**1999 North Carolina Land Use Litigation**

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            Below are brief digests of cases decided by North Carolina courts regarding planning, land use, and related issues.  The state supreme court decisions are listed first, followed by court of appeals decisions.  Selected federal cases arising in North Carolina are the third category of cases included.  The cases are in chronological order (the more recent cases at the bottom of each list).  Index terms are included in italics for each case.

***North Carolina Supreme Court***

**Beechridge Development Co., LLC v. Dahners**, 350 N.C. 583, 516 S.E.2d 592 (1999)  
*Subdivisions, Easements*

            A Chapel Hill subdivision platted in 1966 had two easements running along its outer boundary.  The easement along the southern boundary was denominated a "public easement" on the plat, while the easement on the northern boundary was labeled a "sanitary sewer easement."  In 1997 the adjacent property owner sought a declaratory judgment that the southern easement could be used by the local water and sewer authority for the installation of a sanitary sewer to serve development of the adjacent property.

            The trial court used extrinsic evidence (primarily public records related to city approval of the subdivision) to find that the "public easement" could be used for a sanitary sewer.  The court of appeals reversed, ruling it was improper for the court to consider extrinsic evidence when the terms on the plat are not ambiguous (and holding the term "public easement" did not include a sewer easement to serve an adjacent private development).  The supreme court reversed in a per curiam opinion, ruling that while the term "public easement" was indeed not ambiguous, it encompasses a wide variety of uses, including a sanitary sewer line.

**Smith Chapel Baptist Church v. City of Durham,** 350 N.C. 822, 517 S.E.2d 874 (1999), *superseding* 348 N.C. 632, 502 S.E.2d 364 (1998)  
*Delegation*  
            As part of its stormwater management program, the city assessed fees on all developed property, with the fees based on the impervious area of the assessed land.

In its original 1998 opinion the court upheld the authority of the city to impose fees to operate its program.  The court held that while the public enterprise statutes did not give the city authority to impose these fees, the authority could be based on the state constitutional provision establishing protection of the environment as a proper function of local governments (Article XIV, Section 5) and G.S. 160A-4, which gives cities the supplementary power to impose reasonable fees to put the program into implementation.

            After a rehearing, the court issued a new opinion in 1999 that superceded the 1998 opinion.  The court held that the plain language of G.S. 160A-314(a1) provides that city stormwater utility fees are limited to the costs of providing a stormwater and drainage system (rather than the full cost of maintaining a comprehensive stormwater quality management program).  The court held that costs associated with educational programs, guidance manuals, used oil recycling, household hazardous waste collection, and litter enforcement programs could not be funded through use of these fees (though they could be funded through the general fund).  Thus the court allowed the plaintiffs a full refund of the stormwater fees they had paid under protest.  The court did uphold basing the amount of stormwater fees on the amount of impervious area of the property as rational, reasonable, and within the statutory authority of G.S. 160A-314.

***North Carolina Court of Appeals***

**State v. Moore,** 132 N.C. App. 197, 511 S.E.2d 22 (1999)  
*Adult businesses, Enforcement*  
            The court upheld a finding of the defendant in criminal contempt for violation of a preliminary injunction prohibiting him from operating three specific adult businesses located in violation of a county ordinance requiring a 1,000 feet separation from residences.  The court held the ordinance to be within the constitutional power of the county and not unduly vague.

**Whiteco Outdoor Advertising v. Johnston County Board of Adjustment,** 132 N.C. App. 465, 513 S.E.2d 70 (1999)  
*Signs, Amortization, Evidence*  
            The plaintiff managed two non-conforming billboards along I-95 in Johnston County.  Both signs were substantially damaged in a wind storm.  The zoning ordinance allowed repair, but prohibited replacement (defined as repairs whose cost "exceeds 50 percent of the initial value of the sign as determined by the District Engineer."  The plaintiff replaced the signs without permits and in violation of stop work orders.  On appeal the board of adjustment upheld the determination that the cost of repairs exceeded 50 percent of their initial value.  The trial court and court of appeal affirmed the board's determination.

