainment establishment at 126 8th Avenue North. This application was denied by the Metro Department of Codes due to the violation of the 1,000 foot distance requirement between Classic Cat II and a school. (Fifth Circuit Court, Complaint). The same day a permit was issued for a "community assembly" establishment, with adult entertainment specifically prohibited on the premises ("Classic Cat Permit to Exclude Adult Entertainment," 1983). Further, the Classic Cat II appealed the decision denying the adult entertainment permit to the Zoning Board of Appeals. A variance was sought, with the standards for variance in Nashville being as follows:

Except for variances specifically authorized by the metropolitan council to be considered before the board, the board shall not grant a variance unless it makes findings based upon evidence presented to it as follows:

- (a) The particular physical surroundings, shape, or topographic conditions of the specific property involved that would result in a particular hardship upon the

owner as distinguished from a mere inconvenience, if the strict application of this ordinance were carried out;

- (b) The conditions upon which the petition for a variance is based would not be applicable, generally, to other property within the same district;
- (c) The variance will not authorize activities in a zone district other than those permitted by this ordinance;
- (d) Financial returns only shall not be considered as a basis for granting a variance;
- (e) The alleged difficulty or hardship has not been created by any person having an interest in the property after the effective date of this ordinance;
- (f) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the area in which property is located; and
- (g) The proposed variance will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion in the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the area (Comprehensive Zoning Ordinance, Section 102.6).

On May 19, 1983, the Classic Cat II's appeal was heard before the Board of Zoning Appeals. Unanimously, the request for variance was denied by the Board of Zoning Appeals. At the public hearing accompanying this decision, individuals representing the Metro Board of Education, area churches, the Baptist Sunday School Board, and the Southern Baptist Convention spoke in opposition to the proposed variance. Ultimately, the Board of Zoning Appeals decision was said to be based on:

finding that the activity would adversely affect other properties in the area, the appellant (Classic Cat II) had not exhausted all possibilities for locating a suitable site, and that the hardship was self-imposed (Fifth Circuit Court, Respondant's Trial Brief, p. 3).

On May 31, 1983, the owner of the Classic Cat II, Ms. Elizabeth Ann Martin, filed suit in Fifth Circuit Court seeking to overturn the

decision not to issue a permit for adult entertainment to the Classic Cat II. In the complaint filed with that court, the Classic Cat II maintained that:

It became apparent to the Petitioner (Classic Cat II) that Petitioner's business was being faced with extinction as a result of a combination of efforts by agencies of the Metropolitan Government, specifically, the MDHA, by taking the location currently occupied by the Petitioner by means of the exercise of eminent domain, effectively working a displacement of the Petitioner. And, because of Section 33.50 (COMZO Adult Use Provisions) of the Metropolitan Code, Petitioner was effectively prohibited from removing its business to any other location (Fifth Circuit Court, Complaint, p. 3).

Specifically, the Classic Cat II maintained it had been:

1. Deprived of its property and not allowed to conduct lawful business without judgment of peers;
2. Had its property taken without its consent and without just compensation;
3. Was deprived of its property without due process of the law and without just compensation;
4. That Section 33.50 of the Metropolitan Code had been adopted in an illegal fashion;
5. That the Board of Zoning Appeals had, in its proceedings, deprived the Classic Cat II of due process of the law (Fifth Circuit Court, Complaint).

According to Lon West, attorney representing the Metro Board of Zoning Appeals, the issues of greatest importance were:

1. Had the 1977 Adult Use Zoning Ordinance been properly adopted;

2. Had the Metro Board of Zoning Appeals acted properly in denying variance to the Classic Cat II; and
3. Was the 1977 Adult Use Zoning Ordinance a proper manner of regulation.

By mutual consent, the former two issues were to be tried in a November 1983 hearing, and the latter, on the constitutionality of the ordinance itself, in a February 1984 hearing (West, 1985).

November 1983 hearing. In a brief submitted to Fifth Circuit Court, AME, Inc. (Classic Cat II's corporate name), or the Classic Cat II (plaintiff) argued that the 1977 Adult Use Ordinance was adopted improperly. It was argued that, as noted earlier, the bill that passed Metro Council (Substitute Bill 77-649), had passed only two readings instead of three, as provided by Section 3.05 of the Metro Code. In addition, the Metro Planning Commission had not been afforded an opportunity to make a recommendation on that substitute bill, as required by Section 18.02 of the Metro Charter and Section 37-7-204 of Tennessee Code Annotated (Fifth Circuit Court Plaintiff's Brief).

The brief for the Classic Cat II noted that, when comparing the original bill and the substitute bill, a "substantial" alteration had occurred, thus necessitating the substitute bill be passed in three separate readings by Metro Council. Furthermore, the substitute bill should have been re-referred to the Metro Planning Commission for its recommendation for the same reason (Fifth Circuit Court Plaintiff's Brief).

In addition, it was argued that the denial of variance was arbitrary. It was noted that:

At the hearing before the Board, much testimony was offered regarding the 'fears' of the witnesses. However, no witness refuted the plaintiff's (Classic Cat II) proof that there was no other lawful location in which the business could be moved, that the cause of the move was beyond plaintiff's (Classic Cat II) control and that there was only a 25 foot difference between the old location and the new location's closeness to the school. No proof was offered that plaintiff's (Classic Cat II) activities had caused anyone any problems or that any new problems would result at the new location (Fifth Circuit Court, Plaintiff's Brief, p. 8).

In its brief submitted to the Fifth Circuit Court, the Metro Government argued that the hearing held before the Metro Board of Zoning Appeals did not deprive the Classic Cat II of due process. Furthermore, Metro Government argued that under the terms of variance granted to the Board of Zoning Appeals by both Tennessee Code Annotated 13-7-207 and COMZO Section 102.20, the Board of Zoning Appeals simply could not grant a variance. It was noted "that the petitioner (Classic Cat II) simply failed to present evidence sufficient to justify the granting of a variance under the Comprehensive Zoning Ordinance" (Fifth Circuit Court, Respondent's Trial Brief, p. 8). Finally, it was argued that the substitute bill's changes were simply not substantial enough to warrant reconsideration by Metro Planning Commission.

Oral arguments on this case were heard in November 1983, and a decision was rendered on December 6, 1983. Judge Walter C. Kurtz concluded, based on the evidence presented, that the amendment to the 1977 Adult Use Zoning Ordinance, in the form of Substitute Bill 77-649,

was "insubstantial," and need not be re-referred to the Metro Planning Commission, nor should it be required to pass three times. In addition, Judge Kurtz concluded that the hearing before the Board of Zoning Appeals was fair, and their decision sound. Thus, it was concluded that the denial of variance was not an arbitrary act (Fifth Circuit Court, Memorandum, 1983).

February 1984 hearing. As noted earlier, this hearing was to determine whether or not the 1977 Adult Use Zoning Ordinance was a constitutional exercise of power. In the brief submitted on behalf of the Classic Cat II, it was argued that the ordinance was unconstitutional on three grounds.

The first argument put forth by the Classic Cat II was that the inclusion of nudity as adult entertainment was beyond the scope of the law. Citing the Supreme Court decision, Erznoznik v. City of Jacksonville (422 U.S. 205, 95 Sup. Ct. Rpt. 2268 [1975]), in which a local ordinance prohibiting drive-in theaters showing films containing nudity was overturned, the Classic Cat II sought to draw an analogy. It was noted:

If the Constitution protects the incidental public display of nudity from impermissible regulation, it certainly protects the Plaintiff's (Classic Cat II) business activities from severe limitations continued the Substitute Ordinance 77-649. To lump nudity into the same class as masturbation, sodomy, sexual intercourse, fondling and turgid genitals is to ignore the plain distinctions made by the Supreme Court (Fifth Circuit Court, Plaintiff's Brief [1984]), p. 3).

Secondly, the Classic Cat II argued that the combination of 1,000 foot dispersion and the restriction to a limited commercial area

was too restrictive. While recognizing the constitutionality of each tactic separately, the attorney for the Classic Cat II, Joel Moseley, noted that the constitutionality of the two in combination was uncertain. It was concluded:

Because of the combination of the one thousand (1,000) foot limitation and the limited commercial area within which the activity can take place, the result is the slow and eventual elimination of all adult entertainment. Such is not constitutionally permissible (Fifth Circuit Court, Plaintiff Brief [1984], p. 3).

Finally, it was argued that the government, via a combination of efforts, sought to terminate a lawful business. Mr. Moseley, on behalf of the Classic Cat II noted that, unlike the ordinance upheld in the Young decision, no provision for waiver other than the variance provisions found in COMZO existed for adult uses. Given such, it was said to be "impossible" to obtain a variance. Further, "when this is coupled with the activities of at least three, if not four, other Metro agencies, the result is that once displaced, Plaintiff (Classic Cat II) is out of business" (Fifth Circuit Court, Plaintiff's Brief [1984] p. 4).

In its brief, attorneys for Metro Government argued the five following points:

1. The 1,000 foot and District restriction of the ordinance is a reasonable exercise of the police power, since a legitimate public policy is advanced, and a viable economic use of the property is still available;
2. The Adult Use Zoning Ordinance, as applied in this case, is not considered a "taking" because the Classic Cat II's property interest is not diminished;

3. The ordinance is a reasonable time, place, and manner restrictions justified by a significant state interest while maintaining alternative channels for sex-oriented expression;
4. Even if the ordinance imposes a more than minimal burden upon adult entertainment, the significant state interest outweighs that burden;
5. Even if a section of the ordinance is found to be unconstitutional, the valid portions should be held intact (Fifth Circuit Court, Respondent's Brief [1984]).

As for the former two arguments, Metro Government cited the precedent of Penn Central Transportation Company v. New York City (57 L Ed. Zd. 631) and Agins v. Tiburon (65 1 Ed. Zd. 106) as supportive of the contention that no taking occurred. Quoting the Tiburon decision:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . the determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest (p. 5).

The brief went on to maintain that in this case, the state interest was the compatibility of uses permitted in the CC and CF districts, the incompatibility of adult uses and churches, schools, libraries, and residences, and the mitigation of the negative effects said to accompany adult uses.

In reviewing the Young decision and related cases, it was noted:

[that] it is clear that the incidental regulation of adult entertainment establishments will pass the First Amendment Constitutional test whenever a city articulates a legitimate state interest, and furthermore the implementation of the ordinance does not result in a reduction of adult entertainment establishments, but rather, accomodates the future needs of adult businesses and those who desire to patronize such businesses (p. 17).

Further, it was maintained that sites did exist in the CC and CF districts for adult use, and that the present ordinance merely "inconvenienced" the Classic Cat II (p. 18).

The case came to trial on February 6 and 7, 1984. Ms. Elizabeth Anne Martin, owner of the Classic Cat II, was called to testify as to the nature of her business, the history of the Classic Cat II's relocation, and the effect that relocation seemed to have on her business. Ms. Martin noted that at her previous location, the fare offered consisted of nude dancing. Ms. Martin denied that any of the dancers in her employ engaged in acts of sodomy, sexual intercourse, or simulated sex acts at her previous location (Fifth Circuit Court, Transcript, 2-6-84). Due to the relocation, and loss of status of adult entertainment, her dancers were forced to increase the amount of clothing they could perform in. Since her relocation, Ms. Martin stated on the average, her weekly revenues dropped from \$5,500 to \$3,500 ("No Site Known for Club's Move," 1984).

Ms. Martin recounted her experiences leading up to the selection of the 8th Avenue site for the Court. As noted earlier, the list of sites submitted to her by MDHA were found to be violative of one or more sections of the 1977 Adult Use Zoning Ordinance.

Unable to find a site not in violation of the ordinance, Ms. Martin chose the site on 8th Avenue North. In his cross-examination, Metro Attorney Earl Roberts questioned Ms. Martin extensively about her search for an alternate, legal site under the terms of the Adult Use Zoning Ordinance ("No Site Known For Club's Move," 1984).

