2002

Too Close to Call: The Sufficiency of Alternative Relocation Sites in Diamond v. City of Taft

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Casenotes

TOO CLOSE TO CALL: THE SUFFICIENCY OF ALTERNATIVE RELOCATION SITES IN DIAMOND v. CITY OF TAFT

I. INTRODUCTION

On one hand, the Supreme Court has held that the First Amendment affords the protection of free speech to adult businesses. 1 At the same time however, the Supreme Court has ruled that local governments may regulate adult entertainment businesses through location restrictions. 2 These restrictions are valid, so long as they serve a substantial government interest, do not restrict speech solely for its content, and do not unreasonably limit alternative avenues of communication. 3

The Supreme Court however, has yet to set forth a “bright line” rule to determine exactly the circumstances that prescribe an ordinance unconstitutional for unreasonably limiting alternative avenues of communication. 4 The Supreme Court rather, has given


3. See Renton, 475 U.S. at 47 (arguing content-neutral time, place, manner restrictions are not presumptively invalid if restrictions are designed to serve substantial government interest and allow for reasonable alternative avenues of communication).

4. See Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992) (ruling Constitution does not require cities to make available particular number of sites); see also Trees, supra note 2, at 11-3 to -4 (arguing Supreme Court left unclear how far local government may go in regulating adult businesses); Alan C. Weinstein, Zoning Restrictions on Location of Adult Businesses, 1999 Land Use Inst. 557, 562 (arguing there is no “magic number” of alternative sites defining constitutionality of zoning ordinance because constitutionality inquiry is fact specific). For a discussion of how circuits evaluate whether an ordinance al-
local governments limited power in regulating the location of adult entertainment businesses and left federal courts to determine the constitutionality of such ordinances. Consequently, a crucial issue federal courts continually face is how to determine when ordinances unreasonably restrict alternate avenues of communication.

Generally, courts have considered three relevant factors to determine whether a zoning ordinance provides a reasonable opportunity to open and operate an adult business: 1) the land percentage theoretically available; 2) the number of potentially available sites compared to the city’s population; and 3) the number of available sites compared to the existing number of adult businesses desiring to open. Various federal courts have evaluated

lows a reasonable opportunity to open and operate, see infra notes 74-107 and accompanying text.

5. See Renton, 475 U.S. at 47 (outlining guidelines by which court must determine constitutionality of zoning ordinance giving rise to First Amendment violation); see also Weinstein, supra note 4, at 557 (arguing Supreme Court has left local governments ability to use zoning ordinances to particularly restrict adult businesses). Weinstein also states that “[b]etween 1971 and 1991 the U.S. Supreme Court decided five cases challenging the constitutionality of state or local regulation of adult businesses, while state and lower federal courts have ruled on hundreds of such challenges over the past two decades.” Id. at 557 n.1; see also Martin A. Schwartz, Comment, New York City Zones Out Free Expression, 43 N.Y.L. Sch. Rev. 301, 301 (1999) (noting local governments across nation have used zoning ordinances to zone out adult entertainment establishments).

6. See, e.g., Weinstein, supra note 4, at 557 (arguing recent case law on zoning ordinances restricting adult entertainment businesses raises serious constitutional claims to protection guaranteed by First Amendment).

7. See E. Foothill, Blvd. v. City of Pasadena, 980 F. Supp. 329, 341 (C.D. Cal. 1997) (concluding courts look to three factors to determine whether zoning ordinance satisfies Renton test); see also David Vincent, Inc. v. Broward County, 200 F.3d 1325, 1336-37 (11th Cir. 2000) (considering different factors other courts use in determining whether zoning ordinance satisfies Renton test); D.H.L. Associates, Inc. v. O’Gorman, 199 F.3d 50, 60 (1st Cir. 1999) (recognizing no dispositive test exists to determine whether zoning ordinance satisfies test set forth by Supreme Court in Renton and outlining three general approaches courts take to determine issue); Alan C. Weinstein, Zoning Restriction on Location of Adult Business, 31 Urb. Law. 931, 931-34 (1999) (analyzing sufficiency of three approaches courts generally apply to determine whether ordinance satisfies Renton test).
these factors differently. The United States Court of Appeals for the Ninth Circuit is no exception.

In *Diamond v. City of Taft*, the Ninth Circuit considered whether a restrictive zoning ordinance unreasonably limited alternative avenues of communication. The owner, seeking to open his adult bookstore, contended that the ordinance severely restricted speech. Namely, the owner argued that the ordinance severely restricted First Amendment protected speech by failing to allow for reasonable alternative avenues of communication. The local government, on the other hand, contended that the ordinance provided twenty sufficient sites, and therefore was constitutional.

This Note examines the holding and the analysis provided by the Ninth Circuit in deciding *Diamond*. This Note further examines the distance buffers contained in some restrictive ordinances and the implications that such ordinances have on the First Amendment. In examining these questions, this Note begins by detailing the facts of *Diamond*. Second, this Note provides an overview of the First Amendment and the scope of protection it guarantees to adult entertainment businesses, particularly under distance restric-

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8. Cf. *David Vincent*, 200 F.3d at 1336-37 (focusing on ratio of available sites to number of unincorporated square miles available under ordinance); *D.H.L. Associates*, 199 F.3d at 60 (dismissing percentage of land available test and analyzing whether five alternative sites provided reasonable opportunity to open and operate adult business); *N. Ave. Novelties, Inc. v. City of Chi.*, 88 F.3d 441, 444-45 (7th Cir. 1996) (focusing on demand and supply of adult businesses to determine whether number of alternative sites allows reasonable opportunity to open and operate under ordinance); *Topanga Press, Inc. v. City of L.A.*, 989 F.2d 1524, 1532-34 (9th Cir. 1993) (focusing on number of sites available under ordinance to determine whether number available satisfies the *Renton* test); *Alexander v. City of Minn.*, 928 F.2d 278, 283-84 (8th Cir. 1991) (dismissing analysis examining number of sites available in favor of analysis examining percentage of land available under ordinance).

9. Compare *Topanga Press*, 989 F.2d at 1032-33 (reasoning that proper analysis of sufficiency of alternatives excludes those sites eliminated by distance buffers), *with Diamond v. City of Taft*, 215 F.3d 1052, 1057 (9th Cir. 2000) (concluding that proper analysis of sufficiency of alternative sites does not exclude those sites eliminated by distance buffers).

10. 215 F.3d 1052 (9th Cir. 2000).

11. See id. at 1055-58 (concluding that restrictive ordinance that provides seven alternative sites for adult business to open and operate satisfies *Renton* test of sufficiency).

12. See id. at 1055 (addressing on appeal whether three sites provided *Diamond* with reasonable opportunity to open and operate adult business).

13. See id.

14. See id.

15. For a discussion of the facts and procedural background, see *infra* notes 21-32 and accompanying text.
tive zoning ordinances. Third, this Note explains the Ninth Circuit and other circuits' analyses that support the court's conclusion in Diamond. Fourth, this Note narrates the Diamond court's analysis. Fifth, this Note examines and critiques the court's reasoning based on precedent and additional authority. Finally, this Note considers the impact of the court's holding in Diamond.

II. FACTS

In 1995 Stephen Diamond closed his pawnshop to open an adult bookstore on Center Street in the city of Taft, California ("City" or "City of Taft"). In March of 1995, the City of Taft amended its adult entertainment zoning ordinance to enact an "urgent" zoning ordinance. The "urgent" ordinance further detailed the previous restrictions on adult entertainment businesses. Under the new ordinance, however, adult entertainment businesses could locate only in zones:

designated C-1, C-2, M-1, and M-2, and may not be located within 1000 feet of any area zoned for residential use, any other adult entertainment, business, any public or private school, park, playground public building, church, any commercial establishment operated by a bona fide religious organization, or establishment "likely to be used by minors."

In addition, the ordinance required any prospective adult business that conformed with the zoning ordinance to obtain an approved

16. For an examination of prior cases dealing with the First Amendment and zoning ordinances, see infra notes 33-73 and accompanying text.
17. For an analysis of the Ninth Circuit and other circuits' discussion of sufficient alternative sites in Diamond, see infra notes 74-107 and accompanying text.
18. For a narrative analysis of the court's rationale and holding, see infra notes 108-45 and accompanying text.
19. For a critical analysis of the court's holding and rationale in Diamond, see infra notes 146-91 and accompanying text.
20. For a discussion of the potential impact of the court's decision in Diamond, see infra notes 192-204 and accompanying text.
21. See Diamond v. City of Taft, 215 F.3d 1052, 1055 (9th Cir. 2000).
22. See Diamond v. City of Taft, 29 F. Supp. 2d 633, 635 (E.D. Cal. 1998). The urgent enactment changed the adult entertainment business ordinance from Chapter Twenty-five to Chapter Thirty-one of the Taft Municipal Code. See id. Previously, the adult entertainment business ordinance existed in Chapter Twenty-five of the Taft Municipal Code as it was first enacted in December 1986. See id.
23. See id. at 635 (listing preliminary procedure and details of past ordinances).
24. Id. at 636; see Taft, CA, Code §§ 6-31-3, 6-31-4 (restricting location of new adult businesses).
Conditional Use Permit ("CUP") from the City Council. Under this amended ordinance, Diamond's proposed adult bookstore location fell subject to the prohibited locations. Despite falling subject to the newly amended zoning ordinance, Diamond appealed to the Taft City Council to use his proposed location for an adult bookstore. The Taft Planning Commission denied Diamond his CUP because, among other things, Diamond's proposed location was located within 1,000 feet of parks, churches and residences.

Soon after the Taft City Council denied his proposal, Diamond brought an action against the City for injunctive relief and damages pursuant to the First Amendment. At trial, Diamond first argued that Taft's adult entertainment ordinance was unconstitutional because it effectively failed to allow a reasonable number of locations to open and operate his proposed adult bookstore. Diamond further argued that the CUP requirement for all prospective locations limited other reasonable alternative locations. Nonetheless, the District Court for the Eastern District of California found in favor of the City of Taft and plaintiff, Diamond, subsequently appealed.

III. BACKGROUND

A. Bifurcated Approach to the First Amendment

The First Amendment of the United States Constitution provides that "Congress shall make no laws . . . abridging the freedom of speech, or of the press . . . ." Although the First Amendment

25. See id.; see also Taft, CA, Code §§ 6-31-3, 6-31-4 (requiring each adult business to acquire approval by City Planning Commission).
27. See id.
28. See id. In May 1995 the City held a properly publicized hearing concerning Diamond's CUP. See id. At the hearing, no proponents for Diamond appeared. See id. Additionally, the City Planning Commission determined at the hearing that Diamond's proposed location violated the zoning ordinance because (1) the proposed location fell within 1000 feet of parks, churches, and residences and (2) the proposed bookstore would deleteriously effect the surrounding areas. See id. Consequently, the City Council rejected Diamond's application for CUP. See id.
29. See Diamond, 215 F.3d at 1055.
30. See Diamond, 29 F. Supp. 2d at 686.
31. See id.
32. See id. at 651-52. Specifically, the court held that "because the City's adult zoning ordinance is a content-neutral time, place and manner restriction designed to further a substantial government interest and allows adult entertainment businesses reasonable alternative avenues of communication in Taft, it does not violate the First Amendment." Id.
33. U.S. CONST. amend. I. The Due Process clause of the Fourteenth Amendment makes this law applicable to the states. See U.S. CONST. amend. XIV (stating
explicitly protects freedom of speech, historical jurisprudence shows that the Constitution does not afford this protection to all types of speech.34 Traditionally, courts have employed a bifurcated approach to distinguish fully protected speech from speech subject to government abridgment.35 This approach, prevalent in early American jurisprudence, attempted to categorize forms of expression, based on the nature of the speech, into two classes, protected or unprotected.36 Classifying forms of expression into tailored categories can be difficult.37 Consequently, the Supreme Court has struggled to determine the kinds of speech constitutionally protected from the kinds of speech the government can constitutionally abridge.38

no State shall “deprive any person of life, liberty, or property without due process of law”).

34. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding certain well-defined and narrowly limited categories have never been, nor will be afforded First Amendment protections because any benefit from protecting certain categories of speech, such as fighting words, are outweighed by social and moral interests of not protecting such libelous speech).

35. See, e.g., Schenck v. United States, 249 U.S. 47 (1919) (holding government can abridge some types of speech without violating First Amendment). In Schenck, the government charged Charles Schenck with violating the Espionage Act of 1917. See id. The government alleged that Schenck violated the Espionage Act by mailing pamphlets, denouncing the draft implemented during World War I, to military conscripts. See id. at 49. The Supreme Court upheld Schenck’s conviction by ruling that the government may constitutionally suppress speech when the speech imposes a “clear and present danger” of “substantive evils that Congress can rightfully prevent.” Id. at 52; see also Tribe, supra note 2, § 12-9, at 841-42 (arguing Schenck was Supreme Court’s first decision that gave government right to abridge free speech based on nature of speech); JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 17 (1999) (arguing Supreme Court’s first important ruling on right to free speech came in 1919 in Schenck and established principle that government can abridge speech under certain circumstances).

36. See Tribe, supra note 2, §§ 12-2 to -16, at 780-919 (outlining protected categories and unprotected categories, while unprotected categories, for example, include obscenity and fighting words); Weinstein, supra note 35, at 26 (arguing government can lawfully abridge specific categories of speech in addition to “clear and present danger” test formulated in Schenck). Weinstein states that “face-to-face verbal assaults (‘fighting words’), false statements injurious to reputation (defamation), and sexually oriented material intended solely for the purpose of arousal (obscenity) could be prohibited without unduly impairing legitimate public discourse.” Id.

37. See Weinstein, supra note 35, at 29 (stating that lesson learned from categorical approach is that “[w]hat appears in the abstract to be a reasonable accommodation between free speech and legitimate or even compelling governmental interests often turns out in practice to have a far greater impact on free expression than anticipated”).

38. See, e.g., Chaplinsky, 315 U.S. at 571-72 (holding First Amendment does not protect fighting words because such language fails to contribute to exposition of ideas or finding truth). Later cases show, however, the Court’s difficulty in determining what speech constitutes fighting words. See, e.g., R.A.V. v. City of St. Paul,
B. Content Approach to the First Amendment

Recently, however, the Supreme Court employed a second approach, which probes the government's objectives in abridging free speech. Under this approach, the analysis focuses on the nature of the regulation. Consequently, the test to determine the constitutionality of the regulation depends on whether the nature of the regulation constitutes a content-neutral or a content-based regulation.

505 U.S. 377, 390-91 (1992) (concluding unanimously that St. Paul's ordinance sanctioning fighting words based on race, color, religion, creed or gender violated First Amendment protection while bitterly disagreeing on appropriate rationale for its holding); Gooding v. Wilson, 405 U.S. 518, 550-32 (1972) (ruling that statute, which criminalized defendant's abusive language toward police officers, was overly broad). Similarly, the Supreme Court has also grappled with determining the kind of speech that constitutes obscenity. See, e.g., Cohen v. California, 403 U.S. 15, 26 (1971) (holding defendant's jacket bearing words "Fuck the Draft" was afforded First Amendment protection); Ginsberg v. New York, 390 U.S. 629, 636-37 (1968) (holding materials normally non-obscene to average adult could be deemed obscene when marketed to minors); Roth v. United States, 354 U.S. 476, 489 (1957) (defined obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"); see also Tribe, supra note 2, § 12-16 at 905, 918 (professing difficulty in determining kind of speech that qualifies as obscene).

39. See, e.g., R.A.V., 505 U.S. at 391 (holding only fighting words provoking violence on basis of race, color, creed, religion, or gender are kind of fighting words not protected by First Amendment). In R.A.V., the court added to the traditional analysis the rule that, even if the speech at issue classifies as an unprotected category, the regulation may still violate the First Amendment. See id. In particular, the Court stated that the government must justify regulations that distinguish sub-categories. See id.; see also Weinstein, supra note 35, at 56-58 (arguing new approach was codified in R.A.V.). Weinstein concluded that R.A.V. stands for the principle that even regulation of unprotected speech must be content-neutral. See id. Weinstein further noted the Supreme Court's hostility towards content-based regulations: "[R]egulations which permit the Government to discriminate on the basis of content of the message . . . cannot be tolerated under the First Amendment." Id. (citing Reagan v. Time, Inc. 468 U.S. 641, 647 (1983)).

40. See Tribe, supra note 2, § 12-23, at 977-86 (describing second manner in which government aims to abridge speech). Tribe states that under the more recent approach the "[g]overnment does not aim at ideas or information but seeks a goal independent of communicative content or impact, with the indirect result that the flow of information or ideas is in some significant measure constricted." Id.

41. See id. § 12-2, at 789-92 (defining difference between content-based and content-neutral). Content-neutral ordinances aim to reduce the non-communicative impact and the ordinance is "constitutional, even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas." Id. at 792. In contrast, content-based ordinances are "unconstitutional unless [the] government shows that the message being suppresses poses a 'clear and present danger,' constitutes defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the First Amendment from those open to government regulation with only minimal due process scrutiny." Id. at 791-92.
1. **Content-Specific Speech**

In a 1972 decision, the Supreme Court held that government regulations, restricting speech because of the expression’s content, violated the First Amendment.\(^{42}\) Courts generally define a regulation as content-based "if *on its face* a governmental action is targeted at ideas or information that government seeks to suppress, or if a governmental action neutral on its face was *motivated* by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty."\(^{45}\) Once a regulation is deemed content-based, the regulation is presumed invalid unless it can survive a “strict scrutiny” test.\(^{44}\)

2. **Content-Neutral Speech**

In contrast to a content-based regulation, a content-neutral regulation, according to the Supreme Court, is a regulation that is

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\(^{42}\) *See* Police Dep't of City of Chi. v. Mosley, 408 U.S. 92, 94, 99-101 (1972) *(striking down ordinance that prohibited picketing because local government used ordinance to restrict picketing messages based on content of messages displayed); see also* Boos v. Barry, 485 U.S. 312, 318-19 (1988) *(striking down ordinance prohibiting signs that criticized foreign government within five hundred feet of that government's embassy). In* Boos v. Barry, *Justice O'Connor, writing for the majority, concluded that the ordinance violated the First Amendment, because the ordinance prohibited speech based on the content of the speech. *See* 485 U.S. at 318-19. In particular, the Court deemed the ordinance content-based because it prohibited picketing based on whether the picketing was critical or not. *See id.*

\(^{43}\) *Tribe, supra* note 2, § 12-3, at 794. *See generally* Reagan, 468 U.S. at 648 *(stating that regulations abridging speech because of content cannot be tolerated); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 550, 536-37 (1980) (denouncing First Amendment's hostility to content-based regulation); Mosley, 408 U.S. at 94 *(striking down anti-picketing ordinance because ordinance aimed to suppress picketers' content).*

\(^{44}\) *See, e.g., Simon & Schuster, Inc. v. N.Y. Crime Victims Bd., 502 U.S. 105, 115-17 (1991) (holding statute presumptively invalid if statute imposes financial burden because of speech's content). In* Simon & Schuster, *the statute required accused or criminally convicted authors to deposit income earned from describing the crimes into a victim compensation fund. *See id.* Finding the statute not narrowly tailored to an important government interest, the Court struck down the ordinance for failing the "strict scrutiny" test. *See id. at 123; see also* Texas v. Johnson 491 U.S. 397, 403 (1989) *(arguing that if regulation is content-based, regulation requires more demanding strict scrutiny test). Under strict scrutiny, a content-based regulation is presumptively invalid unless the government can prove that the regulation is necessary for a compelling government interest and is narrowly tailored. *See id.; see also* Tribe, *supra* note 2, § 12-2, at 709-91 *(arguing that First Amendment guarantees freedom against content restrictions on speech). Tribe states that "[i]f the constitutional guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter or its content . . . ." *Id. at 790 (quoting Mosley, 408 U.S at 95-96). But see* Weinstein, *supra* note 35, at 7 *(arguing strict scrutiny analysis, when applied to content-based regulations, rarely results in regulation being upheld).*
"justified without references to the content of the speech." For example, in Clark v. Community for Creative Non-Violence, the Supreme Court upheld an ordinance prohibiting sleeping in Lafayette Park. Ultimately, the Court concluded that a content-neutral government regulation does not violate the First Amendment provided that the narrowly tailored regulation serves a substantial government interest and does not unreasonably limit alternative avenues of communication. Additionally, the Supreme Court has held that time, place and manner regulations do not presumptively violate the First Amendment.

C. Regulating Adult Entertainment

Local governments attempt to regulate adult entertainment businesses through zoning ordinances. These zoning ordinances impose distance restrictions to limit the locations of adult venues. Some local governments design their ordinances to concentrate adult entertainment businesses in a specific area, while other governments employ "anti-skid row" ordinances.

47. See id. at 298. The contested ordinance in Clark prohibited sleeping in the park and applied to protesters for homeless advocacy. See id. at 292. Upon finding that the ordinance legitimately was designed to preserve the park, the Court ruled the ordinance content-neutral and upheld its constitutionality. See id. at 295.
48. See id.; see also Ward v. Rock Against Racism, 491 U.S. 781, 796-97 (1989) (holding narrowly tailored requirement for ordinances only requires local government to use means directly and effectively to effectuate local substantial interest).
50. See Schwartz, supra note 5, at 301 (discussing zoning regulations in New York City). See generally Trees, supra note 2 (discussing local governments ability to regulate adult businesses).
51. See Schwartz, supra note 5, at 301-02 (discussing how New York attempted to zone out adult entertainment businesses).
52. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (upholding anti-skid row ordinance that required distance buffers between adult businesses); Young, 427 U.S. at 73 (upholding anti-skid row ordinance that required adult businesses to locate at least 100 feet from other adult businesses); N. Ave. Novelties, Inc. v. City of Chi., 88 F.3d 441, 445 (7th Cir. 1996) (upholding ordinance that centralized adult businesses into specific districts).
Nonetheless, no matter what goal these regulations embrace, adult businesses continue to challenge the regulations' constitutionality. On one hand, the Supreme Court has given local governments the power to regulate adult entertainment. The Supreme Court, however, has also limited governments' ability to pass such regulations by holding that the First Amendment affords adult entertainment businesses the protection of free speech. As a result, the Supreme Court has left the courts to settle this tension between government interests in regulating such entertainment and the right to free speech. In settling this tension, the federal courts have developed various tests to determine the constitutionality of such ordinances.