            The court concluded there was substantial competent evidence in the whole record to support the decision.  There was testimony from the County Damage Assessment Team that all of the sign poles had been broken and replaced and that new sign faces installed.  The court also allowed use of a letter from NCDOT on value even though the author of the letter did not testify.  The recipient of the letter did testify under oath, was subject to cross examination, and the applicant had ample opportunity to present its own evidence.  The court also upheld the board's interpretation of the term "value" of the signs in the non-conforming section of the ordinance to mean "initial value."  The court noted that interpretation questions are a matter of law and subject to de novo review, but the board's functions include interpretation of the ordinance and their interpretation is given deference.

**C.C. & J. Enterprises, Inc. v. City of Asheville**, 132 N.C. App. 550, 512 S.E.2d 766, *review dismissed as improvidently granted*, 351 N.C. 97, 521 S.E.2d 117 (1999)  
*Special use permits, Standards, Standing*  
            The applicant applied for a special use permit for a twenty-four unit apartment complex on a 2.75 acre tract.  The planning staff and technical review committee recommended approval, the planning board recommended denial, and the city council denied the permit.  The trial court found the decision unsupported by competent, substantial, and material evidence and ordered the permit issued.

            The city had found the project meet all of the technical requirements and development standards in the ordinance, but based the denial on a general concern about impacts on health and safety (citing street conditions, topography, access, flooding potential, and proposed density).  The court held that since the ordinance did not in fact list promotion of the public health, safety, and welfare as a standard for special use permit decisions (though it would have been permissible to do so), it was inappropriate for the city council to use it as a standard in reviewing the application.  A general statement of intent that "adequate standards will be maintained pertaining to the public health, safety, welfare, and convenience" is not a permit standard and may not be used in decision-making.  The court also held that it was proper to allow an adjoining neighborhood association to intervene, as they had alleged special damages (reduced property values) to qualify as an aggrieved party.

**Andrews v. Alamance County**, 132N.C. App. 811, 513 S.E.2d 349 (1999)  
*Standing, Manufactured housing*  
            The county adopted a manufactured home park ordinance that set minimum lot sizes and frontage requirements.  The plaintiff landowner filed a declaratory action challenging the constitutionality of the ordinance.  The court dismissed the suit, finding the plaintiff did not have standing.  The plaintiff must have sustained injury or be in immediate danger of sustaining injury if the ordinance is enforced.  Here there was only an allegation that she intended to develop her land as a manufactured home park, with no assertions that she had developed a site plan, filed a subdivision plat, taken any steps toward development, or applied for a permit of any kind.  Thus the court held there was no genuine controversy and no standing.

**State v. Baggett**, 133N.C. App. 47, 514 S.E.2d 536 (1999)  
*Adult businesses, Extraterritorial jurisdiction*  
            The county adopted an adult business regulation under its general police power to be applied to all land "within the county exclusive of the jurisdiction of any incorporated municipality."  The defendant operated a topless bar within one mile of the city of Jacksonville that did not comply with the minimum separation requirements of the county ordinance.  The court held that while a county general police power ordinance can be applied within a city's extraterritorial planning and zoning jurisdiction, the ordinance must plainly state its intention to do so.  Where the language is ambiguous (as the court held this language to be), the court will strictly construe language creating a criminal offense.  Thus the court dismissed charges against the defendant.

**Procter v. City of Raleigh Board of Adjustment**, 133 N.C. App. 181, 514 S.E.2d 745 (1999)  
*Judicial review, Standing*  
            This case addresses the rights of neighbors who had participated in a board of adjustment case, but not formally intervened there or in the trial court review of the case, to subsequently intervene in appellate judicial review of the case.

            The petitioner proposed to recombine five lots into four lots and build duplexes on the property.  The petitioner contested the city's interpretation of the applicable setback before the board of adjustment.  Neighbors presented information at the hearing to support the city's interpretation of the setback requirements.  The board upheld the city interpretation favored by the neighbors and defended that decision when the petitioner filed for judicial review.  However, when the trial court reversed the board and found for the petitioner, the city decided not to appeal the decision, at which point the neighbors moved to intervene in order to continue judicial appeals.  The trial court rejected the motion to intervene as not timely.  The court of appeals reversed, concluding the extraordinary and unusual circumstances of the case made intervention timely under Rule 24(a)(2).  The court found the neighbors had a interest in the transaction, an alleged practical impairment of that interest, and inadequate representation by the existing parties (and the city's appeals had been adequate representation prior to the city's decision not to appeal the trial court's adverse ruling).

