LETTER OPINION
98-L-157

October 1, 1998

Honorable Ben Tollefson
State Representative
500 24th Street NW
Minot, ND 58703

Dear Representative Tollefson:

Thank you for your letter requesting my review of a proposed city ordinance for the city of Minot. You enclosed a copy of the proposed ordinance, as well as a rather lengthy analysis of the constitutional implications of the ordinance prepared by the Minot city attorney.[1] Essentially, the proposed ordinance would outlaw the sale of sound recordings containing the parental advisory logo developed by the Recording Industry Association of America (the "RIAA") identifying the sound recording as containing "explicit lyrics."[2]

The RIAA, in a May 30, 1996, release explained the history and background of the Parental Advisory Program as follows:

> In 1985, the RIAA reached an agreement with the National Parent Teacher Association and the Parents Music Resource Center, under which record companies would voluntarily identify and label newly released sound recordings that may contain strong language or expressions of violence, sex or substance abuse.
>
> Then, in 1990, the RIAA implemented a uniform Parental Advisory logo that continues in use today. The Parental Advisory Program effectively allows record companies and their artists to exercise their rights of free expression, while fulfilling their social responsibilities to consumers and to the public at large.

---

[1] See Memo from Nevin Van de Streek to Bobbie Ripplinger (June 9, 1998). I concur with much of the analysis contained in that memo and will not replicate those parts in this letter unless necessary to make a point.

[2] According to a March 22, 1996, release from the RIAA appearing on the RIAA website, "the RIAA changed the wording of the Parental Advisory logo so that it could be used for both audio and music video product -- from 'explicit lyrics' to 'explicit content,' and streamlined its graphic presentation." See http://www.riaa.com.

> The logo is widely used not only by RIAA members, which represent approximately 90 percent of the music industry, but also by non-member companies. While the decision to label a particular sound recording is left to each company, there is little question that the industry has taken this program seriously. Indeed, virtually every recording that has been the target of public controversy, either because of its sexually explicit or violently explicit nature, has a voluntary Parental Advisory logo on its cover. The program has also served as an important tool for radio stations and record retailers when considering whether specific explicit recordings should be broadcast or made available for sale to minors.

The sticker is described as a "highly visible black-and-white logo [which] measures 1" x 1 5/8" and is placed on the front of the permanent package." Id. See RIAA website at http://www.riaa.com (the "RIAA website").

The RIAA, in an August 13, 1996, release, stated that it had funded a campaign to provide retailers and wholesalers with information regarding the Parental Advisory. The material features a picture of the Parental Advisory and the following text:

> The Parental Advisory is a notice to parents that recordings identified by this logo may contain strong language or depictions of violence, sex, or substance abuse. Parental discretion is advised.

See RIAA website. These terms are apparently not further defined by the RIAA.

The RIAA itself does not determine which recordings will bear the Parental Advisory. In a June 16, 1998, release, the RIAA explains:

> The industry's black-and-white logo that reads "PARENTAL ADVISORY: EXPLICIT CONTENT" is placed on the front of each recording. While the decision to label a particular recording is left to each company, there is little question that the industry has taken this program seriously. . . . To help parents monitor the music their children purchase, the RIAA strengthened the program by revising the logo to apply to both audio and video product, by encouraging more consistent use and placement of the logo, and by fostering greater awareness of the logo through a point-of-sale merchandising campaign in

> conjunction with NARM and record retailers across the country.

See RIAA website.

While the RIAA has championed the use of the Parental Advisory, they have made public statements that the advisory system is strictly a tool for parents to determine whether it is appropriate for their children to buy or listen to certain recordings, and have stated that "record companies voluntarily have identified and labelled sound recordings that may contain strong language or mature content -- a standard much broader than constitutionally limited obscenity statutes." See February 13, 1998, release.