1. Supreme Court Determines That Distance Restrictive Zoning Laws Are Constitutional

In deciding Young v. American Mini Theatres, Inc., the Supreme Court for the first time, addressed the constitutionality of a

53. See Renton, 475 U.S. at 47 (holding that local governments may zone out adult entertainment establishments if zoning ordinances are content-neutral time, place, manner restrictions that serve substantial governmental interest); Young, 427 U.S. at 73 (concluding that sexually explicit and non-obscene adult entertainment establishments receive less than full First Amendment protection); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66 (1981) (holding that live nude dancing establishments receive same First Amendment protection as adult bookstores and theaters); see also Tribe, supra note 2, § 12-2 at 790 (arguing that under First Amendment law, government can restrict speech that non-communicatively impacts community in negative way); Trees, supra note 2, at 11-3 (arguing that Supreme Court's decision in Young v. Am. Mini Theatres encouraged local governments to regulate adult businesses through zoning ordinances).

54. See Renton, 475 U.S. at 47 (holding local governments may regulate adult businesses via zoning ordinances as long as content-neutral ordinances serve substantial government interest and allow reasonable opportunity for adult businesses to relocate); Schad, 452 U.S. at 66 (concluding that sexually explicit and non-obscene adult entertainment establishments receive less than full First Amendment protection); Topanga Press, Inc. v. City of L.A., 989 F.2d 1524, 1530 (9th Cir. 1993) (defining test to determine whether ordinance allows reasonable opportunity to relocate).

55. See Renton, 475 U.S. at 47 (outlining guidelines by which court must determine constitutionality of zoning ordinance giving rise to First Amendment violation); see also Schwartz, supra note 5, at 301-03 (noting local governments across nation have utilized zoning ordinances to zone out adult entertainment establishments); Weinstein, supra note 7, at 932 (arguing that Supreme Court has left local governments ability to use zoning ordinances to particularly restrict adult businesses). Weinstein also states that “[b]etween 1971 and 1991 the U.S. Supreme Court decided five cases challenging the constitutionality of state or local regulation of adult businesses, while state and lower federal courts have ruled on hundreds of such challenges over the past two decades.” Id. at 931 n.1.

56. For a discussion on how various circuits determine the sufficiency of alternative sites, see infra notes 74-107 and accompanying text.

zoning law that regulated not only certain types of adult entertainment businesses, but also imposed certain distance location restrictions. In *Young*, the city of Detroit enacted an “anti-skid row” zoning ordinance. This zoning ordinance prohibited adult entertainment businesses from locating either within 1,000 feet from any other adult entertainment business or within 500 feet of any residential area.

After determining that the ordinance constituted a valid content-neutral restriction, the Court concluded that regulating the operation of adult films failed to violate the First Amendment because the city’s interest in protecting the “quality of urban life is one that must be accorded high respect.” Furthermore, the Court concluded that zoning ordinances, prohibiting adult theatres from locating within certain distance restrictions, failed to violate the Equal Protection Clause of the Fourteenth Amendment.

After deciding *Young*, the Supreme Court continued to address the constitutionality of other content-neutral zoning ordinances. In *Schad v. Borough of Mount Ephraim*, for example, the Supreme Court considered the constitutionality of a zoning ordinance that effectively banned all live adult entertainment from operating in

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58. See id. at 50. In particular, the Court addressed whether the city of Detroit’s zoning ordinance, which differentiated between adult theaters exhibiting sexually explicit adult films and those that do not, was unconstitutional because the ordinance differentiated between types of adult entertainment based on its content. See id. at 68-73. *Young*, however, was also instrumental for local governments that wanted to control adult entertainment through zoning restrictions in four respects. See Trees, supra note 2, at 11-3. First, the city of Detroit carefully justified the ordinance with evidence and expert testimony. See id. Second, the distance restriction effectively dispersed adult venues throughout the city because the city had ample space to do so. See id. Third, the existing businesses remained unaffected by the ordinance. See id. Fourth, the ordinance did not effectively ban adult entertainment. See id.

59. See *Young*, 427 U.S. at 54. The city argued that it passed this ordinance to prevent the concentration of adult businesses in any single area within the city. See id. at 54-55. The city provided evidence that the concentration of such businesses would negatively effect the property value of the surrounding property and thus tried to prevent this. See id.

60. See id. at 54.

61. Id. at 71.

62. See id. at 72-73.

63. See, e.g., *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981) (holding that live nude dancing establishments receive same First Amendment protection as adult bookstores and theaters); see also Trees, supra note 2, at 11-3 (arguing Supreme Court’s decision in *Young v. American Mini Theatres* encouraged local governments to regulate adult businesses through zoning ordinances); Tribe, supra note 2, § 12-2, at 790 (arguing that under First Amendment law government can restrict speech that non-communicatively impacts community in negative way).

any commercial district. In deciding *Schad*, the Court distinguished the case from *Young* by stating that in *Young*, the restriction "did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them." In declaring the ordinance unconstitutional, the *Schad* Court clarified that its decision did "not establish that every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which live entertainment is permitted." The Court therefore, withheld determining exactly how much protection adult entertainment receives under the Constitution outside an outright ban on all live adult entertainment.

In contrast to *Schad*, the Supreme Court, in the *City of Renton v. Playtime Theatres, Inc.*, upheld a zoning ordinance that prohibited "any 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school." In deciding *Renton*, the Court set forth guidelines by which a government may withstand a constitutional challenge to its restrictive zoning scheme. Specifically, the Court explained that in order to withstand a constitutional challenge, the government must demonstrate that its content-neutral ordinance was "designed to serve a substantial government interest and [does] not unreasonably limit alternative avenues of communication." In *Renton* however, the Court failed to determine a rigid test to determine when an ordinance effec-

65. See *id.* at 75 n.18. The Court determined the ordinance unconstitutional because the local government not only failed to adequately justify the regulation that substantially restricted freedom of expression, but also failed to prove that the ordinance provided alternative avenues of communication. See *id.* at 73-76.

66. *Id.* at 71 (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68-73 (1976)).

67. *Id.* at 75 n.18.

68. See *Trees*, supra note 2, at 11-4 (citing *Schad*, 452 U.S. at 75).


70. *Id.* at 44.

71. See *id.* at 46-47.

72. *Id.* at 47. The Court further defined the substantial interest prong by stating that "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as the evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Id.* at 51-52. In addition, the Court concluded that the government may constitutionally regulate adult businesses by either dispersing them throughout the city or concentrating them in a single location within the city. See *id.*
tively denies an adult business a reasonable opportunity to open and operate.\footnote{See \textit{id.} at 54. The Court merely stated that placing adult businesses on equal footing with other purchasers and lessees in the relevant real estate market failed to violate the First Amendment. See \textit{id.; see also} Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992) (failing also to determine rigid test by concluding that First Amendment does not require government to proffer minimum number of sites when arguing for enforcement of ordinance).}

2. \textit{The Ninth Circuit Applies Renton}

Bound by the Supreme Court’s decision in \textit{Renton}, the Ninth Circuit struggled in applying the \textit{Renton} analysis because the \textit{Renton} decision merely outlined guidelines to determine the constitutionality of distance restrictive ordinances.\footnote{See, e.g., Lim v. City of Long Beach, 217 F.3d 1050, 1055 (9th Cir. 2000) (noting that relevant real estate market must be known to determine sufficiency of alternative sites); Topanga Press, Inc. v. City of L.A., 989 F.2d 1524, 1539 (9th Cir. 1993) (grappling with effect of distance buffers on sufficiency of alternative relocation sites); Walnut Props., Inc. v. City of Whittier, 861 F.2d 1102, 1110 (9th Cir. 1988) (addressing constitutionality of ordinance that forced closure of all adult businesses in city of Whittier).} In \textit{Walnut Properties, Inc. v. City of Whittier},\footnote{861 F.2d 1102 (9th Cir. 1988).} for example, the Ninth Circuit used \textit{Renton} to hold a zoning ordinance, that effectively denied the only adult business a reasonable alternative location site, unconstitutional.\footnote{See \textit{id.} at 1110. Specifically, the restriction prohibited adult businesses from locating not only within 500 feet of residences and liquor establishments, but also within 1,000 feet of schools, churches, parks, and other adult businesses. See \textit{id.} at 1104.} In \textit{Walnut Properties}, the city of Whittier enacted an “urgency zoning ordinance” subjecting the only adult business in the city to a location restriction.\footnote{See \textit{id.} at 1103.} The court reasoned that the Supreme Court in \textit{Renton} did not face an ordinance that would effectively eliminate all adult businesses.\footnote{See \textit{id.} at 1110.} Furthermore, the court found nothing in \textit{Renton} requiring the elimination of all adult businesses.\footnote{See \textit{id.} at 1532-33. Compare City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (outlining guidelines for ordinance to survive constitutional limitations), and \textit{Walnut Properties}, 861 F.2d at 1110 (striking down ordinance that forced closure of all adult businesses in city of Whittier), with \textit{Topanga Press}, 989 F.2d 1524 (9th Cir. 1993).} The court therefore, ruled the zoning ordinance unconstitutional.\footnote{989 F.2d 1524 (9th Cir. 1993).}

Later, in \textit{Topanga Press, Inc. v. City of Los Angeles},\footnote{989 F.2d 1524 (9th Cir. 1993).} the Ninth Circuit attempted to clarify the ambiguities of the sufficiency prong established in \textit{Renton} and unsolved by \textit{Walnut Properties}. In hold-
ing an ordinance, that limited the location of adult entertainment businesses unconstitutional, the court developed a two-prong test to determine whether a restrictive zoning ordinance affords an adult business a reasonable opportunity to open and operate. 83 This test set forth by the *Topanga Press* court provided that the court must determine: (1) "whether relocation sites provided to a business may be considered part of an actual real estate market" and; (2) "whether, after excluding those sites that may not properly be considered to be part of the relevant real estates market, there are an adequate number of potential relocation sites for an already existing business." 84

The city of Los Angeles contended that its ordinance allowed for 120 available sites and that this number provided a sufficient number of alternative relocation sites for the 102 existing businesses. 85 The court, however, determined the sufficiency of the alternative sites by evaluating the acreage available under the ordinance. 86 In applying this test, the court concluded that the distance restrictions in the zoning ordinance severely reduced the actual number of possible sites in the original estimation and simultaneously increased the number of adult businesses needing