**Parkwood Association v. Capital Health Care Investors,**133 N.C. App. 158, 514 S.E.2d 542, *review denied*, 350 N.C. 835, 539 S.E.2d 291 (1999)  
*Restrictive covenants, Group homes*  
            The defendant purchased a residence in the Parkwood subdivision in Durham for use as a temporary emergency shelter home for undisciplined, delinquent, or at risk youth.  The home served up to five youths at a time, with two supervisors in residence.  The plaintiff contended this facility violated restrictive covenants that allowed only single-family residential use (and specifically prohibited house of detention, reform schools, and institutions of kindred character).  The court held that while restrictive covenants are strictly construed, this use falls within its prohibitions.  The court also noted that the residents are not handicapped with the protections of state or federal fair housing laws.

**JWL Investments, Inc. v. Guilford County Board of Adjustment,** 133 N.C. App. 426, 515 S.E.2d 715 (1999), *review denied*, 251 N.C. 715, 540 S.E.2d 349 (2000)  
*Enforcement, Takings, Conflict of interest, Nonconformities*  
            The petitioners were cited for a zoning violation involving use of their property as a vehicle storage yard, a use not permitted in the residential zoning district and scenic corridor overlay districts in which the property was located.  Petitioners appealed to the board of adjustment, presenting evidence that this was the continuation of a nonconforming use, while the county presented evidence that the property was previously undeveloped.  The board of adjustment affirmed the county enforcement order.  The trial court upheld the board and the imposition of civil penalties.

            The petitioner contended there was bias on the board of adjustment due to the membership of a former employee of the county planning department.  However, the court held there was no impermissible conflict of interest in that the petitioner did not object during the hearing to the member's participation and made no showing that they were prejudiced by the member's participation.  The court noted nonconforming uses are not favored by the law and the county's evidence of non-continuous nonconforming status was adequate.  The court held the scenic corridor limitations were not a taking as they did not deprive the owner of all economically beneficial or productive uses of the land.  The court held the board of adjustment had the authority to impose civil penalties

**Shell Island Homeowners Association, Inc. v. Tomlinson**, 134N.C. 217, 517 S.E.2d 406 (1999)  
*CAMA, Takings*  
            The plaintiffs are unit owners of the Shell Island Condominium, on the oceanfront adjacent to Mason's Inlet in Wrightsville Beach.  As the inlet migrated toward the plaintiff's building, they made several permit applications and variance petitions to construct revetments and/or bulkheads.  These applications were denied as inconsistent with state rules prohibiting hardened erosion control structures in inlet and ocean hazard areas.  Eventually a fourth variance petition was granted for a smaller, temporary sandbag bulkhead immediately adjacent to the structure.

In this case the plaintiffs challenged the regulation prohibiting permanent oceanfront shoreline erosion control structures (the "hardened structures rule").  The court held the non-constitutional challenges to the rule were properly dismissed by the trial court for lack of subject matter jurisdiction in that the plaintiff failed to exhaust the administrative remedies provided to challenge their permit and variance denials (noting a variety of administrative appeal options had not been pursued, including the options of filing a contested case appeal under the state Administrative Procedure Act for either the permit denials or the variance denials, filing for review as a regulatory taking, or seeking a declaratory ruling from the Coastal Resources Commission on the rule.  The court however ruled that exhaustion of administrative remedies is not required for constitutional claims.

On the constitutional claims, the court held that equal protection and due process claims were properly dismissed because the plaintiffs had sought, accepted, took advantage of a variance to build a sandbag revetment.  The doctrine of quasi-estoppel prevents one from voluntarily proceeding under a statute, claiming its benefits, and then questioning its constitutionality to avoid its burdens.  The court further noted that even if properly before the court, the equal protection and due process claims were properly dismissed as there was no suspect classification and no fundamental personal constitutional rights affected and the rule was clearly rationally related to legitimate government ends (protecting lands of environmental concern, preservation of the value and enjoyment of neighboring properties, and protection of public access to ocean beaches).

The court also upheld dismissal of the regulatory taking claims.  The court noted the invasion of property and loss of value alleged by the plaintiffs stem from the natural migration of the inlet, not any action of the state.  Since there is no property right of riparian or littoral owners to construct hardened erosion control structures, no property right has been taken.  The court further noted that the rules limiting use of hardened structures were in place and known to the plaintiffs prior to the construction of their building (thus any purported right to construct a hardened erosion control structure was not a part of the plaintiffs' title to begin with).