Further, the RIAA has consistently opposed efforts by states to criminalize the sales of sound recordings with the Parental Advisory logo to minors. In a March 5, 1998, release, the RIAA publicized its opposition to such proposed laws. For example, the release states:

> In Georgia, the RIAA and others are fighting H.B. 1170, a bill that would make it a misdemeanor to sell a sound recording with a parental advisory logo to a minor. The RIAA testified against the bill pointing out that it takes a voluntary program, meant to provide guidance to parents, and turns it into the basis for convicting someone of a crime.

Similar bills in Tennessee and Wisconsin have been opposed by the RIAA. See March 5, 1998, release on the RIAA website.

As I am sure you appreciate after having read the Minot city attorney's analysis of the proposed ordinance, there are significant First Amendment freedom of speech issues raised by ordinances such as the one proposed in Minot.

In Peter Alan Block, Modern-Day Sirens: Rock Lyrics and the First Amendment, 63 S. Cal. L. Rev. 777, 790-91 (1990), the author explained:

> The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." This language has remained unchanged for almost two hundred years. "The [speech] whose freedom it protects, however, has changed dramatically." And although the true "scope of 'the freedom of speech' [that] the adopters of the First Amendment intended to protect is uncertain," with

> narrow exceptions (which will be discussed below), the first amendment effectively limits any attempt to suppress speech based upon its content.
>
> The first amendment guarantee of freedom of speech extends to all artistic and literary expression, including concerts, plays, pictures, books, movies, music, and nude dancing. In Schad v. Borough of Mount Ephraim [452 U.S. 61, 65 (1981)], the Supreme Court observed: "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." This sentiment was echoed by the Court of Appeals for the Ninth Circuit, which noted that "music is a form of expression that is protected by the first amendment." [Cinevision v. City of Burbank, 745 F.2d 560, 567 (9th Cir. 1984)]
>
> In any case, a central concern underlying the protection of speech is maintaining unrestricted access of the expression to the public and of the public to the expression. Courts make no distinction between music and the lyrics which accompany it. . . .

(Footnotes omitted.)

The author went on to note, however, that certain types of speech are subject to regulation:

> First, speech can be regulated or prohibited if it is categorically excluded from first amendment protection. The Supreme Court clearly defined the concept of categorical exclusion in Chaplinsky v. New Hampshire [315 U.S. 568 (1942)], where the Court stated:
>
> > There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

> Restraints placed upon these unprotected classes of speech are immune from first amendment challenges, though the restrictions are subject to other constitutional guarantees.
>
> Second, if speech is not categorically excluded, it receives the benefit of first amendment protection and any restraint on such speech must first pass constitutional muster. Assuming that rock music deserves first amendment protection, any proposed regulation will be strictly scrutinized by courts.

(Footnotes omitted.) 63 S. Cal. L. Rev. at 791-792.

I have found no reported cases where a court has ruled on the validity or constitutionality of a criminal statute or ordinance which outlaws the sale of a recording to persons under 18 containing the RIAA Parental Advisory logo. As noted in the city attorney's memo, there is one reported case concerning a prison regulation which required inmates to submit for review any music cassette tape mailed to an inmate marked "Parental Advisory, Explicit Lyrics." Betts v. McCaughtry, 827 F.Supp. 1400 (W.D. Wis. 1993), aff'd, 19 F.3d 21 (7th Cir. 1994). The regulation required that when such a tape was received at the prison from a retail establishment, prison officials would send a memo to the inmate giving the inmate the choice of having the tape reviewed or returned. Id. at 1404. In most cases, the inmates chose to have the tape reviewed. Id. Upon review, the prison officials would deny receipt of the cassette tape if it was "found to incite or encourage violence, but not if it is merely sexually or racially graphic." Id. As a result of the regulation, a notice was posted in the prison containing a list of 46 allowed cassette tapes and 18 disallowed tapes. Id.

The regulation was attacked by inmates as being both discriminatory and in violation of the First Amendment. However, the court, citing a deference to prison officials in adopting policies that serve security interests, held that the infringements on the inmates' receipt of certain tapes by the system of censorship did not violate their First Amendment rights since they were reasonably related to legitimate penological interests. Id. at 1406-1407.