Mr. Richard Harrison, zoning examiner for the Metro Department of Codes, testified as well. In his testimony, Mr. Harrison was able to identify for the Court general areas within which adult uses could locate under the terms of the Adult Use Ordinance. In addition, Mr. Harrison demonstrated for the Court the manner in which the 1,000 foot walking distance requirement was measured. However, under cross-examination, Mr. Harrison was unable to demonstrate any available sites upon which the Classic Cat II or any other adult uses could locate in either the CC or CF districts (Fifth Circuit Court Transcript, 2-6-84).

Professor James A. Spencer of The University of Tennessee, Knoxville acted as expert witness for Metro Government. In his testimony, Professor Spencer related the planning rationale that treats adult uses as they typically are, and why they are restricted in the manner in which they are. In addition, Professor Spencer was able to locate on a map of the CC and CF districts seven generalized areas in which adult uses could legally locate. When questioned in regard to specific type of regulation employed in Nashville, Professor Spencer answered in the following manner:

The two kinds of restrictions operate on different scales and for different purposes. The restriction of adult entertainment itself to the central area of the city operates in the broad sense at the scale of the city as a whole and as a way of restricting those activities to the central core of the city and protected the predominantly residential neighborhoods and residential shopping areas and the remainders of the city from those influences.

The one thousand foot restriction is a provision that operates within the central core and in effect prevents the concentration of those activities close together into a solidified district and protects those particular uses such as churches and schools, which would be particularly sensitive to their influence (Fifth Circuit Court, Transcript, 2-7-84)

Among the other witnesses to testify were Chief Joe Casey of the Metro Police Department and Farris Deep, Executive Director of the Metro Planning Commission. In his testimony, Chief Casey stated that in his professional opinion, adult uses were typically accompanied by "drunkenness, fights, cuttings, shootings, gambling and narcotics." However, when cross-examined, Chief Casey was unable to recall a single such incident as outlined above having occurred at the Classic Cat II (Fifth Circuit Court, Transcript, 2-7-84).

Farris Deep noted in his testimony that in his opinion, sites in conformance with the Adult Use Ordinance were in existence in the CC and CF zoning districts. During cross-examination, Mr. Deep was not able to identify any parcels that were currently legal and available sites for an adult use ("Classic Cat Request Under Advisement," 1984). In addition to this, Mr. Deep was queried in regard to the history of the Adult Use Ordinance's adoption in 1977 (Fifth Circuit Court, Transcript, 2-7-84).

On March 6, 1984, Judge Kurtz handed down his decision. Judge Kurtz identified two major issues in the case at bar. The first of

these concerned whether the ordinance was unconstitutional on the basis of its prohibition of nude dancing. Judge Kurtz found that the ordinance represented only a restriction on display, rather than a prohibition of nude dancing. As Judge Kurtz wrote in his opinion: "Nude dancing standing alone is subject to constitutional protection, but can be subject to reasonable zoning regulations" (Fifth Circuit Court Memorandum, 1984, pp. 5-6).

The second issue treated by Judge Kurtz's opinion concerned the constitutionality of the dispersion of adult uses within a limited geographic area. Quoting the Young decision, Judge Kurtz noted that "'the content of adult entertainment [is] a basis for subjecting them to different treatment than that accorded other entertainment'" (p.6).

Judge Kurtz went on to note that no factual evidence had been offered at the Metro Council meeting when the substitute bill was offered. At the trial, Judge Kurtz observed that a certified city planner had testified that concentrated adult uses were conducive to reduced retail business, displacement and increases in certain types of crime. It would follow that "the general population [would] shun the area and create an island within the city which would generally be considered detrimental to a well-planned and operated city" (p.6). Noting that prior decisions, Genusa v. City of Peoria (619 F.Ad. 1203, 1211 [7th Cir. 1980]) and City of Whittier v. Walnut Properties (139 Cal. App. 3rd., 618, 199 Cal. Rpt. 12, 18 [1983]), had not required each municipality to test each ordinance anew, it was

concluded there was a "reasoned and significant" basis for this ordinance (pp. 9-10).

The combination of dispersion via 1,000 foot distance requirements and restriction of adult uses to the two square mile downtown area limited the number of available sites. The Court noted that this was evidenced by the difficulty that the Classic Cat II had in finding a suitable site in the CC and CF zoning districts. Based on the evidence, the Court found:

that as a practical matter, the ordinance as presently written prohibits the Classic Cat II from operating as an adult entertainment establishment . . . (and) because of the experience of the Classic Cat II, the Court must conclude that it would be extremely difficult if not impossible for additional adult entertainment establishments to operate within the CF and CC zone (p. 10).

The Court, in its review of the Young decision, noted that its basis for upholding that ordinance was the minimal impact it had upon First Amendment rights. Ordinances in violation of this principle have been invalidated in the past. In the case at bar, Judge Kurtz concluded that the ordinance "unduly restricts First Amendment rights." The Court went on to declare the portion of the ordinance restricting adult uses to the CC and CF zones unconstitutional. Per the Court, "the combination of concentrating adult entertainment establishments within a two square mile area and then at the same time dispersing them by imposing the 1,000 foot limit is just too much" (p. 13).

At the same time, the Court found that the 1,000 foot dispersion regulation was a valid exercise of power. It was left up to the discretion of Metro Council to decide which additional zoning districts

would be made available to accommodate adult uses. In all, the revision should allow the Classic Cat II "a more reasonable opportunity to operate" (p. 14).

Finally, the Court dealt with the remaining question posed by the Classic Cat II's attorney. On the question regarding whether a distinction be made between nude dancing and other forms of adult entertainment, the Court concluded that the ordinance had been drafted to deal with the problems that a concentration of adult uses might produce. Thus, "no valid distinction is warranted between nude dancing and other forms of adult entertainment" (p. 16).

1984 Adult Use Zoning Ordinance

The practical effect of Judge Kurtz's decision was that adult uses could be located in any part of Nashville unless the ordinance was modified. In order to avoid this potentiality, staff members of the Department of Codes and the Metro Planning Commission moved to frame an ordinance to comply with Judge Kurtz's ruling ("150 Foot Distance Between Sex Shops Eyed in New Plan," 1984). In the meantime, attorneys for Metro Government were able to obtain a stay of Judge Kurtz's ruling, pending the adoption of a revised ordinance (West, 1985).

The reaction to Judge Kurtz's ruling was found to be largely negative. Metro Council members were particularly critical. One council member, in addition to being opposed to adult entertainment in Nashville, stated, "'I'm especially opposed to zoning more areas to

locate those establishments. The council or voters will have to do something.'" Another council member, on Judge Kurtz's ruling, asked rhetorically, "'Is he saying we need to provide more space for another red light district?'" (Frederick, p. B-34).

Ms. Mary Anne Eanes, Broadway Revitalization Committee Project Manager, termed the ruling "'a slap in the face.'" A Broadway Revitalization Project Committee Member noted that the argument used in the past to lure potential redevelopers was that the adult use concentration would probably not grow. Now, "that theory is shot" ("Adult Spot Porposal Irks Citizens Panel," p. C-1).

On March 27, 1984, a bill was filed in Metro Council in response to Judge Kurtz's ruling. That bill did not change the zoning districts in which adult uses could locate. Rather, the bill called for distance requirements to be reduced from 1,000 feet to 500 feet. In addition, the distance requirements between dwelling units, libraries, and adult uses were eliminated ("Plan Could Double City Sex Shops Sites," 1984). The means of measurement were altered as well, with such measurement occurring from property line to property line (Metropolitan Bill 84-265). According to Metro Attorney Lon West, it was believed that the number of available sites would be more than doubled ("Plan Could Double City Sex Shop Sites," 1984). A subsequent revision of this draft ordinance reduced the distance requirement, added adult uses to the list of uses with distance requirements, and separated them from other adult uses by 150 feet ("150-Foot Distance Between Sex Shops Eyed in New Plan," 1984).

Several features of this revised ordinance are thought to be worthy of further elaboration. According to Farris Deep, then Executive Director of the Metro Planning Commission, it was the consensus of the drafters of the revised ordinance that adult uses need be confined to the downtown area. Thus, the reduction/elimination of the distance requirements was an attempt to comply with Judge Kurtz's order by "opening up" additional sites. Secondly, Mr. Deep noted, that the change of method of measurement of distance requirement from walking distance to property line to property line was one of convenience. Simply, the former method was quite hard to measure, and the newer method would allow for easier determination of complying and non-complying sites, vis-a-vis the revised ordinance. Finally, Mr. Deep noted that it was extremely difficult to even find a sponsor for the revised ordinance. The eventual sponsor, Councilman Ralph Cohen, was said to have sponsored the bill as a personal favor to Mr. Deep and Mr. Lon West, Metro Attorney (Deep, 1985).

On April 25, 1984, Bill 084-265 was considered by the Metro Planning Commission. The text of that bill is as follows:

SECTION I. Section 32.10 of Appendix A of the Metropolitan Code of Nashville and Davidson County is hereby amended by adding to the list of Permitted Uses under commercial activities the following:

"Adult Entertainment--CF, CC."

SECTION II. Section 33.50 of Appendix A of the Metropolitan Code of Nashville and Davidson County is hereby amended by repealing the section in its entirety and adopting the following in lieu thereof:

'Section 33.50. Locations of adult entertainment establishments restricted.

No establishment classified as an adult entertainment activity shall be located within five hundred (500) feet of any church,

school ground or college campus, or within one hundred fifty (150) feet of any other establishment classified under the category 'adult entertainment', and further all such establishments shall be limited to one per block face. In determining the distance from a church, school ground, college campus, or any other establishment classified under the category 'adult entertainment', the distance shall be measured from property line to property line. However, a variance in these requirements may be requested of the Board of Zoning Appeals in accordance with the provisions set forth in this code for appeals, only where the strict application of these requirements would result in practical difficulties or undue hardships upon the owner of the property.'

SECTION III. This ordinance shall take effect from and after its passage, the welfare of the Metropolitan Government requiring it.

This bill was recommended by a 3-2 vote, with one abstention. At the meeting, several commissioners expressed a concern that "parks" should be included as a use enjoying the 500 foot distance requirement. This concern seemed to be based on "protecting" Riverfront Park, located at Lower Broadway and the Cumberland River. Farris Deep reportedly warned the commissioners that without this ordinance's passage, adult uses "'could go to Donelson, they could go to Madison and they could go to Bellevue'" ("'Porn Near Parks' Worries Expressed," 1984).

At the May 1, 1984 Metro Council meeting, the ordinance was passed on second reading. At that time, the ordinance was amended to include "parks" in the list of uses which would be separated from adult uses by the 500 foot distance restriction (Metropolitan Council Substitute Bill 84-265). Child care facilities, playgrounds, and residences were introduced as additional uses to enjoy the 500 foot distance requirement from adult uses, but did not receive enough support for inclusion ("Pornography Zoning Bill Progresses," 1984).

The ordinance in amended form passed third reading on May 15, 1984, and was signed into law by Mayor Richard Fulton on May 17, 1984 (Metropolitan Council Substitute Bill, 84-265).

Substitute Bill 84-265 deserves additional elaboration. Two points of interest concern attachments to the ordinance, serving as rationale for the ordinance. Chief Joe Casey of the Metro Police Department issued a report, Adult Entertainment Activities--Special Problem Created for Law Enforcement and the Community (1984), outlining his perception of the problems produced by adult uses and possible solutions to those problems. Chief Casey noted in the report that "if I were given the choice, adult entertainment businesses would not be allowed to locate anywhere in Nashville-Davidson County" (p. 1). Chief Casey went on to report that adult uses seem to "breed" prostitution, drug abuse violence, and other types of criminal activities. In addition, Chief Casey asserted that "organized outside interests" seemed to be in control of the adult use industry in Nashville (p. 2). The report went on to recommend that adult uses be regulated to the same general area to facilitate policing, yet dispersed so as to minimize their ill effects.