**Shell Island Homeowners Association, Inc. v. Tomlinson**, 134N.C. 286, 517 S.E.2d 401 (1999)  
*CAMA, Mootness*  
            The plaintiffs are unit owners of the Shell Island Condominium, on the oceanfront adjacent to Mason's Inlet in Wrightsville Beach.  As the inlet migrated toward the plaintiff's building, they made several permit applications and variance petitions to construct revetments and/or bulkheads.  These applications were denied as inconsistent with state rules prohibiting hardened erosion control structures in inlet and ocean hazard areas.  Eventually a fourth variance petition was granted for a smaller, temporary sandbag bulkhead immediately adjacent to the structure.  The plaintiffs challenged the denial of the permits as a taking and asked the regulation be declared unconstitutional.  The trial court dismissed the claims as moot.  The court upheld the dismissal, noting that the plaintiff had failed to seek administrative review of any of the permit denials, had accepted a variance that gave them approval to build a revetment, had built that revetment, and had thus essentially received the relief originally sought (authority to construct an erosion control device, though it was not of the same design and location as originally sought).

**Leftwich v. Gaines**, 134 N.C. App. 502, 521 S.E.2d 717 (1999), *review denied*, 351 N.C. 357, 541 S.E.2d 714 (2000)  
*Inspections, Fraud*  
            In this case the plaintiff was interested in purchasing a tract adjacent to her land for additional access and to allow continuation/expansion of a home occupation.  The plaintiff alleged that Mt. Airy's chief building inspector had provided her fraudulent information regarding the adjacent property (that it could not be rezoned, that condemned structures would have to be removed at her expense, that expensive water/sewer connections would be required) in order to suppress the value of her offer for the property, thereby allowing the building inspector's girlfriend to purchase the property at a reduced price.  The mayor advised the plaintiff that there had been similar previous problems with the inspector and the town manager had been asked the inspector not to purchase property within town limits.

            The court held there was sufficient evidence to support the jury's conclusion that the inspector's representation that a rezoning of the property would be illegal spot zoning was contrary to his true beliefs and was made for the purpose of deceit, and was motivated by a desire to secure benefits for himself and his girlfriend, and thus constituted fraud.  The court held that since the inspector was acting outside the scope of his duties, he was not immune from an unfair trade practice claim under G.S. 75-1.1.  The court held the city was not immune from suit for negligent supervision under the public duty doctrine for two reasons:  (1) the city had notice of prior wrongdoing of a similar nature and had not undertaken adequate supervision to prevent a recurrence (he was merely asked not to do it again) and the wrongdoing took place while on duty; and (2) since the inspector deliberately mislead the plaintiff, this is an intentional tort rather than gross negligence and the public duty doctrine therefore does not apply.  The court upheld treble damages against the individual plaintiffs ($180,000), found the city jointly and severally liable for compensatory damages ($60,000), and ordered the individual plaintiff to pay attorney fees of $50,000.

**Village Creek Property Owners' Association, Inc. v. Town of Edenton**, 135 N.C. App. 482, 520 S.E.2d 793 (1999)  
*Conditional use districts, Standing, Judicial review*  
            This case is a challenge by neighbors to a conditional use district rezoning and conditional use permit. The court noted that conditional use district rezonings involve two legally distinct decisions—the rezoning and the permit decisions.  While the permit decision is properly challenged in the nature of certiorari, the rezoning decision is properly challenged by a declaratory judgment action.  The court ruled that to establish standing, neighbors filing a declaratory judgment action to challenge a rezoning must allege a specific personal and legal interest in the matter and that they are directly and adversely affected by the decision.  They do not have to allege "special damages" as is the case for aggrieved parties seeking review of a quasi-judicial zoning decision by writ of certiorari.

**Harry v. Cresent Resources, Inc.**, 136 N.C. App. 71, 523 S.E.2d 118 (1999)  
*Subdivision, Open space*  
            The defendant platted and recorded a five lot subdivision adjacent to Lake Norman in 1976 and the plaintiff subsequently purchased one of the lots.  The subdivision plat showed four small remnant parcels within the subdivision.  The remnant parcels were unnumbered and had no purpose or use designated on the plat.  The plaintiff challenged the 1997 sale of the remnant parcels to an owner who proposed to place piers on the lots.