The Betts decision is of limited value in analyzing the proposed Minot ordinance, since it involved the special situation of a prison regulation intended to curb violence within the institution, rather than a general criminal ordinance preventing the sale of a recording with the Parental Advisory. Further, the prison did not have a

policy of prohibiting all musical cassettes with the advisory, only those that were found after a formal review by prison officials to have a propensity for creating violence within the institution. The proposed Minot ordinance, on the other hand, is not so narrowly tailored, involves no official review process, and criminalizes all sales of recordings with a Parental Advisory made to persons under 18 years of age.

In Soundgarden v. Eikenberry, 871 P.2d 1050 (Wash. 1994), cert den., 513 U.S. 1056 (1994), the Washington Supreme Court struck down an "erotic sound recording" statute which subjected record dealers and distributors to civil and criminal penalties for displaying or selling erotic sound recordings to minors. Id. at 1056. If a court determined the recordings to be erotic, an "adults only" label was to be attached to the recording. Id. While the court recognized that the state could constitutionally regulate speech it considers harmful to minors by prohibiting sales to minors of material which is obscene or, as in that case, defined as erotic based on contemporary community standards, it nonetheless found the law to be overbroad because it also reached conduct and speech which are constitutionally protected. Id. at 1065. The law was also determined to violate due process on a number of grounds.

The proposed Minot ordinance is even more vulnerable to attack than the law in Soundgarden since it contains no definitions of the type of speech which is deemed to be harmful but instead relies on a parental advisory which is not based on any precise, court-sanctioned definitions, nor is there any determination by any official body that the speech in question has been tested against any such standards.

Although there are apparently no other reported cases dealing with ordinances such as the one in question, there is a somewhat more developed history of cases involving laws which adopt the Motion Picture Association's age-related movie rating system and use such ratings as the basis for criminal laws or ordinances. The earliest reported case is Motion Picture Association of America, Inc. v. Specter, 315 F.Supp. 824 (E.D. Pa. 1970). In Specter, a state criminal statute was enacted which "purports to adopt as its standards the ratings or standards of the Code and Rating Administration of the Motion Picture Association of America." Id. at 825. The ratings, at that time, ranged from a G rating indicating general audiences to an X rating where no one under 17 would be admitted. The court noted that the ratings had no defined standards or criteria. Rather, 12 persons would do the rating and be graded according to the individual reaction of the viewing members. The court noted that "however well-intended, it is so patently vague and

lacking in any ascertainable standards and so infringes upon the plaintiffs' rights to freedom of expression, as protected by the First and Fourteenth Amendments to the Federal Constitution, as to render it unconstitutional." Id. at 826.

In Engdahl v. City of Kenosha, 317 F.Supp. 1133 (E.D. Wis. 1970), a city ordinance prohibited admitting minors to any adult motion picture, which was defined as a picture rated under the rating program of the Motion Picture Association of America in a category denying admission to unaccompanied minors. The court noted that the determination as to what is proper for minors would be made by a private agency, the Motion Picture Association of America. No evidence was presented which would indicate that the Motion Picture Association utilized any standards in determining its ratings, noting:

> In this case, the judgment as to what is protected or unprotected expression with regard to minors is not even exercised by the City of Kenosha. Rather, the judgment is reached by the Motion Picture Association using standards and procedures, if any, known only to them and unknown to both the defendants and this court. The procedures utilized by the City of Kenosha in imposing a prior restraint on First Amendment freedoms, albeit with regard only to persons under age 18, do not meet the constitutional requirements of governmental regulation of obscenity.

Id. at 1136.

