Adult entertainment businesses present one of the most difficult land use problems for cities. These enterprises enjoy considerable latitude to operate – despite their contribution to community blight – because the courts have deemed non-obscene sexually explicit entertainment to be constitutionally protected speech. In order to maximize regulatory authority and mitigate the negative impacts of such uses, three strategies should be followed.

1. Narrowly Define the Use

Many people use the term “adult entertainment business” to refer to any commercial establishment that customarily excludes minors. Some municipalities have codified this broad definition in their zoning ordinance, including businesses ranging from adult bookstores and theaters to massage parlors and adult tanning salons.

A city should more narrowly define what constitutes an adult entertainment business. Bear in mind that the constitutional protection for “speech” applies only to what is deemed “expressive” activity. This primarily encompasses movie exhibitions and book and video sales, and, to a lesser degree, erotic dancing performances.

Enterprises engaged in protected speech generally have to be afforded special treatment. For example, there must be a streamlined review process with objective approval criteria when a permit is required for adult movie theaters or bookstores. This means that municipalities must act quicker and can exercise less discretion with respect to these types of commercial establishments. One consequence of a broad adult entertainment business definition may be that regulatory authority is unnecessarily hindered as to adult uses that do not involve protected speech, such as massage parlors and adult tanning salons.

2. Compile “Secondary Effects” Studies

Ordinarily, the courts will “strictly scrutinize” a government regulation that targets speech on the basis of content. This scrutiny is almost always fatal for the regulation.

Fortunately, the Supreme Court has developed what is known as the “secondary effects” doctrine to provide a less rigorous test for evaluating adult entertainment business regulations. In order to qualify, an ordinance must be adopted for the purpose of curbing the adverse secondary effects of the speech, not for the purpose of regulating the speech itself. Adverse secondary effects can include increased crime and the reduction of property values.

Before enacting an adult entertainment business ordinance, a municipality should compile studies to support a showing that the regulations are intended to mitigate secondary effects. The Supreme Court, in its 1986 decision in Renton v. Playtime Theatres, Inc., 475 U.S. 41, ruled that municipalities can rely on other communities’ experiences as long as the evidence is reasonably believed to be relevant.

That case involved a challenge to a provision in Renton, Washington’s zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multi-family dwelling, church, park, or school. Renton had relied on the experiences of other cities in assessing the adverse impacts of such adult businesses. As the Supreme Court concluded: “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 whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.”

In May 2002, the Supreme Court reaffirmed its “secondary effects” doctrine in Alameda Books, Inc. v. City of Los Angeles, 122 S.Ct. 1728, with Justice Kennedy observing that: “The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.”

3. Allow a “Reasonable Opportunity” For Operation

Most municipalities probably would exclude all adult entertainment businesses if permitted to do so. Unless a community is entirely residential, however, a complete ban is unlikely to be valid.

The key question is how many sites have to be made available for such uses? Unfortunately, there is no bright line answer. Instead, the Supreme Court in its Renton decision established the following standard: “the First Amendment requires only that [cities] refrain from effectively denying [proprietors] a reasonable opportunity to open and operate an adult [entertainment business].”

When establishing location restrictions a city should take into consideration the factors that have been deemed important by the courts in its jurisdiction. Some courts insist that there be available sites served by infrastructure. Others demand that there be a genuine possibility of availability, and will discount any properties that are subject to long-term leases. Almost all courts evaluate the cumulative effect of the restrictions in order to determine how many adult entertainment businesses can be operated simultaneously.

Terence R. Boga is a shareholder in the law firm Richards, Watson & Gershon and works in their Los Angeles office. His practice emphasizes First Amendment law. He is also city attorney for the City of Westlake Village, CA.