A second attachment to the Substitute Ordinance was a report prepared by James A. Spencer, who had acted as expert witness in the February 1984 trial. This report reviewed the strategies of controlling adult uses, and the ill effects said to accompany those uses. The report identified the Central Business District as the "area of peak demand" for these uses, and recommended these uses be restricted to

this area. At the same time, it was recommended that these uses be dispersed within the Central Business District, yet in a fashion that would represent a relaxation of the prior ordinance's standards ("Controlling Adult Entertainment Businesses in Nashville and Davidson County, Tennessee," 1984).

In June 1984, Judge Kurtz, upon reviewing the new ordinance, found it was in compliance with his March ruling (Fifth Circuit Court Order). According to Lon West, Metro Attorney, the revised ordinance left the Classic Cat II in precisely the same posture as it had been in under the old ordinance. Its site was clearly within 500 feet of Hume Fogg High School, and thus could not operate as an adult use (West, 1985).

The attorney for the Classic Cat II, Joel Moseley, appealed Judge Kurtz's ruling to the State Court of Appeals. The basis of the appeal was that the Circuit Court had erred in striking only a portion of the ordinance, instead of the entire ordinance. The Appeals Court ruled that no error was found, and Judge Kurtz's decision should stand (Court of Appeals Order). At this writing, it is unknown if further appeals will take place. As for the Classic Cat II, the business is still unable to offer its preferred fare of adult entertainment (Harrison, 1985).

Conclusion

This overview of the Nashville regulation of adult uses was intended to serve as an illustration of several truisms regarding adult

uses. The first of these is that zoning does not operate in a vacuum. Rather, zoning is implemented in the context of other regulations, and is in the case of most controversial issues, political considerations can complicate matters.

Another notable truism is that planning truism that one does not adopt another's successful policy and apply it to your own situation. Nashville seemed to go one step further--two policies were implemented without a significant amount of study of the outcomes. Granted, the concentration portion of the ordinance was, in effect, a legitimization of the status quo. That, however, does not excuse the lack of study that accompanied the 1977 ordinance. The attitude appeared to be one of symbolic regulation, with more emphasis on appearing to regulate adult uses than the actual, effective regulation of adult uses.

Finally, and most disturbing to planners should be the lack of leadership exhibited by the Metro Planning Commission. In the case of both adult use zoning ordinances, the Planning Commission seemed to be reluctant to lead, or, as was the case of 1977 ordinance, recognize the existence of adult uses as a problem.

Regardless of the above observations, it remains to examine the practical effects of the 1977 and 1984 ordinances. The next section will address those issues.

CHAPTER V

ANALYSIS OF NASHVILLE-DAVIDSON COUNTY ADULT USE ORDINANCES

Introduction

This section will attempt to further examine the Adult Entertainment Zoning Ordinances adopted in 1977 and 1984 in Nashville, Tennessee. The aim of this examination is to determine, under the terms of the Young decision and its progeny, whether these ordinances appear to be valid exercises of power. It is, after all, a valid concern of planners that measures they advocate or consider advocating do meet some semblance of practicability.

As noted in Chapter I, various legal journals have addressed the Young and subsequent decisions concerning adult entertainment zoning. From these journals, three criteria have emerged as standards to be met by an adult entertainment zoning ordinance in order for that ordinance to be considered a valid exercise of power. Those criteria include:

1. Regulations must be motivated by a desire to eliminate the adult entertainment establishments' adverse effects;
2. Adequate factual basis concerning the zoning of adult entertainment establishments and the zoning's ability to abate the deleterious effects must exist;
3. Regulations would be invalid if they are found to severely restrict First and Fourteenth Amendment rights (Harvard Law Review, 1978).

The course of this chapter will be as follows. Each criterion will be examined individually, to further specify them. At that time, an examination of the record in both the case of the 1977 and the 1984 ordinances will take place. Based on those findings, a subjective judgment will be made on the writer's part as to whether or not that criterion has been satisfied.

As an act of foreshadowing, it must be noted that at least two of the criteria must be adjudged as highly subjective in nature. Thus, any statement made in judgment of the meeting or failure to meet those criteria could be construed as arbitrary. That, unfortunately, is unavoidable in this instance.

Criterion One

As noted above, Criterion One concerns the motivation behind the adoption of the adult entertainment zoning ordinances in question. Several sources have attempted to specify just what meeting this criterion might entail.

Hostility to adult uses is not uncommon, as noted in the previous chapters. Sources indicate that a community's opposition to adult entertainment is not adequate justification for adoption of adult entertainment zoning. As noted in Harvard Law Review (1978):

Mere hostility to constitutionally protected speech is an impermissible motive; whatever legitimate interest a community has in maintaining cultural homogeneity or an ambience free of offensive speech must be achieved by some means other than the direct regulation of such speech (pp. 1557-8).

It has been suggested that a review of the legislative process take place, so as to examine the record as thoroughly as possible.

Such an examination would attempt to determine whether the adoption of the zoning ordinance was aimed at combatting the deleterious effects said to accompany adult entertainment. Again, according to Harvard Law Review (1978):

Ordinarily such a record is not required when legislation is reviewed, principally because legislative action is expected to be based on knowledge acquired unsystematically from informal contacts with constituents. But popular hostility to pornography is often so great that intuitive legislation judgements not supported by a record are likely to have been motivated by this hostility and to reflect a distorted assessment to the facts (pp. 1559-60).

In furtherance of the above discussion, Strom (1977) noted that:

a municipality whose real motivation in enacting adult use zoning has been to suppress or significantly diminish legal adult uses, and whose legislation consequently operates to achieve that effect, will likely find its legislation overturned

Weinstein, in an article in Land Use Law and Zoning Digest (1982) noted the following in an Atlanta, Georgia case:

Minutes of a meeting of the zoning review board revealed that, in addition to the ordinance's stated purposes, another purpose was discussed; that it would help those citizens disgusted by the conduct of these businesses to 'zone them out of business.' At that same meeting, an assistant city attorney indicated that the adult zoning ordinance was the 'strongest vehicle toward elimination' of adult businesses and the city was 'hoping for complete eradication' of adult businesses (p. 5).

On the basis of this and other factors, this ordinance was invalidated.

Given the general guidance provided above, the task that remains is to compare the Nashville experience with that related above. The difficulty in this is the inherent subjective nature in determining

that motivation. All conclusions must be qualified due to that subjective nature. In view of this, it is believed in order to examine local newspaper reports and the minutes of Metro Council for whatever explanations were offered by local legislative figures during the adoption of both the 1977 and 1984 ordinances.

1977 ordinance. The 1977 ordinance, as noted earlier, was sponsored by then Councilman Fred Lowry, and co-sponsored by 20 other councilmen (White, 1977). In a recent interview, Mr. Lowry (1985) noted that at that time it was his intention by sponsoring this legislation to restrict adult uses to the downtown area, and avoid the siting of additional adult uses in suburban Nashville. Furthermore, it was his contention that these uses should be confined to areas that would not necessitate their contact with residential areas. This was said to ensure that these uses would have have a detrimental effect on the morals of the community, most particularly those of children (Lowry, 1985).

The Metropolitan Planning Commission, according to newspaper accounts, voted not to recommend the 1977 ordinance for passage by Metro Council. Comments by the commissioners could be seen as interesting in view of their customary duties. Commissioner Ann Roos was quoted in one article as saying that the ordinance would "'further identify downtown as a place where these activities are permitted to exist'"(Gibson, p. 1). Commissioner Kermit Stengel noted, "'There's no historical evidence that this (ordinance) will work'" and that the

city should "'live with'" the current situation rather than risk a worsening of the situation (Gibson, p. 1). The same newspaper account noted that within the proceedings of the meeting, several commissioners noted that they feared any affirmation of this form of regulation would be viewed by the community as an "endorsement" of these activities by the Planning Commission (Gibson, 1977).

Another source for evaluating the motivation for a given piece of legislation is the preamble of that legislation. Traditionally, the preamble offers the rationale for the adoption of that legislation. In this case, that preamble reads as follows:

WHEREAS, the establishment of adult businesses in business districts which are immediately adjacent to and which serve residential neighborhoods has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and a downgrading of property values; and

WHEREAS, with increases and concentrations of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect to the use and occupation of private lands in urban communities; and

WHEREAS, the legitimacy of any particular restriction on land use must be judged with reference to all the surrounding circumstances and conditions; and

WHEREAS, the interest of The Metropolitan Government of Nashville and Davidson County in the present and future character of its neighborhoods adequately supports the limitations imposed by this amendment on the places where adult material may be exhibited or sold; and

WHEREAS, an additional classification of commercial activity denominated adult entertainment will assist the Metropolitan Government in determining the present and future character of its neighborhoods; and

WHEREAS, conditions concerning adult entertainment in Davidson County have changed sufficiently so as to warrant a change in zoning; and

WHEREAS, the changes affect the CC and CF zones generally and do not effect individual property owners the requirements of public hearing and notice of hearing shall be satisfied by publication in a newspaper of general circulation in Metropolitan

Nashville and Davidson County as specified in Section 104.13, Subsection A, Appendix A, of the Metropolitan Code of Laws and no individual notice of the public hearing as prescribed by said subsection shall be required (Metropolitan Government of Nashville, 1977).

As can be noted in the above section, some linkage was noted between legitimate land use objectives and that of regulating adult uses.

Finally, it is important to review the activities of Metro Council itself in adopting this ordinance. Again, it is most difficult to ascertain motivation, particularly when the speech which one is examining is in the course of a public meeting.

The customary procedure for all zoning matters before Metro Council is, as all proposed ordinances, is that the bill must pass three readings before that body. The second of these readings is a public hearing at which time any member of the public may comment on the proposed item. In addition, council members will often times make their views known upon the proposal as well. Such a hearing occurred on September 6, 1977 for the original Adult Entertainment Ordinance.

Councilman Lowry, according to audio tapes of that evening's proceedings, defended the proposal as a constitutional means of controlling adult entertainment. The existing adult uses could not be closed, but this ordinance would prevent adult entertainment from expanding to the suburbs. In Lowry's words, this would leave "'the suburbs free from pornography'". Finally, Lowry noted that the 1,000 foot distance requirement was substantial enough to "'curb'" the uses in the downtown area (Metropolitan Council Minutes, 1977).

Councilman Richard Adams, in his remarks equated a vote against this proposal as one against "'motherhood, apple pie.'" The proliferation of adult uses would "'lower this community.'" Metro Council, in Councilman Adams' words, had "'a strong moral obligation. . . to send a message to pornographers'" (Metropolitan Council Minutes, 1977).

Councilman Mansfield Douglas was found to be critical of this proposal. Douglas seemed to believe that this proposal was merely restricting a series of undesirable uses from the suburbs and placing them in an inner-city area. For that reason, Councilman Douglas urged that Metro Council follow Metro Planning Commission's recommendation and reject the proposal (Metropolitan Council Minutes, 1977).

The last councilman to make a substantial contribution to the debate was Paul Blankenship. Councilman Blankenship prefaced his remarks by stating that he wished he could "'wipe them (adult uses) off the face of the earth.'" In spite of this desire, Councilman Blankenship stated that zoning was not the proper means to regulate these uses. It is noteworthy that Councilman Blankenship failed to specify what means he thought should be used to regulate these uses (Metropolitan Council Minutes, 1977).