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83. *See Topanga Press*, 989 F.2d at 1530. Under the first prong, the court also defined further conditions that render a relocation site part of the actual real estate market. *See id.* at 1531. The court stated that, while the First Amendment protects adult bookstores, the *Renton* decision only required the actual real estate market to contain only sites potentially available. *See id.* The court ruled that potentially available means "potentially connotes genuine possibility" that the relocation sites will become actually available. *Id.* In the second prong, the court evaluated the sufficiency of relocation sites within the relevant real estate market. *See id.* at 1533. The relevant real estate market, the court argued, included those sites that belong to the actual real estate market and those sites not eliminated from the actual market by other restrictions, such as distance buffers. *See id.*

84. *Id.*

85. *See id.* at 1532-33 (evaluating sufficiency of alternative sites within relevant real estate market). The court remained unpersuaded by the government’s argument. *See id.* The court noted that 120 available sites under the ordinance seemed practically sufficient. *See id.* The court also noted that ordinance provisions increased the number of adult businesses needing to relocate above the original 102 figure. *See id.* The number of adult businesses needing to relocate under the ordinance increased because the ordinance required the existing adult businesses that offered two kinds of adult entertainment to separate. *See id.* Concerned about the actual number of adult businesses required to relocate under the ordinance, the court therefore, passed on deciding the sufficiency of 120 available sites for 102 existing businesses. *See id.*

86. *See id.* at 1533; *see also Renton*, 475 U.S. at 47-55 (basing ruling on determination that acreage available under ordinance provided adult entertainment businesses reasonable alternatives to relocate).
to relocate. 87 As a result, the court affirmed the district court's decision that the ordinance imposed serious hardship on Los Angeles' adult businesses. 88

3. Other Circuits Address Sufficiency of Alternative Sites

The Supreme Court, in Renton, refrained from imposing a minimum requirement as to the number of alternative sites or amount of acreage a restrictive zoning ordinance must allow under the Constitution. 89 Without a rigid test, various circuits have analyzed a myriad of factors to determine whether zoning ordinances provide reasonable alternative avenues of communication. 90 In J. Alexander v. City of Minneapolis, 91 for example, the Eighth Circuit favored a test that analyzes the percentage of land available within the city limits. 92 In Alexander, the owners of adult bookstores and adult the-

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87. See Topanga Press, 989 F.2d at 1533. The court relied on an expert's opinion that concluded that the distance restrictions limited the number of available sites in the actual real estate market when the potential relocation sites are adjacent. See id. The court explained that "since many of the definitionally available areas were adjacent to each other, he concluded that acreage available to the tenth or twentieth business to relocate would be 'dramatically less' than the percentage of area definitionally available to the first adult business." Id. The court found this reasoning persuasive because many of the definitionally available areas under the ordinance would violate the ordinance in that they lie adjacent to one another. See id.

88. See id. The court did note, however, that "[i]n sum, a risk exists that a comparison between an estimation of the total number of adult businesses and the total available acreage is misleading." Id.; see also Weinstein, supra note 7, at 932 (critiquing persuasiveness of acreage availability test). The acreage of land available provides a meaningless benchmark absent factual characteristics of the land and the number of adult businesses anticipating relocation. See id. Consequently, the five percent of land available in the city of Renton, a rural community, may be an insufficient percentage in an urban community. See id. at 933.

89. See Renton, 475 U.S. at 47-55 (holding content-neutral time, place, and manner regulations will be upheld so long as regulations are designed to serve substantial governmental interest and do not unreasonably limit alternative avenues of communication); see also Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992) (holding that Renton does not require minimum number of sites or portion of land).

90. Cf. David Vincent, Inc. v. Broward County, 200 F.3d 1325, 1333-37 (11th Cir. 2000) (considering number of factors but focusing on availability of land to determine sufficiency of alternative sites); N. Ave. Novelties, Inc. v. City of Chi., 88 F.3d 441, 445 (7th Cir. 1996) (dismissing percentage of acreage available test and favoring analyses comparing actual supply of adult businesses in Chicago to demand for such entertainment); Topanga Press, 989 F.2d at 1533 (rejecting acreage analysis and favoring analyses that evaluate number of alternative sites, discounting those eliminated by distance buffers); J. Alexander v. City of Minn., 928 F.2d 278, 283-84 (8th Cir. 1991) (favoring test that analyzes percentage of land available to adult entertainment businesses within Minneapolis over test analyzing the sufficiency of number of sites available under ordinance).

91. 928 F.2d 278, 283-84 (8th Cir. 1991).

92. See id. at 283-84.
aters challenged the constitutionality of a zoning ordinance that required adult businesses to operate within a specific zoned area in Minneapolis. Focusing on the unavailability of actual sites, the district court favored the owners and ruled that the ordinance greatly suppressed and restricted access to free expression. The Eighth Circuit, on the other hand, reversed the district court's decision on the basis that the district court applied an improper analysis. In overturning the district court's ruling, the Eighth Circuit concluded that 6.6 percent of the total zoned acreage available to adult businesses was sufficient to satisfy the Renton test.

In contrast, in Vincent v. Broward County, the Eleventh Circuit determined the sufficiency of alternative sites by employing an analysis that focused on "any factors that may affect whether adult entertainment establishments are on 'equal footing with other prospective purchasers and lessees.'" In Vincent, the court considered a restrictive zoning ordinance that allowed from seven to nine alternative relocation sites within the county. In evaluating the sufficiency of these sites, the court considered the following factors: the ratio of available sites to square miles in the unincorporated area of the county; the number of adult establishments relative to

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93. See id. at 280-81.
94. See id. at 283. The district court was persuaded by the owner's lengthy testimony describing his unsuccessful attempts to relocate at particular sites. See id.
95. See id. at 282-84. The Eighth Circuit concluded that the error occurred by failing to decide as a matter of law whether the theoretically available acreage of land provided reasonable relocation alternatives. See id.
96. See Alexander, 928 F.2d at 284.
97. 200 F.3d 1325, 1336 (11th Cir. 2000).
98. Id. at 1336 (quoting Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1254 (11th Cir. 1999)). In Boss Capital, an adult strip club challenged the constitutionality of Casselberry's restrictive zoning ordinance and a license requirement of that ordinance. See 187 F.3d at 1254. The city of Casselberry claimed that the ordinance provided six alternative sites for the adult club to relocate. See id. Three of the proffered sites existed outside Casselberry's city limits and the court passed on determining whether the remaining three sites provided an insufficient number of alternatives for the adult business to relocate. See id. Noting the difficulty in deciding the constitutionality of the sufficiency of three alternative sites, the court remanded the case to the district court to determine if any other possible sites existed within Casselberry's city limits. See id. The court however, provided guidelines to follow should the district court have to determine the sufficiency of three sites alone. See id. The court concluded that the district court should consider more than Casselberry's population to determine whether three or four alternative sites provided a reasonable alternative as required by Renton. See id. In particular, the Eleventh Circuit urged the district court to consider "Casselberry's geographic size, the number of acres available to adult entertainment establishments as a percentage of that size, where the sites are located, the number of adult establishments currently in existence in Casselberry, and the number of adult entertainment establishments wanting to operate in Casselberry." Id.
99. See Vincent, 200 F.3d at 1335 (discussing district court's analysis of sites).
the county’s demand for adult businesses; and the number of existing adult businesses to the number of sites available.\textsuperscript{100} Although the Eleventh Circuit noted a deficiency in the depth of reasoning applied by the district court, the Eleventh Circuit upheld the ordinance on the basis that the unincorporated area in the county seemed to shrink progressively.\textsuperscript{101}

The Seventh Circuit, on the other hand, in \textit{North Avenue Novelties, Inc. v. City of Chicago},\textsuperscript{102} determined the constitutionality of a restrictive zoning ordinance by comparing Chicago’s actual supply of adult businesses to its demand for such entertainment.\textsuperscript{103} In \textit{North Avenue Novelties}, the owner of an adult bookstore challenged Chicago’s zoning ordinance on the grounds that the ordinance failed to allow for alternative avenues of expression by requiring adult businesses to locate a 1,000 feet from both other adult businesses and residential areas, schools and places of worship.\textsuperscript{104}

\textsuperscript{100} See id. at 1336 (relying heavily on district court’s finding about ratio of available sites to number of square miles in unincorporated Broward County). In particular, the district court found that the ratio of available sites to the number square miles of unincorporated Broward County mirrored a previous zoning ordinance that Eleventh Circuit previously upheld as constitutional. See id. The Eleventh Circuit has used various tests inconsistently to determine the sufficiency of alternative sites. See id.; see, e.g., \textit{Int’l Eateries of Am., Inc. v. Broward County}, 941 F.2d 1157 (11th Cir. 1991) (holding distance restrictive zoning ordinance constitutional on basis that number of available sites in proportion to land area provided sufficient test to determine constitutionality of restrictive zoning ordinance). In \textit{Vincent}, the Eleventh Circuit found persuasive the district court’s refusal to solely employ a rigid test comparing the number of available sites to the county’s population. See \textit{Vincent}, 200 F.3d at 1336; see also \textit{Centerfold Club, Inc. v. City of St. Petersburg}, 969 F. Supp. 1288, 1305 (M.D. Fla. 1997) (looking favorably on available site to population ratio); \textit{Lady J. Lingerie v. City of Jacksonville}, 973 F. Supp. 1428 n.7 (M.D. Fla. 1997) (looking unfavorably on available site to population ratio).

\textsuperscript{101} See \textit{Vincent}, 200 F.3d at 1336 (finding most persuasive notion that with each year, there will be fewer sites for any type of business in county).

\textsuperscript{102} 88 F.3d 441 (7th Cir. 1996).

\textsuperscript{103} See id. at 444. The Seventh Circuit noted that the “primary concern of the free speech guarantee is that there be full opportunity for . . . everyone to receive the message.” Id. (quoting Justice Powell in \textit{Young v. Am. Mini Theatres, Inc.}, 427 U.S. 50, 76 (1976)). The Seventh Circuit therefore, concluded that the appropriate analysis for determining Chicago’s constitutionality required focusing on the “ability of producers as a group to provide sexually explicit expression as well as the ability of the public as a whole to receive it.” Id.

\textsuperscript{104} See id. (relying on \textit{Renton}, owner of adult bookstore argued that Chicago’s ordinance failed to provide reasonable opportunity for adult establishments to open and operate). In particular, the expert for North Avenue Novelties testified that the ordinance’s distance restrictions left 270 acres, less than one percent of Chicago’s total acreage, available for adult establishments. See id. at 445. This percentage and acreage, the owner contended, was less than the amount the \textit{Renton} ordinance allowed. See id. The owner concluded that if the Supreme Court ruled the \textit{Renton} ordinance unconstitutional then the Seventh Circuit similarly must rule the Chicago ordinance unconstitutional. See id. The court however disagreed by stating: “Requiring a ‘reasonable opportunity’ in each region can, and
the evidence presented, the court found that the ordinance had not "lessened the ability of producers of sexually explicit materials to find legal locations throughout Chicago to sell their product." Consequently, in applying a test that evaluated Chicago's supply and demand for adult businesses, the Seventh Circuit upheld the ordinance's constitutionality.  

As these cases demonstrate, the circuits vary in manipulating the numerous tests used to determine whether an ordinance allows reasonable alternatives to open and operate. It is against this inconsistent constitutional background that the Ninth Circuit decided *Diamond v. City of Taft*.  

