HENRY MCMASTER
ATTORNEY GENERAL

January 2, 2008

The Honorable Murrell Smith
Member, House of Representatives
Post Office Box 580
Sumter, South Carolina 29151

Dear Representative Smith:

We received your request for an opinion concerning the validity of a City of Cayce ordinance. In your letter, you explain as follows:

> I have a constituent that owns a parcel of real estate in Cayce, South Carolina which is in the County of Lexington. He previously leased this property to a tenant who ran the same in a very poor fashion. He eventually had to force his tenant out of his property. It is also my understanding that his tenant created a lot of trouble for the City of Cayce.
>
> While my constituent understands the difficulty that the leasing of this premises caused the City of Cayce, he is concerned with the attached Ordinance 12-49 which is being applied to his property. The City of Cayce has advised my constituent through this Ordinance that they will not approve this premises for occupancy for a period of five years. There has not been any due process applied to this decision and it seems to me that this is an involuntary taking by the City of Cayce.

Accordingly, you ask that we review the ordinance in question and advise you as to whether it violates "the dictates of due process as guaranteed by South Carolina's Constitution as well as the United States Constitution."

Law/Analysis

The ordinance you refer to is Ordinance 12-49 of the City of Cayce (the "City"). This ordinance is contained in the portion of the Cayce Code of Ordinances addressing business license requirements. Section 12-36 of the Cayce Code of Ordinances requires: "Every person engaged or

intending to engage in any calling, business, occupation or profession listed in the rate classification index portion of this ordinance, in whole or in part, within the limits of the city, is required to pay an annual license fee for the privilege of doing business and obtain a business license as herein provided." Cayce, S.C., Code of Ordinances § 12-36. Section 12-49 of the Cayce Code of Ordinances, of which you and your constituent are concerned, provides as follows:

> The license official shall deny a license to an applicant (1) when the application is incomplete, contains a misrepresentation, false or misleading statement, evasion or suppression of a material fact or (2) when the activity for which a license is sought is unlawful or constitutes a public nuisance per se or per accidens or (3) when the business activity by the applicant, or a business activity of a like classification at that location by a previous applicant, has, at any time within the five-year period preceding the application, been the subject of (a) a license denial or revocation by the license official from which no appeal to council was taken or (b) a license denial or revocation by the license official from which an appeal to council was affirmed and no appeal to the circuit court was taken or (c) a license denial or revocation by the license official from which an appeal to council was affirmed and such affirmance by council was affirmed by the circuit court on appeal. A decision of the license official shall be subject to appeal to council as herein provided. Denial shall be written with reasons stated.

According to this ordinance, the City's local licensing official must deny a license application if the applicant operates business "of a like classification" to that of a previous applicant at the same location and the previous applicant was either denied a licence or had their license revoked. We understand your argument to be that by automatically denying the subsequent applicant's application for a license under these circumstances, the ordinance infringes upon the subsequent applicant's due process rights as provided for under both the United States Constitution and the South Carolina Constitution and therefore, the ordinance is invalid.

Before considering the validity of the ordinance under the State and federal constitutions, we must first consider that "[a] municipal ordinance is a legislative enactment and is presumed to be constitutional. The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991) (citations omitted). Furthermore, "only a court, not this Office, may declare an ordinance unconstitutional." Op. S.C. Atty. Gen., August 15, 2007.

According to the State and federal constitutions, no person may be deprived of property without due process of law. U.S. Const. amend XIV, § 1; S.C. Const. art. I, § 3. As our Supreme

Court explained in Denene, Inc. v. City of Charleston, 359 S.C. 85, 96, 596 S.E.2d 917, 923 (2004) (citations omitted):

> In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. The standard for reviewing all substantive due process challenges to state statutes or municipal ordinances, including economic and social welfare legislation, is whether the ordinance bears a reasonable relationship to any legitimate interest of government.

Although never addressed by our courts, courts in other jurisdiction recognize instances in which a property right attaches to a business licence, thus entitling the holder to due process. Holmes v. Dist. of Columbia Bd. of Appeals and Review, 351 A.2d 518 (D.C. Cir. 1976); Mr. Lucky's, Inc. v. Dolan, 591 P.2d 1021 (Colo. 1979). But see Quetgles v. City of Columbus, 491 S.E.2d 778 (Ga. 1997) ("[T]he procurement of a business license does not, by itself, give the license holder vested rights."). Presuming our courts would also recognize a business license as a property right, we consider whether section 12-49 of the Cayce Code of Ordinances is reasonable in relation to a legitimate governmental interest.