To sum, based on statements by the ordinance's sponsor, the primary aim seemed to be the avoidance of additional adult uses in the suburbs of Nashville. A factor contributing to the motivation of the ordinance's passage seemed to be the desire to regulate the overall growth in number of adult uses because of expected deleterious

effects upon the moral climate of the community. On the face of this, it is uncertain in this writer's judgment that the criterion regarding the ordinance's motivation was met. However, when one reviews the above cited preamble to this ordinance, legitimate planning concerns were cited as a rationale for the ordinance's passage. When balancing the ordinance's preamble with statements made by various councilmen regarding the ordinance, one cannot help believe that the primary motivation was to regulate adult uses to avoid their growth in number and to restrict them to certain areas of Nashville. However, in a case such as this, lacking any clear-cut distinction, one must defer to the preamble, and assume its statements are an accurate reflection of reality.

1984 ordinance. In order to develop an indication of this ordinance's motivation, a similar review of the record must occur. As noted earlier, this ordinance was developed in response to the invalidation of the 1977 ordinance. Metro Nashville was then given time to adopt a new ordinance addressing the defects found in that 1977 ordinance.

When the 1984 ordinance was brought before the Metro Planning Commission, it passed on a 3-2 vote. At that time, several commissioners asked that "parks" be added to the list of "protected" uses. Farris Deep, the then Executive Director of the Planning Commission, told commissioners that unless the proposal passed, adult uses "'could go to Donelson, they could go to Madison and they could go to Bellevue (all Nashville suburbs)'" (McKnight, p. 9-B).

Again, if one examines the preamble to this ordinance, one can review the official rationale of this ordinance. It was as follows:

WHEREAS, the Metropolitan Council, in 1977, did adopt amendments to the Comprehensive Zoning Ordinances so as to define and regulate by location adult entertainment establishments within the area of jurisdiction of the Metropolitan Government; and,

WHEREAS, a Circuit Court in Davidson County did find the ordinance in question to be violative of the safeguards afforded by the Tennessee and U.S. Constitutions in that adult entertainment establishments can no longer find suitable locations to operate; and

WHEREAS, since the adult entertainment ordinance was first adopted in 1977, there have been three applications for permits to operate adult entertainment businesses, all of the permits having been denied, and, further, at the present time there are 10 adult entertainment businesses operating within the jurisdiction of the Metropolitan Government, and

WHEREAS, the Metropolitan Chief of Police has recently issued a report (attached hereto as Exhibit A and by this reference incorporated herein) which finds among other things, that adult entertainment businesses when concentrated together breed prostitution, drug abuse, violence and similar criminal activity; and

WHEREAS, Chief Casey's report recommends that adult entertainment businesses be confined to one area of the city in order to insulate the remaining parts of the city, particularly residential areas, from the criminal activity associated with such businesses; however, Chief Casey recommends that adult entertainment businesses not be allowed to locate side by side; and

WHEREAS, Professor James A Spencer, a planning consultant from the University of Tennessee, has prepared a report captioned: 'Controlling Adult Entertainment Businesses in Nashville and Davidson County, Tennessee,' (attached hereto as Exhibit A and by this reference incorporated herein) which states, among other things, that the central business district of a city would be the area of peak demand for adult entertainment, and further, to allow adult entertainment uses in commercial districts beyond the Central District is to place them in highly visible locations close to neighborhoods; and

WHEREAS, Professor Spencer observes that unless disbursed, adult entertainment businesses tend to undermine a community's feeling of safety and shared values and social norms, and that, therefore, the community needs to protect institutions which reflect shared values such as churches, schools, and other public places that house and sponsor society's values; and,

WHEREAS, Professor Spencer has also recommended that adult entertainment businesses be separated one from another, otherwise they will tend to cluster and drive out of their midst retail and service establishments that cater to a broad cross-section of the population; and

WHEREAS, Professor Spencer also points out in his report that the separation of adult entertainment businesses from existing individual residences within the CC and CF Zoning Districts is difficult operationally, and, therefore, The Metropolitan Government should relax the force of the adult entertainment ordinance by dropping the required separation from individual residences; and,

WHEREAS, in addition to Professor Spencer's report, planning studies have been done in other municipalities around the county which promulgate valid planning reasons for the regulation of adult entertainment establishments by employing the planning strategies of concentration and disbursal of adult entertainment businesses, while affording economically viable places to locate such establishments; and,

WHEREAS, a map (a copy of which is attached hereto as Exhibit C and by this reference incorporated herein) has been prepared which shows the availability of sites for adult entertainment businesses to locate within the CC and CF zoning districts; and,

WHEREAS, the Metropolitan Planning Commission has reviewed this ordinance and submitted its recommendation in regard thereto, prior to the second reading on this ordinance as required by law; and

WHEREAS, this council having reviewed the map attached hereto as Exhibit C, and, further, having satisfied itself that sufficient sites of an economically viable character are available for adult entertainment businesses to locate said businesses, hereby makes legislative findings based upon the preceding paragraphs of this ordinance, and further, determines that it is in the best interest of the general welfare of the citizens of Nashville and Davidson County that adult entertainment businesses be regulated as to the time, place and manner of their operations, and further finds that it is the intent of this ordinance to do so (Metropolitan Government of Nashville, 1984).

As noted in the above section, the motivation seems to encompass the legitimate planning concerns of neighborhood protection, segregation of incompatible uses, and protection of community values, while allowing for a sufficient number of "economically viable" sites. The planning motivation is augmented by the assertion that this proposal would

address effectively certain types of criminal activities identified with these uses.

In addition to the above, it is important to take into account statements of Metro Council members. Sponsor of the proposal, Councilman Ralph Cohen, as noted earlier, was a reluctant actor. When questioned about the proposal's progress, Councilman Cohen replied, "'I'm just chairman of the Codes Committee. It is my responsibility to bring it up on the council floor. What the council does is not my responsibility'" (McKnight, p. 9-B). On another occasion, Councilman Cohen explained his support of the proposal in this manner: "'If we (Metro Council) don't get something they (adult uses) can locate anywhere'" (Gordon, p.C-2).

On May 1, 1984, a public hearing was held before Metro Council regarding this and other zoning bills. As was the case with the public hearing accompanying the 1977 ordinance, members of Metro Council were afforded the opportunity to comment upon the proposal. Councilman Cohen used this opportunity to remind this body that the proposal before them was the result of a court order, and unless Metro Council acted, adult uses could locate throughout the city (Metropolitan Council Minutes, 1984).

Councilwoman Betty Nixon moved that the bill be amended by adding "parks" to the list of uses enjoying the 500 foot required distance from adult uses. Ms. Nixon cited Riverfront Park, located at the terminus of 1st Avenue and Broadway, as an area that deserved protection from the deleterious effects that are said to accompany

adult uses. Ultimately, this proposed amendment was approved by Metro Council (Metropolitan Council Minutes, 1984).

Councilman Ludye Wallace moved for additional uses to be added to the list of protected uses. Those proposed uses included residences, child care facilities, and playgrounds. In addition, Councilman Wallace asked that the 500 foot distance requirement be a walking distance, rather than from property line to property line, as called for by the proposal. When questioned about the possibility that the proposed amendment would not open up additional sites, the source of the previous ordinance's invalidation, Councilman Wallace noted:

If we take a stand and pass this amendment, we will protect ourselves from the erosion of our laws. Any law we pass, it is our intention that it is constitutional and if any one wants to challenge it, they can (Metropolitan Council Minutes, 1984).

This amendment did fail. Councilman Paul Blankenship, as he had noted in the 1977 debate, wished he could "wipe them (adult uses) off the face of the earth." If Metro Council were to pass Councilman Wallace's amendment, according to Mr. Blankenship, the city would be where it began (Metropolitan Council Minutes, 1984).

Debate also centered on whether or not the court ruling invalidating the 1977 ordinance was a firm enough basis upon which to take the course of passing a new adult use zoning ordinance. Councilman Tandy Wilson noted that, after all, it was "only one judge, one court" which had invalidated the 1977 ordinance. Councilman Mansfield Douglas, while expressing the notion that this proposal was a response to court-mandated situation thrust upon it, urged Metro Council to pass the

ordinance without further change. Metro Council followed this advice, passing the ordinance via a voice vote (Metropolitan Council Minutes, 1984).

To sum, the preamble to the bill seems to offer the motivation called for by the Young decision and its progeny. The review of the councilman's debate is not nearly as clear cut. By and large, Metro Council's major concern seemed to be to get some sort of regulation approved while disavowing any responsibility for the legislation. This evidenced by several comments of councilmen pointing out that the proposed ordinance was a result of an adverse court decision. What was not present in this debate was whether or not the ordinance would be effective. Rather, there seemed to be the underlying concern that adult uses could locate in areas outside of the downtown area (i.e., suburban Nashville).

Summation

In all, it appears that the criterion regarding the motivation of adult use zoning was met in both instances. This is thought to be largely due to the preamble in both ordinances, which cited legitimate planning concerns among the reasons given for passage.

At the risk of invoking a charge of cynicism, one cannot say that Metro Council, based on the proceedings examined, acted in a particularly courageous fashion in either case. In fairness, in a matter as controversial as adult uses, one cannot really expect a political body to risk their collective popularity. Generally, based

on their statements council members seemed more concerned with appearances as it was with determining whether or not the ordinances would deal effectively with the issue. Perhaps the best assessment of their actions would be to note that Metro Council was attempting to enact needed legislation in a most reluctant fashion.

Criterion Two

As noted earlier, the second criterion concerned whether or not the community enacting the adult entertainment ordinance has demonstrated "adequate factual basis." This section will address that issue.

According to Weinstein (1982),

even a properly motivated ordinance with only a limited impact on free expression may be unconstitutional if the municipality cannot demonstrate an adequate factual basis for its conclusion that the ordinance will accomplish its objective of eliminating the adverse effects of adult businesses (p. 4).

An article found in the Harvard Law Review (1978) offered some elaboration on what that factual basis should include. This factual basis could consist of studies conducted by planning experts that would indicate whether the proposed ordinance would be able to abate the anticipated adverse effects of adult uses. Moreover, ". . . the conclusions of planning experts should be more readily accepted as sufficient justification for the ordinance if they were not subject to political pressures" (pp. 1560-1).

Aver noted several recent court cases involving adult entertainment zoning which were decided, at least partially, on the basis of

this criterion. In Keego Harbor Company v. City of Keego Harbor (657 F.Zd. 94 [6th Cir. 1981]), the adult entertainment zoning ordinance was invalidated in part due to the city's failure to present any such factual support prior to the ordinance's enactment (Aver, 1982-3). In Avalon Cinema Corporation v. Thompson (667 F.Zd. 659 [8th Cir. 1981]), while upholding the adult entertainment zoning ordinance, the court was critical of the city's failure to demonstrate a history of deleterious effects due to adult uses, nor were any studies submitted by planners or other experts as to the probable effects of the ordinance (Aver, 1982-3).

Based on the above, this section will attempt to examine the amount and types of studies that were conducted by Nashville in the course of adopting the two ordinances. The information in this section is based largely upon an interview with Robert Paslay, Director of Planning, Metro Planning Commission.

1977 ordinance. According to Farris Deep, former Executive Director of Metro Planning Commission (Deep, 1985), and Robert Paslay, Director of Planning for the same body, no planning studies were conducted prior to the ordinance's adoption. There are several reasons why no studies were conducted.

Mr. Paslay noted that it was the finding of the Metro Planning Commission staff that the regulation of adult uses through zoning was inappropriate. It was the staff's conclusion that the control of adult uses was best suited to a device such as nuisance proceedings.

Mr. Paslay noted that the deleterious effects said to accompany adult uses, such as increases in crime, unsightly storefronts and deteriorating property values, fit the traditional definition of nuisance rather than the traditional zoning concerns of "traffic generation, glare, loss of privacy, and interrelation between uses and public facilities." In all, it was the staff's recommendation that the adult use ordinance not be enacted, and that the current "lewd" dancing law be coupled with an ordinance restricting adult uses to the Central Business District. Within the context of these laws, nuisance proceedings could be commenced against any particularly offensive adult use (Paslay, 1985).