IV. NARRATIVE ANALYSIS  

A. Majority Analysis  


In *Diamond v. City of Taft*, the United States Court of Appeals for the Ninth Circuit addressed whether the City of Taft's adult entertainment zoning ordinance, which restricted the locations in which adult businesses can operate, violated the freedom of expression protected by the First Amendment. After determining the appropriate standard of review, the Ninth Circuit addressed the ordinance's constitutionality according to the rule set forth by the Supreme Court in *Renton*. In *Renton*, the Supreme Court held that...
a zoning ordinance unconstitutionally threatens the right to free speech when the ordinance effectively denies an adult business a reasonable opportunity to open and operate the adult business within the city.\textsuperscript{110}

2. \textit{The Ninth Circuit Follows \textit{Topanga Press, Inc. v. City of Los Angeles}}

Bound by \textit{Renton}, the Ninth Circuit also affirmed the two prong test set forth in \textit{Topanga Press} to determine whether the City of Taft's zoning ordinance provided a sufficient number of alternative avenues of communication to open and operate an adult business in the City.\textsuperscript{111} In applying this test, the Ninth Circuit concluded that the sites proffered by the City were part of the actual real estate business market, and that the total number of sites available under the ordinance were sufficient.\textsuperscript{112} The Ninth Circuit, therefore, affirmed the decision of the Eastern District Court of California and ruled in favor of the City of Taft by concluding that the zoning ordinance did not violate the First Amendment.\textsuperscript{113}

a. The Ninth Circuit confirmed that the City's preferred sites belong to the relevant real estate market

To determine the ordinance's constitutionality, the Ninth Circuit discussed the first prong of the test set forth by \textit{Topanga Press}.\textsuperscript{114} The first prong of this test required the court to review whether the alternative sites proffered by the City of Taft were part of the actual business real estate market.\textsuperscript{115} In attempting to clarify the appropriate standard of the first prong set forth by \textit{Topanga Press}, the Ninth Circuit reiterated the district court's analysis of the first prong.\textsuperscript{116}
Diamond, on the other hand, contended that according to the factors listed in *Topanga Press*, the City’s proffered sites failed to belong to the actual business real estate market. 117 Diamond first argued that the City’s proffered sites failed to belong to the actual real estate market because the sites lacked the proper infrastructure as required by *Topanga Press*. 118 In particular, Diamond contended that the three sites proffered by the City lacked proper infrastructure because these sites lack sidewalks and streetlights. 119

In reviewing Diamond’s argument that the City’s proffered sites failed to belong to the actual real estate market, the Ninth Circuit relied on the factors listed in *Topanga Press*. 120 After reviewing *Topanga Press*, the Ninth Circuit rejected Diamond’s argument by stating that *Topanga Press* merely listed sidewalks and streetlighting as examples of the factors that may constitute the proper infrastructure required by *Topanga Press*. 121 The court concluded, when it is unreasonable to believe that it would ever become available to any commercial enterprise.” *Id.* at 1531. Second, for sites that are within manufacturing or industrial zones, “relocation sites that are reasonably accessible to the general public may also be part of the market.” *Id.* Third, parcels in “manufacturing zones which have a proper infrastructure such as sidewalks, roads, and lighting may be included in the market.” *Id.* Fourth, “when a relocation site suits some generic commercial enterprise, it too may be said to be part of the real estate market.” *Id.* Finally, “those relocation sites which are commercially zoned are part of the market.” *Id.*


118. *See id.* Diamond argued that the City’s proffered sites numbered one through six were definitionally unavailable because the absence of sidewalks and streetlights hindered the operation of his business especially because the sites existed outside the population center of the City of Taft. *See id.* at 637, 641. Diamond also argued that the City should have listed the proper evidence for the required infrastructure in the ordinance. *See id.* at 637 n.3. Second, Diamond argued that sites numbered seven through eleven were definitionally unavailable under the ordinance because the sites existed outside the City’s limits and the sites were located within a 1,000 feet of a K-Mart that was an establishment likely to be used by minors, a characteristic prohibited under the ordinance. *See id.* at 642-43. Third, Diamond argued that twelve through twenty were likewise definitionally unavailable. *See id.* at 643. Specifically, Diamond argued that these sites were sensitive under the ordinance because they were located within 1,000 feet of either the police station, detention center, or the K-Mart. *See id.* Finally, Diamond argued that site number twenty-one was also definitionally unavailable under the ordinance because this site was: zoned for industrial, not commercial use; not sufficiently accessible to the public; not suited for generic commercial needs due to its close proximity to a sewage treatment facility. *See id.*

119. For a discussion on the factors the court considered in *Topanga Press*, see *supra* notes 81–88 and accompanying text.

120. For a discussion on the factors the court evaluated in *Topanga Press*, see *supra* notes 81–88 and accompanying text.

121. *See Diamond*, 215 F.3d at 1056; *see also Diamond*, 29 F. Supp. 2d at 633, 641 (noting factors listed in *Topanga Press* is not exclusive list). The district court agreed with Diamond that the City’s proffered sites must possess the proper infrastructure to belong to the relevant real estate market, but the court rejected Dia-
therefore, that *Topanga Press* did not require the proffered sites to possess sidewalks and street lighting.\(^{122}\)

Next, the court analyzed the status of the sites’ infrastructure proffered by the City and approved by the district court.\(^ {123}\) In doing so, the court further reasoned that these sites possessed other examples of infrastructure that could support a general enterprise.\(^ {124}\) Accordingly, the court recognized that these examples of the proffered sites’ infrastructure could have been rebutted.\(^ {125}\) The court ruled against Diamond because he failed to present evidence showing that the City’s proffered sites could not support a general enterprise.\(^ {126}\)

The *Diamond* court then addressed Diamond’s second contention that the sites proffered by the City failed to belong to the real estate market because these sites were currently occupied.\(^ {127}\) The

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\(^{122}\) See *Diamond*, 215 F.3d at 1056. After rejecting Diamond’s interpretation of *Topanga Press*, the *Diamond* court discussed the infrastructure of the City’s proffered sites as approved by the district court. *See id.* In doing so, the court reasoned that customers were unlikely to use a sidewalk or need streetlight because each site was located near a state highway or major road. *See id.; see also Diamond*, 29 F. Supp. 2d at 641 (holding that absence of sidewalks and lighting alone does not effectively bar proffered site from belonging to relevant real estate market).

\(^{123}\) See *Diamond*, 215 F.3d at 1051. The court followed the analysis in *Levi v. City of Ontario*. See 44 F. Supp. 2d 1042, 1050-52 (C.D. Cal. 1999) (holding site, not serviced by road, was outside actual real estate market because it lacked proper infrastructure).

\(^{124}\) See *Diamond*, 215 F.3d at 1056. The Ninth Circuit also relied on precedent to support its statement that the sites proffered by the City had other examples of infrastructure sufficient for supporting a commercial enterprise. *See id.*

\(^{125}\) See *id.* The court ruled however, that to show the infrastructure on the proffered sites was not sufficient, Diamond must have shown that any generic enterprise located in those sites needed sidewalks and streetlights in order to operate. *See id.*

\(^{126}\) See *id.* In particular, the court stated that Diamond would have had to show that sites numbered one, six and twenty-one would need streetlights and sidewalks to sustain an operable generic enterprise. *See id.* *See generally, Topanga Press, Inc. v. City of L.A.*, 989 F.2d 1524, 1532 (9th Cir. 1993) (discussing requirements for alternatives sites’ proper infrastructure).

\(^{127}\) See *Diamond*, 215 F.3d at 1056. In particular, Diamond contended that sites numbered one and six were currently occupied and therefore, failed to be included in the actual market. *See id.* The court noted that the City cannot present a random assortment of properties and merely suggest that the properties
court concluded that the City, in good faith, presented properties with specific and pertinent detailed information about each property.\textsuperscript{128} This evidence, the court reasoned, outweighed the current unavailability of the sites because Diamond failed to show that the sites would not become available within a reasonable amount of time.\textsuperscript{129} As a result, the court assumed that the sites would become available within a reasonable amount of time and included the sites as part of the real estate market.\textsuperscript{130}

b. The Ninth Circuit confirmed that the City's ordinance provides reasonable alternative sites to open and operate an adult business

The court addressed the second prong of the \textit{Topanga Press} test, which determines whether the City ordinance provided reasonable alternative sites to open and operate adult entertainment businesses.\textsuperscript{131} This prong, the court said, was satisfied so long as the relevant real estate market contains a sufficient number of potential alternatives.\textsuperscript{132} The court further noted that reasonableness determines whether the number of alternative sites is sufficient, and that

\textsuperscript{128}See \textit{Diamond}, 215 F.3d at 1056. Attempting to show unavailability, Diamond offered evidence that Kern Electric and Supply Company occupied site number six. \textit{See id.} at n.3. The court however, determined that this evidence was unreliable and insufficient to persuade the court that the property would become available within a reasonable amount of time. \textit{See id.} The court concluded further that Diamond had ample opportunity to present evidence to show that the properties were facially unavailable. \textit{See id.; see also Lim v. City of Long Beach, 217 F.3d 1050, 1055 (9th Cir. 2000).} In \textit{Lim}, the Ninth Circuit stated that "[t]he city's duty to demonstrate the availability of properties is defined, at a bare minimum, by reasonableness and good faith." 217 F.3d at 1055.

\textsuperscript{129}See \textit{Diamond}, 215 F.3d at 1056.

\textsuperscript{130}See \textit{id.}

\textsuperscript{131}See \textit{id.} (citing \textit{Lim}, 217 F.3d at 1056). In particular, the court ruled "that once the relevant real estate market is defined, we must then determine whether the market contains a sufficient number of potential relocation sites for this adult business." \textit{Id.}

\textsuperscript{132}See \textit{id.} (citing City of Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986) (stating that city cannot deny adult businesses reasonable opportunity to open and operate)).
there is no constitutional requirement that the City proffer a certain number of alternative sites. 133

The court concluded that when a zoning ordinance limits the allowable distance between adult businesses, the appropriate test was the test adopted by the district court and a majority of other courts. 134 This test compares "the number of sites in the relevant real estate market to the number of adult businesses currently in existence or seeking to open." 135

In considering this test, the court rejected Diamond's argument that the three sites the City proffered were insufficient. 136 In

133. See id. at 1056 (citing Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992) (holding that there is no constitutional requirement that municipality provide certain number of alternative sites to provide sufficient number of alternative sites in accordance with Renton)).