See also Swope v. Lubbers, 560 F.Supp. 1328 (W.D. Mich. 1983) (college policy prohibiting funding of showing of X-rated movies on campus unlawful since motion picture ratings may not be used as a standard for determination of constitutional status of content of movies); Gascoe, Ltd. v. Newtown Tp., 699 F.Supp. 1092 (E.D. Pa. 1988) (case law clear that township board may not attribute obscenity to a film based solely on nondeviate sexual content or an X-rating from the Motion Picture Association of America); Time Warner Entertainment Co., L.P. v. F.C.C., 93 F.3d 957, 982 (D.C. Cir. 1996) ("[t]here is no doubt that [the Motion Picture Association's] ratings do not measure which movies are constitutionally protected and which are not.").

In Borger v. Bisciglia, 888 F.Supp. 97 (E.D. Wis. 1995), a school district adopted a policy concerning which films may be shown in its school based upon the movie rating system of the Motion Picture

Association of America. The policy excluded showing any R, N17, or X-rated movies. The court framed the issue as whether the school board could rely on the Motion Picture Association of America rating system rather than upon their own viewing of the film in order to exclude it from the curriculum. Id. at 100. While the court recognized that a private organization's rating system cannot be used to determine whether a movie receives constitutional protection and that a city cannot rely on the rating system to determine which movies are obscene speech and thereby less protected, nevertheless, in the context of the treatment of schools and classrooms as nonpublic forums and the greater discretion of school boards to censor within the school environment than do bodies governing the public sphere, the court determined that school boards have some rights to censor when reasonably related to legitimate pedagogical concerns. Id. at 100. The court also noted that, unlike some other cases, the school board had established through Motion Picture Association of America literature that the ratings were a reasonable way of determining which movies are more likely to contain harsh language, nudity, and other inappropriate material. Id. at 100-101.

Finally, in Motion Picture Appeal Board of the City of Chicago v. S. K. Films, 382 N.E.2d 103, 109 (Ill. App. 1978), in discussing the Motion Picture Association of America's rating system and how it interrelated with a city ordinance regulating movies deemed to be harmful to children, the court noted:

> The MPAA is a voluntary organization of the film industry which adopted its own ratings classification system for motion pictures. It is an extra-legal system which operates without either the approval or disapproval of the city. The city is not required either to adopt the movie industry's standards or to enforce them.

The court went on to uphold the city of Chicago ordinance which was principally based on the Supreme Court's rather well-known three-part obscenity definition contained in Miller v. California, 413 U.S. 15, 24 (1973).[3] Id. at 110.

---

[3] In Miller v. California, the court laid out the following three-part test for identifying material that may be banned as obscene:

1. the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

Thus, as is apparent from a review of the foregoing case law, where public bodies have attempted to adapt or incorporate by reference a private organization's rating or warning system as a basis for regulating speech or expression, they have not been upheld by the courts, except in the narrow contexts of regulation of violence in a prison and as a means to filter certain materials out of a public school. Furthermore, as is evident from the statements issued by the RIAA, the entity that develops and promotes the parental warning logo utilized in the proposed Minot ordinance, such warnings were not intended to be used other than for assistance to parents in deciding what is appropriate for their children to listen to or view. The warnings were not intended to be used as a basis for a criminal statute; the warnings were only meant to identify for parents recordings that "may contain strong language or mature content" and are not intended to define constitutional standards. See RIAA March 22, 1996, press release. The warnings may be applied to recordings containing language that would be considered by the courts to be protected speech, as well as to speech that may be unprotected or which may be regulated. As the D.C. Circuit Court noted, while ratings are important tools for parents to use, "ratings do not measure which movies are constitutionally protected and which are not." Time Warner Entertainment Co. L.P. v. F.C.C., 93 F.3d at 982.

In order to survive constitutional attack, a criminal statute must give due warning of the conduct that is prohibited, particularly in the area of regulation that touches or affects speech, or it may be determined to be "void for vagueness." This legal concept is based on both the First Amendment and the Fifth and Fourteenth Amendments. On the face of it, the proposed Minot ordinance appears clear in that it outlaws the sale to persons under 18 years of age of any musical recording containing the Parental Advisory logo developed by the RIAA. However, the placement of the logo is not done by the RIAA or by any official body, but rather by individual record companies. There apparently are no specific and detailed standards or guidelines as to what the advisory is intended to cover. As explained by the RIAA, noted above, "[t]he Parental Advisory is a notice to parents that recordings identified by this logo may contain strong language or depictions of violence, sex, or substance abuse." See RIAA August

---

2. the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

3. the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

13, 1996, press release. As noted above, those terms are apparently not further defined.