Mr. Paslay related that several councilmen, including Councilman Fred Lowry, requested that the Metro Planning Commission staff conduct a study upon the probable effects of the 1977 ordinance. The Planning Commission staff declined to conduct such a study for several reasons. Paslay noted that no one on the Planning Commission staff had a particular expertise in this area, nor did time enough exist for an adequate study to be designed and carried out. Finally, the staff expressed some reluctance in conducting a study upon a zoning matter that they had little confidence would work (Paslay, 1985).

From the above discussion, it seems certain that no studies accompanied the adoption of the 1977 ordinance. Thus, on the basis of this, one must conclude that this criterion was not met. However, it is most noteworthy what Judge Walter Kurtz noted in his opinion in the case of AME, Inc. v. Board of Zoning Appeals (5th Circuit Court, 1984) that the Metro Government did not present any evidence

that suggested that Metro Council had acted "for the preservation of the quality of life in the Nashville community" (p. 7). Judge Kurtz did observe during the trial that the court had heard testimony from both the Chief of Police and a qualified city planner outlining the problems that tend to accompany adult uses. In addition, the court noted that the preamble of the 1977 ordinance as passed by Metro Council was "consistent with the proof heard by the court" (p. 8). Finally, citing two recent cases, Genusa v. City of Peoria (619 F.2d 1203, 1211 [7th Cir. 1980]) and City of Whittier v. Walnut Properties (139 Cal. Appl. 3rd, 618, 189 Cal. Rpt. 12, 18 [1983]), in which the courts held that other communities experiences could be substituted planning studies, Judge Kurtz concluded that "there is a reasoned and significant basis for the ordinance" (p. 10).

Thus, it appears that in the court's opinion, this criterion was met. This does not alter the fact that the factual justification for this ordinance occurred after the fact, and within the context of a lawsuit. It was most fortunate that Metro Government was able to survive this challenge on this criterion.

1984 ordinance. As noted earlier, the environment in which the 1984 ordinance was to be adopted differed considerably from 1977. Metro Nashville was under pressure to adopt an ordinance acceptable to the Fifth Circuit Court of Davidson County. Failure to do so would mean that adult uses could locate in any commercial district. As noted in the previous discussion, it is not particularly surprising that Nashville wished to avoid that outcome.

Robert Paslay, Director of Planning for the Metro Planning Commission, noted that the Planning Commission staff was approached by Metro Legal Department to develop a study to accompany the proposed 1984 ordinance. Again, as was the case of the 1977 ordinance, the Planning Commission staff chose not to involve itself. This was said to be due to the lack of needed time to develop such a study. In addition, as was the case in 1977, the Planning Commission staff was reportedly still of the mind that adult use zoning was not the proper device to regulate these uses (Paslay, 1985).

Three attachments were made a part of the preamble to the 1984 ordinance. The first of these was a map outlining what areas, under the terms of this ordinance, would be legal sites for adult uses. This map was prepared by the Department of Codes, and was the result of a "windshield" survey of the CC and CF zoning districts, the districts in which adult uses could site. "Protected" uses (churches, schools, college campuses, parks, and adult uses) and their respective distance requirements were delineated upon this map (Harrison, 1985).

The second attachment was a report issued by Chief Joe Casey of Metro Police Department. The report entitled Adult Entertainment Activities: Special Problems Created for Law Enforcement and the Community (1984) outlined the police department's experience with adult uses. Chief Casey characterized the businesses as safety and health hazards, and stated that drug-related offenses, prostitution, receiving and selling of stolen goods, gang warfare, and muggings were related to such businesses. Furthermore, he characterized the businesses as

under the control of "organized outside interests." In all, Chief Casey noted if he were given the choice, ". . . adult entertainment businesses would not be allowed to locate anywhere in Nashville-Davidson County" (Casey, p. 1).

Chief Casey urged that these businesses be restricted to the same general area of Nashville. At the same time, it was advocated that these uses not be allowed to congregate together, nor should they be able to locate in close proximity to schools or churches (Casey, 1984).

Overall, this report appeared to be based on the professional experience of Chief Casey and Metro Police Department. No statistics were cited in the text that would evidence Chief Casey's contentions regarding adult uses in Nashville. Without such statistics and given adult uses' typical unwelcome status, the report might lack some of the impact it would otherwise have.

Finally, the final attachment to the ordinance was a report written by James A. Spencer of University of Tennessee, Knoxville. Professor Spencer, a professor of planning, had been an expert witness for Metro Government in the court case that invalidated the 1977 ordinance. The report, Controlling Adult Entertainment Businesses In Nashville and Davidson County, Tennessee (1984) served as a rationale for the 1984 ordinance.

Within the text of this report, Professor Spencer described the strategies in regulating adult uses, primarily concentration and dispersion approaches. In addition, Professor Spencer described the

conflicts between adult uses and schools, colleges, churches, and libraries, and why these uses should be separated from adult uses. Professor Spencer suggested that the reduction of the required distance from 1,000 to 500 feet would serve to create more sites (the chief defect noted in Judge Kurtz's decision) without greatly increasing the likelihood of street contact between patrons of schools, colleges, churches, libraries, and adult uses. Finally, in order to increase the number of sites, Professor Spencer suggested that residences be eliminated from the list of protected uses, and that adult use be limited to one per blockface.

This report is noteworthy for several reasons. The recommendations contained within the report were in fact a part of the 1984 ordinance. Secondly, Professor Spencer's report did not take into account the geographic concerns of the ordinance. Specific areas in which adult uses could locate were not cited, and thus whether or not these additional sites were suitable for adult entertainment was not examined either.

Summation

The two ordinances have marked different outcomes in regard to the issue of prior study. In the case of the 1977 ordinance, no studies were done prior to enactment. Its justification was developed some six years after the fact, and that by way largely of expert testimony at the trial at which the ordinance was invalidated. However, Judge Kurtz's ruling in this case seemed to say that such studies dealing

with the specific community in question are not necessary. Lacking legal expertise, this writer is not qualified to question Judge Kurtz's ruling. However, the outgrowth of his ruling would seem to indicate that a community is not obliged to study the probable outcomes of a law adopted to deal with a problem currently confronting that community.

In the case of the 1984 ordinance, it appears that Metro Government met the prior study criterion. Both Professor Spencer's and Chief Casey's reports address the problems of adult uses, and made suggestions on what type of regulation would best suit the needs of Nashville. Although some weaknesses were noted, this study, by and large, is a vast improvement over no studies at all.

Criterion Three

This section addresses whether or not the imposition of a given adult use zoning ordinance would allow for an adequate number of sites. Again, the literature is not silent on this matter.

An article in Harvard Law Review (1978) noted that the Young decision seemed to indicate the following:

In discussing the restrictive impact of Detroit's ordinance, the plurality focused not on the interest of individual proprietors, but on the interests of distributors and consumers of pornography (In addition), a majority thus seemed to agree that pornography zoning would be unconstitutional if the total number of potential customers who could conveniently patronize them did not remain approximately the same (p. 1558).

Aver (1982-3) noted that a case-by-case analysis need occur when determining whether an adequate number of sites exist. This was said to be necessary due to the varying geographical layout of a given city.

Several cases have come to bar since the Young decision which would seem to offer guidance to a community undertaking such an analysis. In the case of Alexander v. City of Minneapolis (531 F. Suppl. 1162 [D. Minn. 1982]), the court heard testimony from individuals knowledgeable about adult uses and their successful operation. Witnesses suggested that an adult use is best located in an area in close proximity to other retail businesses, and within a short distance of vehicular and pedestrian traffic. Finally, it was suggested that these areas be well-lighted. Based at least partly on this testimony, the adult use ordinance governing Minneapolis was overturned due to lack of sites meeting the above criteria (Aver, 1982-3).

Weinstein (1982) reported that a recent Georgia decision offered further guidance. The case, Purple Onion, Inc. v. Joachim (511 F. Supp. 1207 [N.D. Georgia 1981]), involved an adult use ordinance similar to that of Detroit's. The city of Atlanta contended that 81 sites were available for additional adult use establishments. Of those sites, the court found that only 10 were acceptable sites. Of the remaining 71, the court found that a series of factors prevented their utilization as adult use sites. Those factors included too small lots, sites 20 to 30 feet below street level, sites in the floodplain, and sites too close to noxious uses. In addition, other sites were ruled out due to unavailability for such reasons as the site being a part of a substantial business. In all, this ordinance was said to have been overruled for other reasons as well. This discussion does give some indication what factors a court would take into consideration when ruling on this question.

In order to develop a judgment upon the Nashville experience, it is necessary to compare the number of available sites under both ordinances, and to a lesser extent, determine the suitability of those sites. Such was accomplished by identifying the various uses enjoying the required distance stipulation ("protected uses") in the Nashville Criss-Cross Directory (Summer 1984), and plotting their location on maps of the CC and CF zoning districts. Then, the lots falling within those required distances (1,000 foot walking distance for the 1977 ordinance, and 500 and 150, dependent upon uses, in the 1984 ordinance) were so eliminated. Finally, the total number of city blocks within the CC and CF districts were counted, with five categories of blocks identified. The categorization of these blocks were based on the percentage upon which an adult use could not locate. Those percentages were 0%, 1 to 33%, 34-66%, 67-99%, and 100%. Accordingly, a block scored 0% would mean that an adult use could locate anywhere upon that block.

Prior to examining the two ordinances, one must point out that the designation of blocks was an arbitrary one. Blocks were found to be various sizes, with some quite small, and others quite large. The primary criterion for designation as a block was property bounded on four sides by city streets. Other areas were designated as blocks without meeting this criterion. These areas were either triangular shaped blocks, irregular shaped blocks due to major landmarks (e.g., railroad tracks, Interstate 240, etc). Typically, a city block in this area of Nashville was found to be 500 feet by 600 feet. It is

not believed that the variance in lot size would preclude a viable analysis.

Finally, a word must be said regarding the suitability of those sites available. Previously, it was noted that adult uses are best suited to retail business areas in close proximity to pedestrian and vehicular traffic. Based on this writer's subjective knowledge of Nashville, the following areas of the CC and CF zones districts appear to meet that description:

1. First Avenue to Union Street to Ninth Avenue to Broadway;
2. Properties beginning at L&N Railroad running west along Charlotte;
3. Properties beginning at L&N Railroad running west along Church Street;
4. Properties beginning at L&N Railroad running west along Broadway/West End;
5. Demonbreun from Interstate 240 to 17th Avenue.

The areas so described contain the vast majority of the retail business trade in the two-square mile area making up the CC and CF zoning districts. Special attention will be paid these areas in the coming analysis.

1977 ordinance. Under the terms of the 1977 ordinance, adult uses could not locate within 1,000 feet walking distance of any church, school ground, college campus, residence, dwelling or rooming unit, or any branch of the metropolitan library or any adult entertainment establishment. Furthermore, these uses were restricted to the CC and CF zoning districts (Metropolitan Government of Nashville, 1977).

The 1,000 foot walking distance requirement is an interesting device in that it is determined by the customary pedestrian path, going from front door to front door. When measuring these distances, the outcomes can at times be ironic. For instance, when measuring front door to front door, it is possible on the larger blocks to have an adult use sharing a common rear property line with a site that would lie more than 1,000 feet away. By and large, this type of distance requirement is rather unpredictable in that properties that one would believe lie outside the distance are not, and vice versa (Harrison, 1985).

As observed earlier, the CC and CF zoning districts were broken down into 222 more or less uniform blocks. Of these blocks, percentages were calculated on the amount of property upon which adult uses could not locate upon. The breakdown is presented in Table 1.