134. See Diamond, 215 F.3d at 1056-57. To support its conclusion, the Ninth Circuit cited the district court, which determined that the issue is whether the number of potential sites under the ordinance provided sufficient alternative avenues of communication. See id. (citing Diamond v. City of Taft, 29 F. Supp. 2d 633, 645 (E.D. Cal. 1999)). In determining this issue, the district court suggested that "were it not for the 1,000-foot buffer requirement between adult uses, the 120 sites available for the 102 adult businesses then existing in the city might be constitutionally sufficient." Id. at 645. To support this suggestion the district court in turn relied on Woodall v. City of El Paso. See Diamond, 29 F. Supp. 2d at 645 (citing Woodall v. City of El Paso, 49 F.3d 1120, 1127 (5th Cir. 1995) (discussing number of potential sites that would be sufficient)). In Woodall, the Fifth Circuit held that forty available sites for thirty-nine existing businesses provided adequate means of communication because there were more reasonable sites available under the ordinance than the demand for such sites. See Woodall, 49 F.3d at 1127. To further support its contention, the Ninth Circuit also cited Lakeland Lounge of Jackson, Inc. v. City of Jackson. See Lakeland Lounge, 973 F.2d at 1260 (holding ordinance that allowed for more sites than number of adult businesses seeking to operate deemed ordinance constitutional).

135. Weinstein, supra note 7, at 932-34 (discussing ongoing search for general standard to determine whether restrictive zoning ordinance allows adult businesses reasonable opportunity to open and operate). Weinstein notes that courts ask whether the ordinance provides a sufficient number of alternative sites within the relevant real estate market for adult businesses to open and operate. See id. at 932. Courts must determine whether the ordinance provides "reasonable alternative avenues of communication." Id. at 931. Weinstein argues that an analysis comparing the number of alternative sites to the number of existing businesses provides a meaningful analysis. See id. at 953-34. Weinstein approves this analysis because "courts will strike down ordinances that provide fewer sites than are needed for relocation and uphold ordinances that provide an adequate number." Id. at 933-34; see, e.g., Levi v. City of Ontario, 44 F. Supp. 2d 1042, 1052 (C.D. Cal. 1999) (deeming ordinance unconstitutional because it allowed for only one alternative site with respect to two adult businesses required to relocate under ordinance).

136. See Diamond, 215 F.3d at 1057. The court rejected Diamond's argument on the basis that the proper measure of sufficiency of alternative sites does not analyze how many sites could exist simultaneously. See id. The court, therefore, rejected the district court's holding that the proper measure of sufficiency analyzes the number of sites that could exist simultaneously under the ordinance's distance restrictions. See id. The court thus passed on ruling whether three sites would be
response to Diamond's argument, the court began by stating that because Diamond was the first person to open an adult business in the City of Taft, the ordinance applied only to new adult businesses. The court nonetheless conceded that the case might require an opposite ruling had the ordinance required the closing of the City of Taft's only adult business.

Next, the court addressed the provision in the ordinance that restricts the allowable distance between adult businesses. The court reasoned that despite the distance restriction, its analysis should examine the total number of sites available because Diamond was the first person seeking to open and operate an adult business in the City of Taft. Diamond being the first, the court

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sufficient alternative avenues of communication as required by the Supreme Court in Renton. See id. at n.4. The court supported this conclusion by stating that “the touchstone here is reasonableness.” Id. Additionally, the court articulated an example to support its conclusion that the proper analysis does not take into account the number of sites that could exist under the ordinance simultaneously. See id. In particular, the court stated:

Assume one adult business in a city must relocate under a new zoning ordinance. Under Topanaga Press, a site with a restrictive lease banning adult businesses may be included in the actual business real estate market. No one would argue that if this site were the only property potentially available to the adult businesses, this one-to-one ratio would provide the adult business a reasonable opportunity to open and operate.

Id.

137. See id. at 1057 (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 73 (1976)). In Young, the Supreme Court upheld a restrictive zoning ordinance that expressly applied to new adult businesses only. See 427 U.S. at 72-73. The Ninth Circuit also relied on the Supreme Court’s analysis in Renton v. Playtime Theatres, Inc. See 475 U.S. at 44. In Renton, no adult businesses existed when the city of Renton enacted its ordinance, so the ordinance applied only to the location of new adult establishments. See id.

138. See Diamond, 215 F.3d at 1057 (citing Walnut Prop., Inc. v. City of Whittier, 861 F.2d 1102, 1110 (9th Cir. 1988)). Previously, in Walnut Properties, the Ninth Circuit struck down an ordinance that effectively forced the city’s only adult establishment to close with no definite alternative relocation site. See 861 F.2d at 1110. As a result, the Walnut Properties court passed on determining the specific number of sites in the relevant real estate market. See id.

139. See Diamond, 215 F.3d at 1057. In particular, the court dismissed an analysis of the effects of the ordinance’s 1,000-foot restriction between adult establishments. See id.

140. See id. The court stated that the ordinance’s distance restriction failed to limit Diamond because Diamond was the first person seeking to open an adult establishment in the City. See id. The court did recognize however, the inconsistency between this conclusion and its previous holding in Walnut Properties. See id. at 1058 n.5. Specifically, the court noted Walnut Properties suggestion “that the separation requirement between adult businesses should be taken into account even where only one adult business is affected.” Id. The court distinguished the facts in Walnut Properties from the facts in Diamond by arguing that the goal in Diamond differed from the goal in Walnut Properties. See id. In particular, the court stated that the Diamond court focused on the sufficiency of the number of sites proffered, while the court in Walnut Properties concerned itself with whether the ordinance in
concluded that the ordinance’s distance restriction failed to limit the total number of available sites to Diamond.141

The court, however, stated that the general rule for ordinances that limit the distances between adult businesses measures the sufficiency of the proffered sites by assessing the total number of sites that could coexist in the City’s total acreage.142 Diamond being the first person seeking to open an adult business in the City of Taft, the court reasoned that the general rule did not apply to Diamond because Diamond could choose among all the available number of sites.143 The court concluded that the total of seven possible sites in the City of Taft allowed Diamond sufficient opportunity to open and operate his adult bookstore.144 As a result, the court ruled the zoning ordinance constitutional.145

V. CRITICAL ANALYSIS

The Diamond court noted that an adult bookstore constitutes free speech protected by the First Amendment of the Constitution.146 The court appropriately identified the test set forth in Renton as the proper tool for analyzing zoning ordinances restricting the locations for adult entertainment businesses; however, the question forced the closing of the only adult establishment without any specific relocation site. See id.

141. See id. at 1057. Consequently, the court ruled that Diamond could choose from the total number of sites available under the ordinance. See id. Diamond, therefore could choose among seven alternative sites, not just the three of those that could exist simultaneously under the ordinance. See id.

142. See id. at 1058. The court noted that that the general rule includes measuring the number of sites that could co-exist under the ordinance because the total acreage of the land in the relevant real estate market does not adequately determine the number of available alternative sites. See id. (citing Walnut Properties, 861 F.2d at 1108 and North Av. Novelties, Inc. v. City of Chi., 88 F.3d 441, 445 to support this position). The court also cited Topanga Press to support its conclusion. See id. (citing Topanga Press, Inc. v. City of L.A., 989 F.2d 1524, 1533 (9th Cir. 1993)). In particular, the court adopted the reasoning set forth by Topanga Press which argued that the land available to future businesses wanting to relocate would be dramatically less than that available to the first adult business. See id. (citing Topanga Press, 989 F.2d at 1533). Weinstein argues that the land percentage test is an inadequate measure of sufficiency because this test fails to inquire deeply into a city’s factual setting. See Weinstein, supra note 7, at 932-34.

143. See Diamond, 215 F.3d at 1058. The court specifically stated: “Under these circumstances, however, we are only concerned with Diamond’s ability to open an adult business.” Id.

144. See id. The court deemed that seven sites provided Diamond with sufficient opportunity to open an adult establishment. See id.

145. See id.

146. See id. at 1056. The court stated that its overriding concern was that an ordinance, failing to allow adult businesses a reasonable opportunity to relocate, violates the First Amendment. See id.
court erred in its application of the second prong of this test. First, the court erroneously concluded that the *Diamond* ordinance provided a reasonable opportunity for an adult bookstore to open and operate in the City of Taft. Second, the court failed to recognize that the ordinance, through severe restrictions, threatened the protection of free speech guaranteed under the First Amendment.

A. Sufficiency of Alternative Sites

Based on a faulty analysis of the sufficiency test previously set forth by the Ninth Circuit in *Topanga Press*, the *Diamond* court wrongfully rejected Diamond's contention that the zoning ordinance failed to provide for a sufficient number of relocation sites. In particular, the Ninth Circuit in *Diamond* ignored the 1,000-foot distance buffer to side-step deciding the more difficult question before the court. Particularly, the *Diamond* court side-stepped having to determine the difficult question of whether three alternative sites provide sufficient alternatives of expression. The *Diamond* court evaded deciding the critical question of whether three potential sites provided sufficient alternative avenues of expression in two respects. First, the Ninth Circuit avoided addressing the effects of distance buffers and instead relied on an off-point and widely sweeping argument.

The *Diamond* court evaded deciding the critical question of whether three potential sites provided sufficient alternative avenues of expression in two respects. First, the Ninth Circuit avoided addressing the effects of distance buffers and instead relied on an off-point and widely sweeping argument. Particularly, the *Diamond* court stated that if a city ordinance forced its only adult entertain-

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147. See id. at 1055 (stating that issue presented is whether ordinance in question allows reasonable alternative sites for communication).
148. See *Diamond*, 215 F.3d at 1056-57. See generally *Topanga Press*, Inc. v. City of L.A., 989 F.2d 1524 (9th Cir. 1993) (upholding lower court's decision that zoning ordinance imposed serious hardship on adult entertainment establishments because 1,000-foot distance restriction between adult entertainment businesses severely restricted number of potential relocation sites); *Walnut Props.*, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988) (striking down ordinance that effectively closed only adult establishment in city of Long Beach); *Bayside Enters.*, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978) (striking down ordinance that effectively barred future access to adult entertainment establishments).
149. See *Diamond*, 215 F.3d at 1057-58 (contending that appropriate measure of alternative sites' sufficiency requires examining total number of sites available regardless of distance buffer). In fact, the court failed to address that the City's distance buffers reduced the number of relocation sites to a critically low number—three. See id.
150. See id.; see also *Boss Capital*, Inc. v. City of Casselberry, 187 F.3d 1251, 1254 (11th Cir. 1999) (passing on ruling whether three sites provides reasonable opportunity for adult establishment to open and operate under ordinance); *Weinstein*, supra note 7, at 934 (arguing that there is no magic number because each determination is fact specific).
151. See *Diamond*, 215 F.3d at 1057 n.4. The court contended that no one would argue that an ordinance, which allows one alternative location for single existing adult establishment to relocate, is sufficient. See id.
ment establishment to relocate to the only possible alternative site under the ordinance, then "[n]o one would argue that if this site were the only property potentially available to the adult business, this one-to-one ratio would provide the adult business a reasonable opportunity to open and operate." 152 The court, however, failed to recognize that other courts have in fact ruled a zoning ordinance unconstitutional on the grounds that the ordinance severely restricted a city's only adult entertainment establishment.153 The Ninth Circuit therefore, inexplicably avoided considering the competing considerations in determining whether three alternative sites provided sufficient opportunity to relocate.154

Second, the Diamond court evaded ruling on whether three alternative sites provided sufficient relocation opportunities by erroneously dismissing precedent.155 Particularly, the Diamond court erroneously dismissed the analysis set forth previously by the Ninth Circuit in Topanga Press.156 In Topanga Press, the Ninth Circuit con-

152. Id. The court stated that the district court erred in finding that three sites were sufficient to allow Diamond an opportunity to open and operate his business. See id. The court finally concluded that the "proper measure of sufficiency is not the three sites that could exist simultaneously, but the total seven sites that are available under the ordinance." Id.

