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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 30, 1997

The Honorable Robert L. Waldrep, Jr.
Senator, District No.3
P. O. Box 597
Anderson, South Carolina 29622

Re: Informal Opinion

Dear Senator Waldrep:

You have enclosed a copy of a Sample Ordinance relating to Sexually Oriented Business Regulations. You note that "our County Council is considering actions, along with our County Sheriff, Gene Taylor, to implement regulations to severely restrict nude bars and dancing in Anderson County." You further state that

> [s]ince there are so many judicial interpretations regarding the "Freedom of Expression" provision, I would greatly appreciate some guidance from your staff on what we can best do to exclude this offensive activity from our community.

LAW / ANALYSIS

It would appear that the Sample Model Ordinance which you have enclosed (from the National Law Center for Children and Families, Inc.) is a zoning ordinance "[d]ispersing [s]exually [o]riented [b]usinesses and [l]imiting [t]hem to [s]pecified [z]oning [d]istricts. Such model ordinance also provides for licensing and regulation of sexually oriented businesses and employees and further provides for additional health and safety regulations for sexually oriented businesses, the regulation of newsracks, etc.

There are two cases decided by the South Carolina Supreme Court which have addressed the validity of Richland County's Zoning Ordinance concerning the regulation

Request Letter

of "sexually oriented businesses" and which have upheld such Ordinance. In Rothschild v. Richland County Board of Adjustment, 309 S.C. 194, 420 S.E.2d 853 (1992), our Court held that that Section 8A of the Ordinance, requiring that sexually oriented businesses be situate in a C-3 zoning district and be at least 1,000 feet from a church, school, park, residential area or another sexually oriented business was valid.

Rothschild argued to the Court that the Ordinance " ... as applied to him ... acts to completely ban his sexually oriented businesses and deprives of him of any avenue of communication." He further contended that he could find no available property relocation for his business which was both "commercially viable and in compliance with the commands of the Ordinance.

The Court rebuffed these contentions, relying in part upon its earlier decision of Centaur v. Richland County, 301 S.C. 374, 392 S.E.2d 165 (1990). Recalling that it had sustained the facial validity of Richland County's Zoning Ordinance, Justice Chandler, speaking for the Court quoted the following language from Centaur, which itself had quoted the United States Supreme Court in City of Renton v. Playtime Theatres, 475 U.S. 41, 51, 106 S.Ct. 925, 932, 89 L.Ed.2d 29, 42 (1986).

> [t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," we have never suggested that the First Amendment compels the Government to ensure that adult theatres, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city ... .

301 S.C. at 379, 380, 392 S.E.2d at 168.

The Rothschild Court also referenced the Fourth Circuit's decision in D.G. Restaurant Corporation v. City of Myrtle Beach, 953 F.2d 140 (4th Cir.1991) where the Court had spoken to the issue of "commercial viability". In D.G., the Court had said that

> [i]t is argued that this restriction leaves an opportunity to operate adult businesses only in the C-9 zone, which is limited to a few poorly lit sites in industrial areas, far from the tourist-oriented businesses. While D.G. Restaurant may not find it as commercially desirable to operate in such locations, it has not been demonstrated that the restriction to a C-9 zone will impede the restaurant's ability to convey its message to those listeners who desire to be enlightened by it. The decision to restrict adult businesses to a specific area does not oblige the city to provide commercially desirable land. (emphasis supplied in Rothschild).

309 S.C. at 197-198, quoting 953 F.2d at 147.

Thus, concluded the Court, "'commercial viability' is irrelevant to the consideration of whether alternative avenues exist for sexually oriented businesses to operate."

And in Centaur, the Court discussed the validity of the Richland Zoning Ordinance at considerable length. In that case, the Ordinance was attacked on a variety of grounds, among them that the Ordinance was beyond the county's zoning power, the locational provisions violate the First Amendment in that they do not provide reasonable alternative avenues of communication; certain licensing provisions violate the First Amendment in that they are not narrowly tailored to serve the County's interest; the two-year amortization provision is an unconstitutional taking of property and that the Ordinance is unconstitutionally vague.

The Court noted that the Richland County Ordinance was entitled to a presumption of constitutional validity. Further, the Court held that the County's regulation of sexually oriented businesses was "a proper exercise of the County's statutory authority" relating to land use and zoning.

As to First Amendment claims, the Court first found that Centaur "presented no evidence that it was 'effectively' denied a reasonable opportunity to continue the operation of its bookstores at other locations", and thus sustained "the constitutionality of the Ordinance's locational provisions as applied to Centaur."

Next, the Court concluded that the Ordinance's licensing provisions were valid, sustaining these parts of the Ordinance against the argument that they vested "the Zoning Administrator with unfettered discretion to deny licenses when an applicant fails to supply information 'reasonably necessary' for their issuance. The County concluded that the

Ordinance "provides the Administrator with a standard susceptible of objective measurement,' thus adequately circumscribing his discretion." To the contention that "the provisions covering suspension and revocation of licenses are not narrowly tailored", the Court found that the provisions of the Richland County Ordinance are "'not substantially broader than necessary to achieve the [County's] interest." Quoting Ward v. Rock Against Racism, ___ U.S.___, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661, 681 (1989).

Next, Centaur challenged the Ordinance's two-year amortization period as an unconstitutional taking of his property. Referencing earlier cases such as Collins v. City of Spartanburg, 281 S.C. 212, 314 S.E.2d 332 (1984), however, the Court reasoned that the two year period was reasonable and thus constitutional. Concluded the Court,

> [t]he burden is upon Centaur to prove the unreasonableness of the amortization period. ... The period is presumed to be valid unless Centaur demonstrates that its loss outweighs the public gain. ...
>
> Centaur patently failed to meet its burden. Although it presented some evidence of improvements to buildings from which the bookstores are operated, Centaur offered no evidence of economic loss to its businesses as, for example, cost of relocation. On the other hand, the record contains numerous studies detailing the deleterious effects that adult businesses have upon the surrounding community.

301 S.C. at 381.

A copy of the Richland County Ordinance, challenged and upheld in Centaur and Rothschild is included in the Court's opinion in Centaur. I am enclosing a copy of both of those cases for you review. While I have not compared the Richland County Ordinance with the model you have enclosed in every detail, the two Ordinances are similar. You may wish to contact officials in Richland County concerning its Ordinance and its effectiveness for the County.

I am also enclosing for your information a copy of the Court's recent opinion in Diamonds v. Greenville County, Op.No. 24567 (filed January 27, 1997) which declared unconstitutional the Greenville Ordinance prohibiting public nudity. It is my understanding that this case has no effect upon the Centaur and Rothschild zoning cases, but I enclose this decision to indicate that a county or city's ordinance totally banning public nudity would likely be held invalid by the Court.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph
Enclosures