TABLE 1. 1977 Adult Use Zoning Ordinance Percentage of Blocks Available for Adult Uses Nashville-Davidson County, Tennessee

Percentage of Block Upon Which Adult Uses Cannot Locate	Number of Blocks	Percentage of Total
0%	67	30.2
1-33%	14	6.3
34-66%	17	7.7
67-99%	24	10.8
100%	<u>100</u>	<u>45.0</u>
	222	100.0

SOURCE: Field survey.

As can be noted, based on this somewhat clumsy methodology, 45% of the blocks making up the CC and CF zones were totally unavailable for adult uses. Another 10.8% of the blocks making up these zoning districts were found to have at least 67% of their land area unavailable for adult uses. Conversely, 30.8% of the blocks making up these districts were without any restriction on adult uses.

It is difficult to place the above figures into any sort of perspective without examining at least in general the locations that adult uses could site. There are a number of ways to examine such. The CC district is the central core of Nashville, making up some 12 full blocks and 6 partial blocks. Of this area, only one site was available for adult uses.

Earlier, five areas containing a majority of the retail businesses in these districts were identified. Table 2 shows a summary of the number of sites available and number of sites which would allow adult uses. No attempt was made to ascertain whether or not these adult use sites were unsuitable due to physical constraints or the availability of property. It is noteworthy that no such analysis was offered in the court case that invalidated this ordinance.

In addition, several large sections of land where adult uses could locate were observed as well. Below are the locations of those areas. Please note there is some overlap with the prior list:

1. L & N Railroad to Church Street to Interstate 240 to Division Street;
2. Broadway to 17th Avenue to Division Street to Interstate 240;

TABLE 2. 1977 Adult Use Zoning Ordinance, Number and Percentage of Adult Use Sites, Selected Areas of Nashville

Area	Number of Building Sites	Adult Use Sites	Percentage
1st Avenue to Union St. to 9th Avenue to Broadway	472	18	3.8
Properties beginning at L&N Railroad west along Charlotte	56	11	19.6
Properties beginning at L&N Railroad west along Church	83	36	43.4
Properties beginning at L&N Railroad west along Broadway West End	230	84	36.5
Benonbreun from Interstate 240 to 17th Avenue	<u>24</u>	<u>24</u>	<u>100.0</u>
	865	173	20.0

SOURCE: Field survey.

3. Broadway/West End to 19th Avenue to Hayes Street to 17th Avenue;
4. Molloy Street to 1st Avenue/Hermitage Avenue to Peabody Street to Cumberland River.

A "windshield" inspection of these areas was undertaken in order to ascertain the general type of land uses. In Area One, the land uses seemed to be largely warehousing and wholesaling, owing such status in all likelihood to its proximity to the L&N Railroad. Area Two is characterized by tourist-type businesses, offices, and service establishments.

Area Three is somewhat smaller in area, and is made up of largely medical offices. Finally, Area Four is largely made up of Metro Government properties, including General Hospital and Metro Maintenance Center. All the above areas are not considered the most suitable sites for adult uses. Area Two, containing the tourist type businesses, would probably be judged as best of the four. However, again it must be remembered that no analysis was conducted upon availability of those sites.

Other isolated sites and blocks of legal sites were noted as well. However, one must defer to the reasoning of Judge Kutz in his observation of this situation. He observed "that it would be extremely difficult if not impossible for additional adult entertainment establishments to operate within the CF or CC zone" (5th Circuit Court, 1984). Based on the above, it is believed reasonable to conclude that the 1977 ordinance did not allow for an adequate number of sites.

1984 ordinance. The Adult Use Zoning Ordinance enacted in 1984 differed in several ways. The distance requirement was dropped to 500 feet, measured from property line to property line, except in the cases of adult uses, when the distance is reduced to 150 feet. In addition, the uses upon which the 500 foot requirement was applied to were churches, school grounds, college campuses, and parks (Metropolitan Government of Nashville, 1984).

The 500 and 150 foot distance requirements are a much more predictable device than that utilized previously. The measurements are not so hard to ascertain, and there are not the usual occurrences noted in the previous section.

Following the procedures outlined in the previous case, the findings are shown in Table 3.

TABLE 3. 1984 Adult Use Zoning Ordinance, Percentage of Block Available for Adult Uses Nashville-Davidson County, Tennessee

Percentage of Blocks Upon Which Adult Uses Cannot Locate	Number of Blocks	Percentage of Total
0%	115	51.8
1-33%	19	8.6
34-66%	18	8.1
67-99%	27	12.2
100%	<u>43</u>	<u>19.4</u>
	222	100.1

SOURCE: Field survey.

Under the 1984 ordinance, 19.4% of the blocks in the CC and CF zoning districts had no legal sites under this law. In addition, 12.2% of the blocks had at least 67% of their land area eliminated as adult use sites. Conversely, 52.3% of the blocks had no restrictions on the siting of adult uses. To better put these percentages into perspective, Table 4 compares the 1977 and 1984 ordinances.

As will be noted upon comparing the figures, the 1984 ordinance seems to be significantly less restrictive than the 1977 ordinance. The difference is particularly telling when comparing the most restrictive

TABLE 4. Comparison of 1977 and 1984 Ordinances, Percentage of Blocks Available for Adult Uses Nashville-Davidson County, Tennessee

Percentages of Block Upon Which Adult Uses Cannot Locate	1977 Percentage of Total	1984 Percentage of Total
0%	30.2	51.8
1-33%	6.3	8.6
34-66%	7.7	8.1
67-99%	10.8	12.2
100%	<u>45.0</u>	<u>19.4</u>
	100.0	100.0

SOURCE: Field Survey

category of 100%, where the percentage of total for 1977 and 1984 were 45.0% and 19.4%, respectively.

In contrast to the 1977 ordinance, the 1984 ordinance yielded 47 sites upon which adult uses could locate in the CC zoning district. Undoubtedly, this is an improvement over the legal site under the 1977 ordinance. Furthermore, when examining the five retail business areas identified earlier, the findings are as shown in Table 5. As was the case previously, no attempt was made to determine whether or not the possible adult sites were unsuitable due to physical constraints or the availability of property.

The 1984 ordinance marked a significant increase in the number of sites in the five areas. In 1977, there were only 173 sites; in

TABLE 5. 1984 Adult Use Zoning Ordinance, Number and Percentage of Adult Use Sites Selected Areas of Nashville

Area	Number of Building Sites	Adult Use Sites	Percentage
1st Avenue to Union Street to 9th Avenue to Broadway	472	172	36.4
Properties beginning at L&N Railroad west along Charlotte	56	10	17.9
Properties beginning at L&N Railroad west along Church	83	72	86.7
Properties beginning at L&N Railroad west along Broadway/West End	230	131	57.0
Denonbreun from Interstate 240 to 17th Avenue	<u>24</u>	<u>14</u>	<u>58.3</u>
	865	399	46.1

SOURCE: Field survey.

1984, that number increased to 399. Table 6 summarizes the differences in percentage of adult use sites in the five areas.

TABLE 6. Comparison of 1977 and 1984 Adult Use Zoning Ordinances
Percentage of Adult Use Building Sites Selected Areas of
Nashville

Area	1977 Ordinance Sites Percentage (Sites)	1984 Ordinance Sites Percentage (Sites)
1st Avenue to Union Street to 9th Avenue to Broadway	3.8 (18)	36.4 (172)
Properties beginning at L&N Railroad west along Charlotte	19.6 (11)	17.9 (10)
Properties beginning at L&N Railroad west along Church	43.4 (36)	86.7 (72)
Properties beginning at L&N Railroad west along Broadway/West End	36.5 (84)	57.0 (131)
Demonbraun from Interstate 240 to 17th Avenue	100.0 (24)	58.3 (14)

SOURCE: Field survey.

Although in two of the areas the number of possible adult use sites actually declined, great increases were noted in two areas. Given such an increase, no attempt was made to examine large areas in which adult uses could locate.

It would be most difficult to definitively state that the 1984 ordinance would offer adequate number of sites. However, based on

the figures produced above, it is clear that the 1984 ordinance offers significantly more sites than the 1977 ordinance. Furthermore, the location of these sites seemed to be better than those under the 1977 ordinance. Based on the above, this writer is inclined to believe that the criterion regarding adequate number of sites has been met.

Conclusion

Based on this rather inexact methodology, it seems that the 1977 ordinance could be best viewed as an invalid exercise of power. Both the prior study and adequate number of sites criteria appear not to have been met. At least in the latter case, this writer can rely on the judgment of the Fifth Circuit Court of Davidson County to reinforce that assertion. Although the court did not agree, it is believed that adequate prior study was not conducted in this case.

As for the 1984 ordinance, it is believed it does represent a valid exercise of power. All three criteria appear to have been met. The least clear-cut is that regarding the number of sites available for adult uses. Although this study failed to determine actual property availability or suitability, it is certain that the number of possible sites is much greater than in the case of the 1977 ordinance.

The final chapter of this study will attempt to review the Nashville experience, and its applicability to other communities. In addition, recommendations will be made as well.

CHAPTER VI

SUMMARY AND CONCLUSIONS

Introduction

The value of a case study, at least from this writer's perspective, is the opportunity to observe the manner in which an entity grapples with a given issue. Each entity, predictably, is different, and requires different approaches to the settlement of that issue. When the issue is as controversial as adult uses, the regulations and the processes leading up to the adoption of those regulations can be quite revealing.

In this case study, the Metropolitan Government of Nashville-Davidson County was studied for its response to the issue of regulating adult uses. Several observations seem to be in order regarding the findings of that discussion.

Observations and Comments

In 1977, Metro Council considered and passed an adult use zoning ordinance. The ordinance, based on evidence supplied by newspaper accounts and personal interviews, appeared to have one primary aim. That aim was to prevent the spread of adult uses to suburban areas of Nashville. To accomplish such, Nashville sought to restrict adult uses to the downtown area of Nashville, while dispersing those uses from themselves and other "sensitive" uses.

This ordinance, as identified in Chapter V, was not without defects. Based on the findings of that chapter (and the Fifth Circuit

Court of Davidson County), the ordinance did not seem to have been adequately studied. In addition, an adequate number of sites was not provided for within the context of the geographic constraints offered by this ordinance (i.e., required distances). The latter defect appears to be a result of the former; if the studies had been conducted prior to the enactment of the ordinance, it is thought reasonable to assume that sufficient sites would have been made available.

As noted in Chapter IV, the sponsor of the ordinance was supplied the ordinance by the Office of the Mayor. That ordinance, reportedly based on the Detroit Anti-Skid Row Ordinance, was designed to restrict future adult uses to the downtown area. Since distance requirements need to be based on local geography and land use patterns, it would seem that some sort of planning study should have been conducted in order to ascertain the impacts of this ordinance on adult uses and the downtown area. The Planning Commission Staff, as observed earlier in the context of an interview with the Director of Planning, declined the request to do such a study for reasons of lack of time, and the professional opinion that zoning was an improper device to regulate these uses. It is most curious that the Planning Commission staff would decline the opportunity to study a land use issue for the reasons given.

Again, as noted in Chapter IV and Chapter V, Metro Council agreed to this measure. However, upon examining the available evidence, it seems that Metro Council wished to go on record as opposed to adult uses, and only voted for this measure to keep the uses out of the

suburbs. Little or no discussion was noted on the merits of zoning as a means of regulation; rather, something had to be done about these uses.

It is easy to make judgments in retrospect in matters such as this. Nonetheless, the situation at hand vaguely recalls an admonishment made some 30 years ago by Harold V. Miller in Mr. Planning Commissioner (1954). According to Miller:

You can learn a great deal about zoning from studying ordinances in effect elsewhere, but write your own ordinance and don't simply copy something from somewhere else. No two communities are the same even though they may have some characteristics in common. Because they are different, they need and should want different material in their zoning ordinances (pp. 65-6).