153. See, e.g., Levi v. City of Ontario, 44 F. Supp. 2d 1042, 1052 (9th Cir. 1999) (ruling ordinance unconstitutional because ordinance allowed for two alternative sites, at best, for two adult businesses demanding to open and operate under ordinance); Woodall v. City of El Paso, 950 F.2d 255, 260-61 (5th Cir. 1992) (holding that for ordinance to survive constitutional challenge, ordinance must at minimum allow for greater number of potential sites than number of adult businesses demanding to open and operate under ordinance); Walnut Props., Inc. v. City of Whittier, 861 F.2d 1102, 1110 (9th Cir. 1988) (suggesting ordinance was unconstitutional when only small handful of potential sites exist for city's only adult business and were forced to relocate under ordinance).

154. But see Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1254 (11th Cir. 1999) (passing also to rule on whether three sites provide sufficient opportunity for adult establishment to open and operate because that issue is too difficult). See also Weinstein, supra note 7, at 934 (arguing that determining sufficient number of sites is difficult task that presents fact sensitive inquiry that depends deeply on circumstances of particular community). See generally Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992) (holding that number of alternative sites is sufficient when more sites are available than number of existing businesses).

155. See Diamond, 215 F.3d at 1057 (evading ruling on whether three alternative sites provides sufficient opportunity for adult businesses to relocate). Instead, the Diamond court concluded that it need not consider how many sites could exist simultaneously under the distance restrictions. See id.

156. See Diamond, 215 F.3d at 1057. In contending that the court need not consider how many sites could exist simultaneously due to the distance restrictions, the court concluded that "[t]he proper measure of sufficiency is not the three sites that could exist simultaneously, but the total seven sites that are available under the ordinance." Id. Compare Diamond, 215 F.3d at 1057 (failing to consider effects of distance buffer), with Topanga Press, Inc. v. City of L.A., 989 F.2d 1524, 1533 (9th Cir. 1993) (contending that distance buffers require consideration
cluded that ordinances with distance restrictions between adult businesses severely limit the availability of sites contained in the relevant real estate market.\textsuperscript{157} The \textit{Diamond} court concluded on the other hand, that the proper analysis regarding the sufficiency of alternative sites ignored such restrictive distance buffers.\textsuperscript{158} The court supported this contention by comparing Diamond's case to the Supreme Court cases, \textit{Young} and \textit{Walnut Properties}, which shaped the Ninth Circuit's previous analysis in \textit{Topanga Press}.\textsuperscript{159}

Relying on \textit{Young}, the court contended that "because Diamond is the first person to seek to open an adult business in Taft, we need not worry about the forced relocation of existing adult businesses."\textsuperscript{160} While the \textit{Diamond} court correctly relied on \textit{Young} to argue that it need not factor the effect of the ordinance on existing businesses, the \textit{Diamond} court failed to address that the holding of \textit{Young} is distinguishable.\textsuperscript{161} Specifically, the Supreme Court in \textit{Young} based its holding on whether a local government may legitimately classify entertainment, based on its content for zoning purposes, without violating the First Amendment.\textsuperscript{162} Only in dicta did

because not only will amount of land to tenth or twentieth business under ordinance be significantly less than that available to first, but also could under some circumstances severely burden ability of adult businesses to open and operate).

\textsuperscript{157.} See \textit{Topanga Press}, 989 F.2d at 1533 (contending that distance buffers require consideration because such restrictions not only severely burdens ability to open and operate adult businesses, but also makes it more difficult for later adult businesses to do same); see also \textit{Diamond v. City of Taft}, 29 F. Supp. 2d 633, 645 (E.D. Cal. 1999) (concluding that proper analysis of relevant real estate market included only those sites not eliminated by distance buffer). Following this precedent, the district court determined that within City of Taft three possible alternative sites for Diamond to relocate existed after accounting for 1,000-foot distance buffer. See \textit{Diamond}, 29 F. Supp. 2d at 645.

\textsuperscript{158.} See \textit{Diamond}, 215 F.3d at 1057 (concluding that appropriate test of sufficiency of alternative sites does not measure sufficiency of number of sites that could exist simultaneously, but rather measures sufficiency of total number of potential sites available under ordinance).

\textsuperscript{159.} See \textit{id.} (contending that considerations afforded by Ninth Circuit previously in \textit{Topanga Press} are distinguishable to Diamond's case).

\textsuperscript{160.} \textit{id.} Consequently, the court did not evaluate the number of proffered sites that could exist simultaneously. See \textit{id.} The Ninth Circuit also argued that the Supreme Court upheld distance restrictive ordinances that expressly apply only to new adult businesses and do not affect the operation of existing adult businesses. See \textit{id.}

\textsuperscript{161.} \textit{Compare} \textit{Young v. Am. Mini Theatres, Inc.}, 427 U.S. 50, 70-73 (1976) (focusing on whether local government violates First Amendment by classifying erotic motion pictures into adult entertainment categories to prevent concentration of such venues through restrictive zoning ordinances), \textit{with Diamond}, 215 F.3d at 1057 (characterizing Supreme Court's decision in \textit{Young} as focusing on whether ordinances apply to both existing and new adult businesses).

\textsuperscript{162.} See \textit{Young}, 427 U.S. at 70-73 (holding that local government does not violate First Amendment by legitimately classifying erotic motion pictures into
the Supreme Court discuss that the burden on the First Amend-
ment is slight because the ordinance affected only new adult estab-
lishments, not existing adult establishments.168

The court also relied on *Walnut Properties* to bolster the argu-
ment that *Topanga Press* was not applicable to *Diamond*.164 Specifi-
cally, the *Diamond* court relied on *Walnut Properties* to argue that the
proper analysis of the sufficiency of alternative sites ignored dis-
tance buffers.165 In *Walnut Properties*, the Ninth Circuit set forth an
analysis requiring the consideration of distance buffers because the
ordinance in question forced the city of Whittier’s only adult en-
tertainment establishment to close.166 The *Diamond* court ignored
this analysis set forth by the court in *Walnut Properties* by distinguish-
ing the factual circumstances of the two cases.167 Specifically, the
Ninth Circuit distinguished *Diamond* on the basis that Diamond
only sought to open an adult establishment, while the *Walnut
Properties* court considered an ordinance that effectively shut down
the city of Whittier’s only existing adult entertainment establish-
ment.168

adult entertainment categories to prevent concentration of such venues through
restrictive zoning ordinances).

163. See id. at 71 n.35 (noting ordinance’s effect on new adult establishments
only). Compare *Young*, 427 U.S. at 71 n.35 (stating that harm to First Amendment is
slight because myriad of adult establishments in city would suffer no hardship be-
cause ordinance affects only new adult businesses and not existing adult busi-
nesses), with *Diamond*, 215 F.3d at 1057 (characterizing Supreme Court’s decision
in *Young* as addressing effects of ordinance on new and existing adult entertain-
ment establishments). The *Diamond* court stated that “the Supreme Court held
constitutional a restrictive zoning ordinance that did not affect the operation of
existing adult businesses because its restrictions expressly only applied to new adult
businesses.” *Diamond*, 215 F.3d at 1057.

164. See *Diamond*, 215 F.3d at 1057. The court reasoned against employing an
evaluation of the distance buffer, as the court previously did in *Walnut Properties*,
because Diamond’s Bookstore did not exist at the time the ordinance was enacted.
See id.

165. See id. at 1057-58.

166. See *Walnut Props., Inc. v. City of Whittier*, 861 F.2d 1102, 1110 (9th Cir.
1988) (holding ordinance that forced closing of only adult entertainment business
in city of Whittier unconstitutional).

167. See *Diamond*, 215 F.3d at 1057. Compare *Diamond*, 215 F.3d at 1057 (up-
holding ordinance where no adult businesses exist at time ordinance is passed),
with *Walnut Properties*, 861 F.2d at 1113 (striking down ordinance in city where only
one adult business existed at time ordinance was passed). In *Walnut Properties*, the
city of Whittier enacted an urgent zoning ordinance a month after Walnut opened
an adult theatre within the city’s limits. See *Walnut Properties*, 861 F.3d at 1104.
Despite no findings as to the number of potential sites available under the ordi-
nance the court inferred from the city’s map that approximately a handful of adult
businesses could operate within the city and thus struck down the ordinance. See
id. at 1109.

168. See *Diamond*, 215 F.3d at 1057. The *Diamond* court stated that in *Walnut
Properties* “the court did not have before it a specific number of sites; rather it was
In this analysis, the Ninth Circuit incorrectly distinguished Diamond from Walnut Properties. First, in distinguishing Diamond from Walnut Properties, the Diamond court clearly ignored the reasoning applied in Walnut Properties. Particularly, the Walnut Properties court held that because Walnut Properties, Inc. was the only adult business in the city of Whittier, even a handful of potential alternative sites failed to allow a sufficient number of alternative sites to satisfy the purpose of Renton. Additionally, the Walnut Properties court struck down the ordinance by focusing on the fact that the ordinance effectively eliminated the city of Whitter's only adult entertainment establishment. While Diamond's store did not exist at the time the City fully enacted the "urgent" ordinance, the ordinance, similar to the ordinance in Walnut Properties, restricted Diamond and effectively eliminated the public's access to any adult entertainment in the City. The Ninth Circuit therefore, ignored the reasoning in Walnut Properties that there is "nothing in the Renton opinion which indicates that the Court would uphold an ordinance which would eliminate all adult business in existence at the time the ordinance was passed." Furthermore, the Diamond court wrongly distinguished Diamond from Walnut Properties by overlooking another striking similarity between the two cases. In particular, the Diamond court ignored that similar to the city of Whittier in Walnut Properties, the concerned that the only adult business in Whittier was closed with 'no definite prospect of a place to relocate.'" See id. (citing Walnut Properties, 861 F.2d at 1110).

169. Compare Walnut Properties, 861 F.2d at 1110 (striking down ordinance because ordinance effectively restricted city of Whittier's access to its only adult business), with Diamond, 215 F.3d at 1057 (upholding ordinance that restricted City's access to its only adult business).

170. See Diamond, 215 F.3d at 1057. The Diamond court ignored the precedent in Walnut Properties that held that the proper analysis compares looking at the number of sites that could exist simultaneously with the number of existing adult businesses or the number seeking to open. See id.

171. See Walnut Properties, 861 F.2d at 1109. In discussing the number of potential sites, the Walnut Properties court stated:

To hold, as the City urges, that there are adequate alternatives available for expression of this sort would make a mockery of First Amendment protections and would render meaningless the Supreme Court's admonition that an ordinance must not effectively "deny...a reasonable opportunity to open and operate an adult theatre within the city." Id. (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53-54 (1986)).