The court in Davidson v. Time Warner, Inc., 1997 W.L. 405907 (S.D. Tex. 1997), described the parental advisory warning itself as a "vague statement." The vagueness problem also extends to the language used by the RIAA to describe when the Parental Advisory is to be used, i.e., to warn about "strong language" and "depictions of violence, sex, or substance abuse." These undefined terms are so broad and imprecise, in a constitutional law sense, as to be vulnerable to a vagueness attack.

In State v. Hatch, 346 N.W.2d 268, 272 (N.D. 1984), the North Dakota Supreme Court explained the classic "void-for-vagueness" doctrine:

> The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited or permitted and in a manner that does not encourage arbitrary and discriminatory enforcement. . . . The United States Supreme Court has recently recognized "that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement.'"

(Citations omitted.)

Again, while the proscribed conduct, i.e., selling sound recordings to minors containing the RIAA Parental Advisory logo, is not in and of itself vague, it implicates First Amendment freedom of speech issues. As the United States Supreme Court noted in Reno v. American Civil Liberties Union, ____ U.S. ____, 117 S.Ct. 2329 (1997), in striking down the Communications Decency Act of 1996's "indecent transmission" and "patently offensive display" provisions as abridging the freedom of speech protected by the First Amendment:

> While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue.

Id. at 2341. In other words, when courts construe statutes which may implicate the First Amendment, they will look at the vagueness of the

statute, i.e., whether it sufficiently defines what is proscribed by the law in determining whether the law is overbroad.

The North Dakota Supreme Court explained the overbreadth doctrine in City of Fargo v. Stensland, 492 N.W.2d 591, 593 (N.D. 1992):

> The doctrine of overbreadth prohibits the law from criminalizing constitutionally protected activity. State v. Tibor, 373 N.W.2d 877, 880 (N.D. 1985), "A governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broad and thereby invade the area of protected freedoms." Zwickler v. Koota, 389 U.S. 241, 250, 88 S.Ct. 391, 396, 19 L.Ed.2d 444, 451 (1967); cited in State v. Tibor, supra. In reviewing overbreadth claims, we first consider whether the statute infringes upon a "substantial amount of constitutionally protected conduct." Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 368 (1982).

In Bolinske v. North Dakota State Fair Ass'n, 522 N.W.2d 426, 429 (N.D. 1994), the court noted:

> State action can be challenged on overbreadth grounds for its potential to chill or infringe free speech even though the challenger's rights may not have been violated under the circumstances.

Based on the foregoing, I have no choice but to conclude, as did the Minot city attorney, that the proposed ordinance, as currently drafted, which would criminalize the sale of sound recordings containing the RIAA developed Parental Advisory logo would more likely than not be struck down by a court, particularly on the grounds of overbreadth and vagueness.

Even though I have concluded that the proposed ordinance would likely not survive a court challenge, it does not mean that I do not believe that an ordinance could not be drafted which would survive constitutional scrutiny. I empathize with the frustration expressed by the court in Allied Artists Pictures Corp. v. Alford, 410 F.Supp. 1348, 1357 (W.D. Tenn. 1976), when it stated:

> This Court regrets the necessity under present . . . standards that vulgar, offensive, filthy and gutter type language cannot be, in and of itself, "obscene to

> juveniles", and subject to elimination. . . . [S]ociety and parents are to be commended for current concern about the extraordinary portrayals of violent conduct on movie (as well as television) screens. If carefully drawn, under obscenity standards, such portrayals might be subject to permissible criminal standards.