Although the Detroit and Nashville ordinances are similar in some respects, their overall thrust is different. They both seek to disperse adult uses; however, Nashville chose to disperse adult uses within a two square mile area. As evidenced by the ruling of the Fifth Circuit Court, even though the Detroit ordinance was a valid exercise of power, it was found that the 1977 Nashville ordinance was not.

As noted in Chapter IV, in addition to zoning, Metro Nashville sought to regulate adult uses with other devices. Those devices, including building codes, health and safety inspections, liquor and beer licensing and obscenity proceedings. Their effectiveness was not particularly apparent. At best, the regulations were haphazard; at their worst, it was harassment.

Nashville's use of these devices might be viewed as indicative of the community's distaste for adult uses. As noted within Chapter III, those devices were not a comprehensive means of regulating adult uses.

Accordingly, these regulations suffered from the defects of lack of predictability, uncertain legal status, and limited effectiveness. In all, it seemed that in addition to restricting adult uses to specific areas of the city, Metro Nashville was seeking to drive those uses out at the same time. Such is not to say that adult uses do not impose certain costs upon the community. It is believed, however, that zoning of adult uses is an improvement over the regulation offered by these devices.

By 1984, and the then recent invalidation of the 1977 Adult Use Zoning Ordinance, Metro Nashville found itself precisely in the same position as it was in seven years prior. As earlier, it appeared that the overriding concern of Metro Council was to maintain the status quo as much as possible; that is, restrict adult uses to the downtown area. However, unlike the prior case, some attempts were made to justify the form of regulation. Reports were issued by both the Chief of Police and a planning consultant as to the probable effects of adult uses, and planning strategies to deal with those effects. In addition to this, a map that was made part of the record delineated areas where adult uses could locate under the liberalized standards of this ordinance. Whether or not these additional sites were economically viable is still a matter of conjecture. However, it is believed the process represented an improvement over that of the 1977 ordinance.

Again, one must be concerned with the failure of the Metro Planning Commission staff to involve itself in a study of this nature. As noted earlier, the Planning Director noted that the lack of time to conduct a study was a factor in declining to study this issue, as

well as the professional concern that this was not the proper means of regulating those uses. In fairness to the Planning Director and his staff, it was noted that the staff was under-manned at that time, and the proposed budget for the planning commission staff had been reduced significantly for the coming year. This undoubtedly contributed to the planning commission staff's attitude in this case (Paslay, 1985). Still, it is difficult to understand why a planning agency would decline the opportunity to study a land use concern.

Metro Council, in its debate prior to the 1984 ordinance's passage, seemed again driven by the concern of enacting an ordinance which would restrict adult uses to the downtown area. Although this perceived attitude did not differ significantly from that displayed in 1977, it was at least in conjunction with an ordinance that had been relieved of its more serious defects.

All in all, when reviewing the entire process, one cannot help but make several observations. Despite their unpopularity, adult uses still exist in Nashville, Tennessee, and scores of other communities. This would seem to indicate a certain amount of resiliency, and a certain amount of demand on behalf of adult uses. Morality issues aside, these uses are going to remain a part of Nashville and scores of other communities for the foreseeable future. As is the case with all land uses, it is a proper pursuit of planners to treat these uses in a detached, objective manner to assure that these uses and other uses interact in a fashion as harmonious as possible. To do less than that is to ignore a certain amount of reality in the urban landscape.

Zoning for adult uses is only the latest of attempts to regulate these uses. Due to the controversial nature of adult uses, it is believed that local legislatures are not comfortable dealing with adult uses unless that regulation is perceived as severely limiting adult uses. Herein lies the tension; zoning, in its most pristine form, attempts to treat uses objectively as possible, taking into consideration, among other matters, the spillovers that accompany those uses. Zoning for adult uses does seem to offer adult uses some legitimacy insofar as it would follow that those uses have a right to locate in that community so long as it meets the requirements of the zoning ordinance.

In 1977, Metro Council reluctantly passed an adult use ordinance later proven to be too restrictive. This was followed, again somewhat reluctantly, by a revised ordinance in 1984 which seems to have corrected those defects. Since passage, no additional adult uses have located in Nashville (Harrison, 1985). It will be most interesting to observe the community's reaction if and when another adult use attempts to site in Nashville.

It is believed that the 1984 ordinance marks a new beginning in the regulation of adult uses in Nashville-Davidson County. This ordinance, better conceived and studied than the prior ordinance, seemed to meet the three criteria that valid adult use ordinances must meet. This ordinance will not remove the controversy from adult uses, but it should lend some predictability to the process.

Recommendations

In concluding this study, it is customary that recommendations be made. In this case, only two come to mind. The first of these

concerns the need for study by a community considering the use of adult use zoning. Some attempt need be made to understand the uses and how these uses fit into the particular neighborhood in which they reside. The zoning ordinance that result from such study should at least attempt to abate the spillovers of these uses while not being so restrictive as to place unnecessary and possibly illegal pressures on those uses.

Secondly, and more importantly, a better understanding of the adult use industry should be developed as well. As noted in Chapter II, the "underground" nature of these uses have made study most difficult. Perhaps the most comprehensive work, the Report of the Commission on Obscenity and Pornography (1970), is roughly 15 years old at this writing. An update of this report should be of interest to planners as well as other social scientists. Such a study should allow planners to develop location standards for these uses so as to make them as compatible as possible with the remainder of the community.

LIST OF REFERENCES

LIST OF REFERENCES

- Adult Cinema Suit Challenges Proximity Rule, Tennessean, April 5, 1977, p. 79.
- Aver, Raymond A. The Zoning of Adult Entertainment: How Far Can Planning Commissions Go. Comm/ENT, Winter 1982-3, 293-315.
- Babbie, Earl R. The Practice of Social Research (2nd ed.). Belmont, California: Wadsworth, 1979.
- Babcock, Richard F. Zoning. In F. So. I. Stollman, F. Beal and D. S. Arnold (Eds.). The Practice of Local Government Planning. Washington, D. C.: International City Management Association, 1979.
- Bailey, Greg. Opry Move Not Death Knell For Broadway, After All. Nashville Banner, Neighborhood Edition, July 20, 1983, pp. 1-2.
- Bailey, Greg. Rich History Runs Through Old Street. Nashville Banner, Neighborhood Edition, July 3, 1983, pp. 1-2.
- Barlowe, Raleigh. Land Resource Economics (3rd ed.). Englewood Cliffs, New Jersey: Prentice Hall, 1978.
- Boston Redevelopment Commission. Entertainment District Study, Interim Report, April 1974.
- Boyce, Byrl N. Real Estate Appraisal Terminology. Cambridge, Massachusetts: Ballinger, 1983.
- Casey, Joe D. Adult Entertainment Activities-Special Problems Created For Law Enforcement and the Community. Report to Metropolitan Council of Nashville-Davidson County, Tennessee, April 1984.
- Chancery Court for Davidson County, Part Three. Metropolitan Government of Nashville-Davidson County v. Joe Kachinko et al. Memorandum, December 7, 1979.
- Clor, Harry. Public Morality and Free Expression: The Judicial Search for Principles of Reconciliation. Hastings Law Journal, July 1977, 1305-1313.
- Club Beer Licence Revocation Asked. Tennessean, March 10, 1978, p. 43.
- Cohen, Bervard. Deviant Street Networks: Prostitution in New York City. Lexington, Massachusetts: Lexington, 1980.

Constitutional Law. Land Use Law & Zoning Digest. Volume 28, Number 6, 1976, 12-13.

Cook, James A. The X-Rated Economy. Forbes. September 18, 1978, pp. 81-92.

Court of Appeals of Tennessee, Middle Section. AME, Inc. v. Board of Zoning Appeals, et al. Order, May 8, 1985.

Crackdown on Porn. Newsweek, February 28, 1977, pp. 21-22, 27.

Cross Reference Directory of Nashville. Independence, Kansas: City Publishing, 1984.

Deep, Farris, Personal Interview, June 17, 1985.

Detroit, Michigan. Municipal Zoning Ordinance of City of Detroit.

Dow, Dennis R. Constitutional Law: Municipal Zoning Ordinance May Restrict Location of Adult Motion Picture Theaters. Washburn Law Review, 1977, 479-489.

Fee, Charles T., Jr. Using Constitutional Zoning to Neutralize Adult Entertainment-Detroit to New York. Fordham Urban Law Journal, 1977, 455-474.

Fifth Circuit Court for Davidson County, Tennessee. AME, Inc. v. Board of Zoning Appeals, et al. Complaint, May 31, 1983.

Fifth Circuit Court for Davidson County, Tennessee. AME, Inc., v. Board of Zoning Appeals, et al. Memorandum, December 6, 1983.

Fifth Circuit Court for Davidson County, Tennessee. AME, Inc., v. Board of Zoning Appeals, et al. Memorandum, March 6, 1984.

Fifth Circuit Court for Davidson County, Tennessee. AME, Inc., v. Board of Zoning Appeals, et al. Plaintiff's Brief, November 9, 1983.

Fifth Circuit Court for Davidson County, Tennessee. AME, Inc., v. Board of Zoning Appeals, et al. Plaintiff's Brief, February 4, 1984.

Fifth Circuit Court for Davidson County, Tennessee. AME, Inc., v. Board of Zoning Appeals, et al. Respondent's Brief, November 9, 1983.

Fifth Circuit Court for Davidson County, Tennessee. AME, Inc., v. Board of Zoning Appeals, et al. Respondent's Brief, February 2, 1984.

- Fifth Circuit Court for Davidson County, Tennessee. AME, Inc., v. Board of Zoning Appeals, et al. Transcript of February 6, 1984.
- Fifth Circuit Court for Davidson County, Tennessee. AME, Inc., v. Board of Zoning Appeals, et al. Transcript of February 7, 1984.
- Fletcher, Bill. Owners Eye Petition on Land Near Center. Nashville Banner, April 29, 1982, p. C-1.
- Frederick, Elise. Adult Entertainment Ruling Draws Criticism. Nashville Banner, March 7, 1984, p. B-34.
- Friedman, Jane M. Zoning "Adult" Movies: The Potential Impact of Young v. American Mini-theaters. Hasting Law Journal, July 1977, 1293-1304.
- Fulton Signs Anti-Nude Dancing Law. Tennessean, April 6, 1978, p. 23.
- Gibson, Frank. Adult Bookstore Restriction Approved. Tennessean, September 21, 1977, pp. 1,20.
- Gibson, Frank. Anti-Nude Dancing Law Passed by Metro Council. Tennessean, April 5, 1978, p. 15.
- Gibson, Frank. Bill Restricting Adult Bookstores, Movies Advanced. Tennessean, September 7, 1977, p. 41.
- Gibson, Frank. Judge Rules Drunk Loiter Law Illegal. Tennessean, August 22, 1978, p. 1.
- Gibson, Frank. Panel Disapproves Adult Stores Restriction. Tennessean, August 25, 1977, p. 1.
- Gibson, Frank. Penthouse Has Further Law Troubles. Tennessean, November 10, 1977, pp. 1,4.
- Gold, David. Equal Protection and the First Amendment: Zoning Away Skid Row. University of Miami Law Review, 1977, 713-721.
- Gordon, Tam. Adult Spot Proposed Irks Citizens Panel. Nashville Banner, March 29, 1984, p. C-1.
- Gordon, Tam. Classic Cat Cannot Move Near School. Nashville Banner, April 22, 1983, pp. A-1, A-8.
- Gordon, Tam. Classic Cat Permit to Exclude Adult Entertainment. Nashville Banner, April 26, 1983, p. C-2.