            The court held that the remnant lots were not limited to open space use.  In order to be reserved for such use, the plat must designate the lots as open space, park, beach lands or the like, or there must have been oral representations or actions on the part of the developer that reasonably led purchasers to believe the land would remain as open space.  The court also refused to extend the restrictive covenants (which had been imposed on the residential lots but not the residual lots) to those residual lots under a doctrine of implied equitable servitudes, as there was no evidence that the developer intended such.

**Clark v. City of Asheboro**, 136 N.C. App. 114, 524 S.E.2d 46 (1999)  
*Special use permits, Manufactured housing*  
            The petitioners were denied a special use permit for a proposed manufactured home park proposed for a twenty-six acre parcel in the city's extraterritorial jurisdiction.  The petitioners presented detailed evidence at the hearing to support the application.  Six neighbors appeared and presented testimony in opposition.  The court held the permit was improperly denied, as there was substantial, competent, and material evidence presented to sufficiently show compliance with all permit conditions. The evidence in opposition was characterized as being generalized fears that park residents would be low-income residents who would constitute a danger to the neighborhood, concerns unsupported by competent evidence.  The court also held the council had failed to make written findings of fact to support the denial and that the trial court had properly ordered the permit issued (as there was sufficient evidence in the record to support issuance and none supporting denial).

**Richardson v. Union County Board of Adjustment**, 136 N.C. App. 134, 523 S.E.2d 432 (1999)  
*Conditional use permits, Notice, Findings*  
            In this case neighbors challenged a special use permit issued for the construction of a 500 feet tall commercial radio tower and transmitter building.  The court upheld the decision, rejecting a variety of challenges.  On the question of mailed notice of the hearing, the court noted the zoning statutes require "due notice" and the zoning ordinance specified a ten day mailed notice requirement and specified how that period is to be computed.  The court held these requirements control, rather than G.S. 1A-1, Rule 6 (the more general state law regarding computation of notice periods).  The court also noted in dicta that it is necessary for the party claiming inadequate notice of a hearing to specify how they would have benefited from a later hearing in order to establish they were prejudiced by lack of notice.  The court further held that all interested persons were given an opportunity to present evidence, that the application was complete, and that all relevant permit standards were separately considered (though findings on two of the four standards were combined in the board's decision).  Finally, the court held that findings to support the permit issuance need not be made simultaneously with permit approval and may be included within the subsequently issued permit.

**Harry v. Mecklenburg County**, 136 N.C. App. 200, 523 S.E.2d 135 (1999)  
*Interpretation, Piers, Principal use*  
            In a companion case 136 N.C. App. 71 noted above, neighbors challenged the issuance of building permits for piers on each of the four remnant lots.  The lots were in an R-3 single family residential zoning districts, where piers are not listed among the permitted uses.  The ordinance provided that accessory uses must be approved in conjunction with principal uses.  The staff ruled that where there was no residence planned on the lot, the pier became the principal use and thus issued permits for the construction.  The board of adjustment and trial court upheld this interpretation.

            The court of appeal reversed.  The court interpreted the zoning ordinance as clearly establishing single family housing as the primary purpose of a lot in the R-3 district, with piers being an accessory use (and thus by the terms of the ordinance not allowed in the absence of the principal use).  The court noted that while the zoning administrator's interpretation is entitled to some deference, the court is not bound by that interpretation where it is contrary to the express purpose of the ordinance.

**Through the Looking Glass, Inc. v. Zoning Board of Adjustment for City of Charlotte**, 136 N.C. App. 212, 523 S.E.2d 444 (1999)  
*Variances, Precedents*  
            The plaintiff sought variances from the zoning ordinance requirements of a ten-foot buffer between the property and an adjacent residential use and from a five-foot side yard setback for a driveway.  Very similar variances had been granted for property directly across the street a year earlier.  The board of adjustment however denied these variances.  The court held that while the board is not bound by its previous decision, where fact situations are essentially the same, decisions should be the same.  Here the board's findings did not explain why very similar facts led to differing decisions, so the court remanded the case for additional findings in order to determine if the decision was supported by substantial evidence or was arbitrary and capricious.