As the Time Warner court noted:

> Parents have a right to control what comes into their homes and what thus becomes available to their children. Rowan v. Post Office Dep't, 397 U.S. 728, 736-37, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970). And the government has a substantial interest in facilitating their ability to do so. Sable Communications, 492 U.S. at 126, 109 S.Ct. at 2836-37.

93 F.3d at 982. In F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), the United States Supreme Court noted:

> Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression.

Id. at 749.

In Ginsberg v. State of New York, 390 U.S. 629, the court stated:

> We do not regard New York's regulation defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather [the statute] simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . ." of such minors. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope

> of its authority over adults. . . ." [C]onstitutional interpretation has consistently recognized that parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.

Id. at 638-39 (citations omitted).

Notwithstanding the rather broad pronouncements quoted above by the United States Supreme Court in Ginsberg and Pacifica, in Reno v. American Civil Liberties Union, 117 S.Ct. 2329 (1997), it struck down provisions of the Communications Decency Act which sought to curtail minors' access to indecent and offensive transmissions over the Internet. The court in Reno further explained its decisions in Ginsberg and Pacifica, which explanation may aid in redrafting the proposed Minot ordinance to pass constitutional muster. The Reno court noted:

> In Ginsberg, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. . . . [W]e relied not only on the State's independent interest in the well-being of its youth, but also on our consistent recognition of the principle that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."

Id. at 2341.

The Court went on to state:

> In four important respects, the statute upheld in Ginsberg was narrower than the CDA. First, we noted in Ginsberg that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." Id., at 639, 88 S.Ct., at 1280. Under the CDA, by contrast, neither the parents' consent -- nor even their participation -- in the communication would avoid the application of the statute. Second, the New York statute applied only to commercial transactions, id., at 647, 88 S.Ct., at 1284-1285, whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be "utterly without redeeming social importance for minors." Id., at 646, 88 S.Ct., at

> 1284. The CDA fails to provide us with any definition of the term "indecent" as used in § 223(a)(1) and, importantly, omits any requirement that the "patently offensive" material covered by § 223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

Id.

Thus, in order to draft an ordinance which would pass constitutional muster and prevent minors from receiving indecent or patently offensive music recordings, the revisions should incorporate the cues from the Reno and Ginsberg cases. First, the ordinance should make clear that parents may consent to their children's use of restricted materials, for example, by only outlawing the sale of such restricted materials in the absence of parental consent. Second, the ordinance should be restricted to strictly commercial transactions. As currently drafted, the ordinance makes it unlawful for "any person" to sell a restricted sound recording. Third, the ordinance should provide a definition of indecent material, that is, material that is not necessarily obscene but which is harmful to minors. The New York statute upheld in Ginsberg provided a definition of harmful to minors as that which:

> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.

Ginsberg v. State of New York, 390 U.S. at 633. Additionally, terms like indecent should not be left undefined in any ordinance. As the Minot city attorney's memo indicates, inclusion of such a concept in an ordinance is more likely to be acceptable to a court if it is defined. However, prurient appeal is not necessarily an essential component of indecent language. F.C.C. v. Pacifica Foundation, 438 U.S. at 741. As used in the Pacifica case, indecent has been defined to include "exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." 438 U.S. at 732.

Finally, the Reno court cast some doubt as to the age cutoff in a statute that would be upheld as a reasonable restriction on the rights of minors. In Reno, the court stated that the New York statute in question defined a minor as a person under the age of 17. Reno v. American Civil Liberties Union, 117 S.Ct at 2341. It is unclear whether defining a minor for purposes of such statutes or ordinances and which would use the cutoff as age 18 would be invalid on that basis alone.

In summary, I concur with the conclusion of the Minot city attorney that the proposed ordinance would probably be determined by a court to be constitutionally infirm. However, with careful drafting, I believe it is possible to craft a statute or ordinance that would be upheld by the courts and yet serve the purpose of keeping materials recognized by the community as patently offensive and obscene for minors out of the hands of children. We will be happy to work with the Minot city attorney in reviewing future draft ordinances in this area.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jjf/pg