- Gordon, Tam. 150-Foot Distance Between Sex Shops Eyed in New Plan. Nashville Banner, April 27, 1984, p. C-2.
- Gordon, Tam. Plan Could Double City Sex Shop Sites. Nashville Banner, March 27, 1984, pp. A-1, A-4.
- Hall, Doug. Broadway Businesses Eye Porno Protection. Tennessean. August 6, 1977, p. 4.
- Hall, Alan. Classic Cat II Gives Up Liquor, Has Beer, Nude Dancing. Tennessean, July 22, 1980, p. 9.
- Hall, Alan. Two Arrested for Allowing Liquor Inside Club. Tennessean, July 24, 1980, p. 14.
- Harper, Steven. Personal Interview, March 8, 1985.
- Harrison, Richard. Personal Interview, July 11, 1985.
- Hawkins, Brett W. Nashville Metro. Nashville: Vanderbilt University, 1966.
- Herbert, David. Urban Geography. New York: Prager, 1972.
- Hilman, Randy. Broadway Checks Asked by Revitalization Panel. Tennessean, February 6, 1984, pp. B1, B3.
- Hilman, Randy. Lower Broad-Once Proud, It Now Draws the Rootless, Restless, Desperate. Tennessean, October 6, 1980, pp. 1,4.
- Hilman, Randy. Massive Porno Raid. Tennessean, March 3, 1984, p. 1.
- Hudgins, Bill. Chancellor Dismisses 4 More Prostitution Cases. Nashville Banner, March 15, 1984, p. C-2.
- Karp, David A. Hiding in Pornographic Bookstores. Urban Life and Culture, January 1973, 427-451.
- Kasimer, Wendy. Pornography and the First Amendment: Prior Restraints and Private Action. In. L. Lederer (Ed.), Take Back the Night. New York: Morrow, 1980.
- Keeping a Rein on Sex Businesses. Changing Times, January 1978, pp. 21-23.
- Lewis, Dwight and Sherbourne, Robert. Large Cache of Explosives Under Club. Tennessean, August 31, 1979, pp. 1,4.

Loggins, Kirk. No Site Known For Club's Move. Tennessean, February 7, 1984, p. 6-B.

Loggins, Kirk, and McKnight, Gail. Classic Cat Request Under Advisement. Tennessean, February 8, 1984, p. 2-B.

Lowry, Fred. Personal Interview, July 5, 1985.

Mandelker, Daniel and Cunningham, Roger A. Planning and Land Development. Indianapolis: Babbs-Merrill, 1979.

Marcum, Lester. Personal Interview, May 29, 1984.

Marcus, Normal. Zoning Obscenity: Or, the Moral Politics of Porn. Buffalo Law Review, 1978, 1-46.

Marion County, Indiana Department of Metropolitan Development, Division of Planning. Adult Entertainment Businesses in Indianapolis, February, 1984.

McKnight, Gail. Adult Businesses Now "Up to Par." Tennessean, March 3, 1984, pp. B1, B4.

McKnight, Gail. Baldwin Sentenced to Seven Years. Tennessean, February 24, 1984, p. 1.

McKnight, Gail. Lower Broadway Adult Shops Dealt Double Punch. Tennessean, February 4, 1984, p. C6.

McKnight Gail. Porn Near Parks Worries Expressed. Tennessean, April 26, 1984, p. B9.

McKnight, Gail. Pornography Zoning Bill Progresses. Tennessean, May 2, 1984, pp. A1, A6.

Metro Asks Court to Stop Penthouse's "Entertainment." Tennessean, November 3, 1979, p. 27.

Metropolitan Council of Nashville-Davidson County, Tennessee. Minutes of May 1, 1984 Meeting.

Metropolitan Council of Nashville-Davidson County, Tennessee. Minutes of September 6, 1977 Meeting.

Metropolitan Council of Nashville-Davidson County, Tennessee. Substitute Ordinance 77-649.

Metropolitan Council fo Nashville-Davidson County, Tennessee. Substitute Ordinance 84-265.

Metropolitan Government of Nashville-Davidson County, Tennessee.
Comprehensive Zoning Ordinance of Nashville-Davidson County,
Tennessee.

Metropolitan Government of Nashville-Davidson County, Tennessee.
Metropolitan Code.

Metropolitan Planning Commission of Nashville-Davidson County, Tennessee.
General Plan for Nashville 1980-2000. September, 1981.

Metropolitan Planning Commission of Nashville-Davidson County, Tennessee.
Resolution 77-630.

Michaud, Leonard J. Zoning: Content Classification for Adult Movie
 Theatres. Loyola Law Review, 1977, 1079-1086.

Metropolitan Planning Commission of Nashville-Davidson County, Tennessee.
Log of Zone Change Request.

Miller, Harold V. Mr. Planning Commissioner. Nashville, Tennessee:
 Public Administration Service, 1954.

Morgan, Ted. United States Versus the Princes of Porn. The New York
Times Magazine, March 6, 1977, pp. 17-18, 26, 38.

Mulgrew, Tom. Relocation of Classic Cat Angers School Principal.
Tennessean, April 21, 1983, pp. 1A, 12A.

New Club Inspections Timing Hit. Tennessean, December 14, 1979,
 pp. 1,12.

Nightclub to Appeal Ruling of Zoning Board. Nashville Banner, June
 24, 1980, p. 12.

Once Booming Penthouse Closes. Nashville Banner, January 8, 1980,
 p. 12.

Ordinance Would Reduce Downtown Porno District. Tennessean, October
 28, 1977, p. 15.

Paslay, Robert. Personal Interview, September 18, 1985.

Pigott, Mike. Chancellor Sounds Off After Ruling on Club. Nashville
Banner, January 2, 1980, p. 20.

Pomeroy, Leslie. Permits Denied Madison Restaurant. Tennessean,
 December 18, 1979, p. 1.

Pornography Goes Public. Newsweek, December 21, 1970, pp. 24, 27-28,
 31-32.

The Porno Plague. Time, April 5, 1976, pp. 58-63.

- Porno Zoning Measure Appears Likely to Backfire (Ed.). Tennessean, August 15, 1977, p. 6.
- Pratter, Jerome and Hages, Connie. Zoning Laws, Not Obscenity Laws, Offer the Way to Control Adult Entertainment. National Cities Weekly, April 21, 1980, p. 9-11.
- Rasmussen, Paul K and Kuhn, Lauren L. The New Masseur. Urban Life, October 1976, 271-292.
- Ratcliff, Richard U. Urban Land Economics. New York: McGraw-Hill, 1949.
- Rehearing Denied for Classic Cat. Nashville Banner, August 7, 1979, p. 10.
- Rist, Ray C. Pornography as a Social Problem: Reflections on the Relation of Morality and the Law. In R. Rist (Ed.), Pornography Controversy. New Brunswick, New Jersey: Transaction Books, 1975.
- Salutin, Marilyn. Stripper Morality. In J. M. Henslin (Ed.), Deviant Lifestyles. New Brunswick, New Jersey: Transaction, 1977.
- Schmalz, Kurt. Adult Book Sales Bouncing Back. Nashville Banner, August 16, 1977, p. 102.
- Schmalz, Kurt. Nude Dancing Target of Metro. Nashville Banner, July 26, 1980, p. 15.
- Schmalz, Kurt. Porno Zoning's Validity Questioned. Nashville Banner, July 26, 1980, p. 15.
- Schmalz, Kurt. Porno Zoning's Validity Questioned. Nashville Banner, August 6, 1977, pp. 1, 6.
- Sexploitation: Sin's Wages. Newsweek, February 12, 1973, pp. 78-80.
- Shapiro, Martin and Tresolini, Rocco J. American Constitutional Law (4th ed.). New York: McMillan, 1975.
- Sherbourne, Robert. Agents Eye Possible Competition Link in Club Bomb. Tennessean, January 25, 1978, pp. 1, 4, 5.
- Shoulders, Carolyn. Beer Board Asking Nude Dancing Control. Tennessean, July 28, 1980, p. 1.

- Spencer, James A. Controlling Adult Entertainment Businesses in Nashville and Davidson County, Tennessee. Report to the Department of Law of the Metropolitan Government of Nashville and Davidson County, Tennessee, April 1984.
- Stewart, Shelley B. Young v. American Mini Theatres, Inc.: A Limit on First Amendment Protection. New England Law Review, 1976, 391-418.
- Strom, Fredrick A. Zoning Control of Sex Businesses. New York: Clark Boardman, 1977.
- Tennessee, State of. Tennessee Code Annotated.
- Thomas, Susan. Classic Cat Beer License Suspended; Appeal Planned. Tennessean, May 9, 1978, p. 29.
- Thompson, Jerry and Sherbourne, Robert. Broadway Strip-"Action" Unlimited. Tennessean, August 25, 1977, pp. 1, 6.
- Toner, William. Regulating Sex Businesses. PAS Report No. 327. American Society of Planning Officials, May 1977.
- Trachtman, Jeffrey S. Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of Nuisance Power. New York University Law Review, December 1983, 1478-1529.
- Turchi, Kenneth L. Municipal Zoning Restriction on Adult Entertainment: Young, Its Progeny and Indianapolis Special Exception Ordinance. Indiana Law Journal, 1983, 505-529.
- Vande Berge, Marsha. City Plans Curb on Peep Shows. Tennessean. August 27, 1977, p. 7.
- Vande Berg, Marsha. Classic Cat Beer Licence Suspended. Tennessean, April 11, 1978, p. 1.
- Vande Berg, Marshal. Metro's Lewdness Law Ruled Out; Nudity to Return. Tennessean, January 17, 1979, p. 15.
- Verlarde, Albert J. and Warlick, Mark. Massage Parlors: The Sensuality Business. In J. M. Henslin (Ed.), Deviant Lifestyles. New Brunswick, New Jersey: Transaction, 1977.
- The War Against Pornography. Newsweek, March 18, 1985, pp. 58-66.
- Weinstein, Alan. Regulating Pornography: Recent Legal Trends. Land Use Law, February 1982, pp. 4-9.

- West, Phil. Citizens Sign During March Against Porno. Nashville Banner, January 25, 1978, pp. 1, 8.
- West, Lon. Personal Interview, June 10, 1985.
- White, Joe. Bill Would Restrict Porno Bookstores. Nashville Banner, August 3, 1977, p. 4.
- Wilson, W. Cody. Report of the Commission on Obscenity and Pornography. Washington, D.C.: United States Government Printing Office, 1970.
- Wilson, W. Cody. Technical Report of the Commission on Obscenity and Pornography, Volume IV; The Marketplace: Empirical Studies. Washington, D.C.: United States Government Printing Office, 1970.
- The World Almanac and Book of Facts. New York: Newspaper Publishing Association, 1983.
- Wright, Robert and Webber, Susan. Land Use In a Nutshell. St. Paul, Minnesota: West, 1978.
- Young v. American Mini-Theatres: Zoning of Sexually Oriented Businesses. Zoning and Planning Law Report, December 1977, p. 9-14.
- Yow, Robert B. Adult Entertainment Zoning: A Case Study. Carolina Planning, Spring 1981, pp. 33-41.
- Zimmermann, Karen. Club's Beer Licence Suspended By Panel. Nashville Banner, August 12, 1980, p. 16.
- Zoning and the First Amendment. Harvard Law Review, 1978, pp. 1550-1568.

VITA

Joseph Christopher Horne was born in Lawrenceburg, Tennessee on June 22, 1957. He attended Sacred Heart Catholic School in that city, and was graduated from Lawrence County High School in 1975. In August 1975, he entered Middle Tennessee State University, and in May 1979 he received a Bachelor of Arts degree in History and Political Science.

After his graduation, Mr. Horne was employed by the Metropolitan Planning Commission of Nashville-Davidson County, Tennessee. In September 1981 Mr. Horne entered the Graduate School of Planning at The University of Tennessee, Knoxville. In December 1985, Mr. Horne received the Master of Science in Planning degree.

The author is currently employed in the real estate development field. He is married to the former Leanne Cox.