172. See id. (striking down ordinance because it violated First Amendment).

173. See Diamond, 215 F.3d at 1053-55.

174. Walnut Properties, 861 F.2d at 1109-10 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).

175. Compare Diamond, 29 F. Supp. 2d at 635 (contending with "urgent zoning ordinance), with Walnut Properties, 861 F.2d at 1104 (considering also "urgent" zoning ordinance).
City of Taft also enacted emergency zoning ordinances to prevent the prevalence of adult entertainment establishments.\(^{176}\) Essentially, the Walnut Properties court struck down an ordinance aiming effectively to ban all existing adult entertainment businesses in existence at the time the city of Whittier passed the ordinance.\(^{177}\) Although Diamond's adult bookstore was not operating at the time the ordinance was passed, the Diamond court ignored that in the same year Diamond closed his pawn shop to open an adult bookstore, the City passed its "urgent" ordinance to include Diamond's proposed location in the location restrictions.\(^{178}\) Clearly, the manner in which the City of Taft enacted its urgent ordinance suggests that the City, like the city of Whittier, attempted to ban all adult entertainment by zoning it out before it technically existed.\(^{179}\)

The court correctly noted that Diamond was the first person seeking to open an adult business in the City of Taft.\(^{180}\) The court, however, ruled on limited evidence about the actual number of businesses seeking to open an adult business.\(^{181}\) Consequently, to provide meaning to its measurement of sufficiency, the court should have remanded the case to determine the exact number of businesses potentially seeking to open and operate an adult bookstore.\(^{182}\) Without such evidence, the court, on de novo review, incorrectly deduced the reasonableness of the restrictive zoning ordinance.\(^{183}\)

\(^{176}\) Compare Walnut Properties, 861 F.2d at 1104 (enacting "urgent" zoning ordinance that imposed distance restrictions one month after Walnut began to operate his adult business), with Diamond, 29 F. Supp. 2d at 635 (enacting urgent zoning ordinance same year that Diamond closed his pawn shop to open an adult bookstore).

\(^{177}\) See Walnut Properties, 861 F.2d at 1110. The court in Walnut Properties struck down an ordinance because it forced all existing adult businesses to close. \(\text{See id.}\)

\(^{178}\) See Diamond, 215 F.3d at 1054-55; Diamond v. City of Taft, 29 F. Supp. 2d 633, 635 (E.D. Cal. 1998).

\(^{179}\) See Diamond, 29 F. Supp. 2d at 635 (discussing circumstances under which ordinance was passed).

\(^{180}\) See Diamond v. City of Taft, 215 F.3d 1052, 1055 (9th Cir. 2000) (stating that Diamond was first person seeking to open adult business in City).

\(^{181}\) See id. The court did note, however, that the district court concluded that Diamond was the first person seeking to open an adult business in Taft. \(\text{See id.}\) The district court, however, based this conclusion on limited evidence. \(\text{See Diamond, 29 F. Supp. 2d at 637.}\)

\(^{182}\) See Weinstein, supra note 7, at 932-34 (arguing that court must determine factual circumstances of city's geography and number of adult businesses seeking to open). Weinstein states, "[i]f the court engages in nothing more than speculation about the 'number of businesses,' the standard is meaningless." \(\text{Id.}\)

\(^{183}\) See Diamond, 215 F.3d at 1055.
B. Abandonment of First Amendment Protection

In addition to incorrectly deducing the reasonableness, the Ninth Circuit also failed to recognize that the ordinance threatens the protection the First Amendment affords to adult business owners such as Diamond. Specifically, the court ignored the distance limitation contained in the ordinance. In doing so, the court failed to evaluate fully whether the ordinance provided Diamond freedom of expression as protected by Renton. The Ninth Circuit additionally failed to inquire fully about the number of potential adult businesses in the City of Taft. As a result, without requiring substantial evidence about potential adult businesses seeking to open in the City, the court’s holding effectively “would make a mockery of the First Amendment protections and would render meaningless the Supreme Court’s admonition that an ordinance must not ‘effectively den[y] . . . a reasonable opportunity to open and operate and adult business within the City.’”

Additionally, the Diamond court’s ruling ignored the First Amendment warning set forth by the Supreme Court in Young. In Young, the Court clearly stated that although it struck down the}

184. Compare Diamond, 215 F.3d at 1057-58 (upholding ordinance prohibiting public’s only access to adult business in City of Taft), with Young, 427 U.S. at 72 (upholding ordinance where city of Detroit already had numerous adult businesses), and Levi v. City of Ontario, 44 F. Supp. 2d 1042, 1052 (9th Cir. 1999) (ruling ordinance unconstitutional because ordinance allowed for two alternative sites that, at best, allowed for two adult businesses to relocate successfully).

185. For a discussion on how the Diamond court ignored the effect of the distance restrictions, see supra notes 148-82 and accompanying text.

186. See Topanga Press, Inc. v. City of L.A., 989 F.2d 1524, 1533 (9th Cir. 1993) (discussing also negative effect of distance buffers on number of potential sites available); Walnut Props., Inc. v. City of Whittier, 861 F.2d 1102, 1109 (9th Cir. 1988) (arguing that distance buffers must be taken into account because under distance buffer restrictions land available to tenth or twentieth business will be dramatically lower than that available to the first business).

187. See Diamond, 215 F.3d at 1055 (concluding on limited evidence that Diamond was first person seeking to open and operate adult business).

188. Walnut Properties, 861 F.2d at 1119 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53-54 (1986). See also Weinstein, supra note 7, at 933-34 (questioning consistency of test that evaluates number of sites compared to number of businesses seeking relocation). Weinstein argues that this standard may or may not be useful depending on how it is applied by the courts. See id. at 931-34. Weinstein states:

If the court engages in nothing more than speculation about the ‘number of businesses,’ then the standard is meaningless. On the other hand, the standard can be meaningful if the court requires those challenging the ordinance to provide evidence about potential businesses that can be examined and weighed by the trier of fact.

Id.

189. See Young, 427 U.S. at 71 n.35. In Young, the Supreme Court upheld an ordinance imposing distance restrictions on adult businesses. See id. The court
ordinance in question, the case might yield a different conclusion had the ordinance effectively suppressed or greatly restricted free speech protected under the First Amendment. Clearly, the City of Taft's zoning ordinance effectively suppressed and greatly restricted free speech protected by the First Amendment because Diamond supplied the City with its only entertainment business.

VI. IMPACT

The Ninth Circuit's holding in Diamond allowed the local government effectively to zone out the only adult business seeking to open in the City of Taft. In determining this result, the Ninth Circuit further complicated the confusing body of case law regarding zoning ordinances that impose distance buffers on adult businesses. More significantly, the Diamond decision unfortunately ignores the pressing question of whether three alternatives provide a sufficient opportunity to a single adult business to open and operate.

As the Ninth Circuit in Diamond points out, the law regarding the sufficiency of alternative sites offers various tests. Exacerbating the problem, these tests are applied often, inconsistently. In failing to apply, consistently, the tests comparing the number of sites to the number of potentially relocating adult businesses, the

found that the city of Detroit possessed a legitimate interest in protecting the quality of urban life. See id. at 71.

190. See Diamond, 215 F.3d at 1057 (failing to address Supreme Court's warning that case may have yielded different ruling had ordinance effectively denied protections of freedom of expression afforded by First Amendment). The Diamond court did not consider that the ordinance in Young failed to severely restrict or greatly suppress free speech because Detroit had various other existing adult businesses throughout the city. See id; see also Young, 427 U.S. at 71 n.35 (noting that limitations placed on new businesses seeking to open were not unconstitutional because Detroit had reasonable access to adult businesses). Compare Diamond, 215 F.3d at 1058 (upholding ordinance prohibiting public's access to only potential adult businesses in City of Taft), with Young, 427 U.S. at 63 (upholding ordinance where city of Detroit already had ample access to adult businesses).

191. See Diamond, 215 F.3d at 1058 (striking down City of Taft's only prospective adult entertainment business).

192. See Diamond, 215 F.3d at 1057.

193. See id. The court in Diamond had difficulty in determining the effect of the distance buffer in the number of available relocation sites. See id.

194. For a discussion of the Ninth Circuit's refusal to determine whether three alternative sites provides sufficient opportunity to open and operate, see supra notes 150-56 and accompanying text.

195. For a discussion of the circuits applying different tests, see supra notes 71-106 and accompanying text.

196. For a discussion of the circuits applying the different tests inconsistently, see supra notes 71-106 and accompanying text.
Diamond court contributes to this uncertainty.\textsuperscript{197} Due to the inconsistent regulation of adult businesses, both among and within the circuits, the law regulating adult entertainment businesses remains an uncertain quagmire for both local governments and adult business owners.\textsuperscript{198}

The most devastating effect of the Diamond decision however, will resonate outside the legal community to adult entertainment businesses.\textsuperscript{199} Without clear guidance as to the legal standards that will be applied to zoning challenges, adult business owners will have to continue scouring the country to find alternative sites to relocate.\textsuperscript{200} In turn, many adult businesses will fade gradually from sight.\textsuperscript{201} Such a gradual disappearance of adult businesses may help protect the aesthetic appearances of cities nationwide.\textsuperscript{202} This gradual disappearance, however, has the more harmful effect of impeding the values of freedom, guaranteed by the First Amendment.\textsuperscript{203} In Diamond, the Ninth Circuit allowed the government to obstruct the protections guaranteed by the First Amendment and

\textsuperscript{197} According to one commentator, the inconsistent regulation of adult businesses raises grave constitutional issues. See Weinstein, \textit{supra} note 7, at 931. Weinstein states that "[t]he importance of these issues can be seen in the fact that between 1976 and 1991 the U.S. Supreme Court decided five cases challenging the constitutionality of state or local regulation of adult businesses, while state or local courts have ruled on hundreds of such challenges over the past two decades." \textit{Id.} at n.1.

\textsuperscript{198} See generally Trees, \textit{supra} note 2 (discussing zoning of adult businesses and difficulties encountered in such zoning).

\textsuperscript{199} See \textit{id.} at 11-24, 11-3 (noting that although law surrounding zoning of adult businesses remains uncertain, local governments can certainly be successful with careful planning, good records and willingness to litigate).

\textsuperscript{200} See E. Foothill, Blvd., Inc. v. City of Pasadena, 980 F. Supp. 329, 341-42 (C.D. Cal. 1997) (discussing adult business owners' difficulty in finding alternative sites to relocate). According to one adult business owner "[n]umerous persons are actively combing southern California to find areas for adult uses." \textit{Id.}

\textsuperscript{201} See \textit{id.}


\textsuperscript{203} See Cohen v. California, 403 U.S. 15, 21 (1971) (stating values embodied in First Amendment). In Cohen for example, Justice Harlan articulates the classic values protected by the First Amendment:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a manner of personal predilections. \textit{Id.}; see also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986) (holding that sexually explicit, non-obscene adult entertainment businesses receive First Amendment protection).
protected by the Supreme Court.\textsuperscript{204} This obstruction sends the
dangerous message that First Amendment protection, in reality, is
no protection at all.

Pauline P. Clark

\textsuperscript{204} For a discussion of how the \textit{Diamond} court ignored the impact its ruling
has on the First Amendment, \textit{see supra} notes 158-91 and accompanying text.