Neither South Carolina courts, nor this Office, have addressed the constitutionality of a similar ordinance under the due process clause. However, in our research we discovered an Ohio Court of Appeals case considering the constitutionality of a Toledo city ordinance instructing the Toledo Massage Board to deny or revoke a massage establishment's operators license "if the 'establishment' has a history of conduct involving prostitution." Oglesby v. Toledo, 635 N.E.2d 1319, 1324 (Ohio Ct. App. 1993). In that case, the City of Toledo took the position that "once a physical location is used for prostitution, then the city may for all times deny to any person, no matter how law abiding, a license to operate a massage establishment at that location." Id. The Court found this interpretation "irrational and not reasonably related to the legitimate goals of the city of Toledo." Id. The Court continued:

> Locations do not commit acts of prostitution. Only people engage in conduct involving prostitution; therefore, the ordinance must be limited to regulating the conduct of people.
>
> The administrative construction has the effect of allowing the board to create a permanent, unrecorded restriction on the use of property by law-abiding citizens merely because of the acts of another. The board's construction, in effect, allows the board to engage in piecemeal zoning prohibited by R.C. 713.06. To the extent, then, that Toledo Municipal Code Chapter 1735 allows the board to deny a license to an otherwise qualified applicant, solely on the basis that

> other people have previously engaged in prostitution at the location, such enactment is constitutionally wanting, invalids and unenforceable under the Fourteenth Amendment to the United States Constitution.

Id. at 1324-25.

Nonetheless, we also discovered a Tennessee Supreme Court case upholding a rule promulgated by the Commission of Finance for the State of Tennessee precluding employees or relatives of a revoked license holder from receiving a liquor license for a business near the location of the establishment whose license was revoked. McCanless v. State ex rel. Hamm, 181 S.W.2d 154 (Tenn. 1944). The Tennessee Court considered the purpose behind the Commissioner's rule and the Commissioner's testimony that relatives of revoked license holders in the past came forward and obtained a license for the business while in fact the original license holder continued to operate the business. Id. at 156. Based on this evidence, the Court determined: "The object of the rule is to make it impossible for recreant liquor dealers, whose licenses have been revoked thereafter, directly or indirectly, to engage in the same business in this State." Id. The Court concluded as follows: "A man so connected with another is ordinarily subject to the influence of that other, and to prevent fraud and deception, the Commissioner was entirely justified in barring relatives as successors to lawbreaking liquor dealers." Id.

The City of Cayce ordinance places restrictions on particular locations previously covered under a business license. Following the courts reasoning in Obglesby, this restriction appears unreasonable given that no matter how law-abiding a new applicant operating at the same location may be, he or she is restricted by the actions of the previous applicant. Additionally, the City of Cayce ordinance is not limited to employees and relatives of the former license holder as was the case in McCanless. Thus, the ordinance appears constitutionally suspect under the Fourteenth Amendment. However, unlike a court that has the ability to hear testimony and consider all facts presented by both parties, this Office is limited in its review because we are not privy to the possible legitimate governmental interests the City may assert. Under these circumstances and coupled with the presumption that ordinances are constitutional, although we believe the ordinance may violate due process, we cannot conclusively opine as to the validity of this ordinance under our State and federal constitutions. Thus, we suggest a declaratory judgment action be brought to determine the validity of the ordinance.

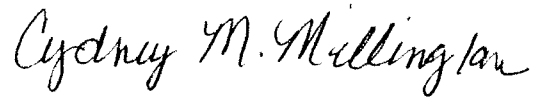
Conclusion

Although we were unable to locate South Carolina law addressing the validity of an ordinance such as the one adopted by the City of Cayce, we found a couple of court decisions from other states addressing similar ordinances. Based upon these decisions, it appears the ordinance could be found unconstitutional as a violation of due process. However, this determination depends upon a court's view of the governmental interest the City of Cayce believes this ordinance serves.

Furthermore, we are of the opinion that the validity of the ordinance is best left to a court to decide possibly through the assertion of declaratory judgment action.

Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
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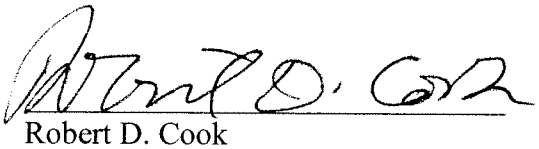

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