***Selected Federal Cases Arising in North Carolina***

**Steakhouse, Inc. v. City of Raleigh,** 166 F.3d 634 (4th Cir., 1999)  
*Adult businesses*  
            The plaintiff challenged Raleigh's denial of a special use permit for a proposed topless bar as an unlawful prior restraint under the First Amendment.  The board of adjustment denied the permit on the grounds of insufficient parking and a failure to demonstrate the use would not adversely affect public services or adjacent properties.  Rather than seeking judicial review in superior court, the plaintiff filled this federal court action.  The district court refused to issue a preliminary injunction compelling issuance of the permit and the Fourth Circuit affirmed.

            The court held the plaintiff failed to show any irreparable harm without a preliminary injunction or that any harm it would suffer would outweigh the harm the city and neighbors would suffer if the injunction were issued.  The court also held the plaintiff was unlikely to succeed on the merits of their claim that Raleigh's regulations constituted an unlawful prior restraint.  The court held the standards for the permit decision sufficiently limited the board of adjustment's discretion to "concrete topics that generate palpable effects on the surrounding neighborhood" (including factors such as parking, traffic, police protection, noise, light, stormwater runoff, pedestrian circulation, and safety).  The court held the ordinance provided for a decision within a reasonably short time frame as the ordinance mandated a final decision by the board within 90 days of receipt of a completed application.  The court also ruled that the state statutory provisions for judicial review of special use permit denials provides the requisite prompt judicial review for First Amendment purposes.  The court noted that permission to open a topless bar does not present particularly time sensitive issues (as might be the case with a parade, demonstration, or exhibition of a film), that the petitioner must file for review within 30 days, and that the board's rules of procedure insured prompt submittal of its record and brief regarding such a petition.

**AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment,** 172 F.3d 307 (4th Cir. 1999)  
*Telecommunications, Findings*  
            The plaintiff challenged the city's denial of a special use permit for a 148-foot telecommunications tower proposed to be built on the property of the Southeastern Center for Contemporary Art.  The site was located on a 31-acre tract in a single family residential neighborhood.  The site itself includes a structure on the National Register of Historic Places.  The tower would be 500 feet from any other residences.  On November 6, 1997 the city's zoning board held a hearing on the permit application and received testimony both supporting and opposing the permit.  The board voted to deny the permit on the ground the tower would not be in harmony with the area nor consistent with the city's comprehensive plan.  Immediately after the hearing the board's secretary sent an official notice of the decision to the plaintiff, with the word "denied" written in the blank for case disposition.  In February 1998 the board adopted minutes for the November meeting and a written decision that summarized the evidence and the board's reasons for its decision.

            The plaintiff alleged this procedure violated the requirement of the federal Telecommunications Act that denials be "in writing and supported by substantial evidence contained in a written record."  42 U.S.C. § 332(c)(7)(B)(iii).  The district court agreed and ordered the permit issued.  The Fourth Circuit reversed and upheld the city's decision.

            The court held the prompt mailing of a letter with the word "denied" on the application met the requirement that the decision be in writing.  The court held the subsequent transcription of the hearing, adoption of minutes, and adoption of written findings met the requirement of a written record to support the decision, as there is no requirement that the formal written decision be filed contemporaneously with the actual decision.  Finally, the court held that while there was adequate evidence in the record to support the permit issuance, there was also competent, substantial evidence in the record to support denial and thus the decision must be affirmed.

**Frye v. City of Kannapolis**, 109 F.Supp.2d 436 (M.D.N.C. 1999)  
*Adult entertainment, Statute of limitations*  
            Plaintiff operated an adult newsstand in Kannapolis.  Zoning regulations were adopted in 1994 to require a 2,000-foot separation between individual adult businesses and between these businesses and sensitive land uses.  Plaintiff’s store was nonconforming upon adoption of the regulations and he was given sixty days to come into compliance.  Plaintiff in 1999 brought a § 1983 claim alleging a First Amendment violation on the grounds that the regulation totally exclude adult businesses from the jurisdiction.  The city moved to dismiss, contending the claim was barred by the three-year statute of limitations of N.C.G.S. § 1-52(5).

            The court held the plaintiff had made a facial challenge to the ordinance on First Amendment grounds, as an allegation that the ordinance left no sites within the city as a permissible site for adult businesses would not provide the requisite reasonable alternative avenues for expression.  The court then held that statutes of limitations do not bar facial challenges on First Amendment grounds, so motion to dismiss can not be granted.