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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

January 26, 1999

Reginald I. Lloyd, Counsel and Director of Research
Judiciary Committee, South Carolina House
of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Mr. Lloyd:

On behalf of Representative Cotty, Chairman of the Constitutional Laws Subcommittee of the House Judiciary Committee, you have requested an opinion letter relative to H.3002. By way of background, you note that the House Judiciary Committee passed H.3002 banning gambling "cruises to nowhere" as allowed by the Johnson Act, 15 U.S.C. § 1175 (b)(2)(A). Further, you state that

> [t]he ban has raised a question by some current gambling cruise operators as to whether H.3002 will amount to a "taking" of private property which will require the State of South Carolina to compensate the boat owners. Rep. Cotty requests an opinion from the Attorney General concerning whether H.3002 is an unconstitutional taking of private property requiring compensation to current gambling cruise ship owners.

Law / Analysis

As you are no doubt aware, one boat owner (Casino Ventures) has sued the Attorney General and Chief Stewart of SLED in their official capacities for declaratory relief regarding the proper interpretation of the Johnson Act amendments of 1992. That litigation is currently pending in the Fourth Circuit Court of Appeals in Richmond. The Attorney General has taken the position therein that

> Congress neither expected nor demanded that state gambling legislation must be enacted after 1992, and, if not, all previous gambling statutes were thereby preempted by the Johnson Act. Such a conclusion would absurdly require of a state what Congress never envisioned or foresaw. It would elevate form over substance in the most pernicious way never contemplated by the Tenth Amendment. It would create a single arbitrary exception to the broad Congressional scheme of leaving to each state the fundamental decision regarding gambling enforcement policy.

Appellant's Brief at 32. In other words, the State continues to argue on appeal that South Carolina's longstanding prohibition of the possession of gambling equipment, in existence since the 1800s, is applicable with respect to "cruises to nowhere." Obviously, therefore, if our position in court were to ultimately prevail, no constitutional "taking" issue could be raised because such "cruises to nowhere" have always been and continue to be illegal in South Carolina. If that argument is adopted, the Johnson Act would have had no impact whatever on these longstanding state prohibitions.

It is equally obvious that the District Court did not agree with the State in the Casino Ventures litigation. Thus far, the legal view that new legislation by the General Assembly is now necessary to ban "cruises to nowhere" has prevailed. However, since the State continues to assert the contrary view, this Office must be very cautious in any comment it might make regarding the constitutionality of pending legislation. It would be most unwise and imprudent to make any statement which would suggest any inconsistency with the State's official position in court.

In an effort to assist you, however, I would make the following comments and provide you with relevant and controlling authorities in this area. First, I would point out that the District Court certainly did not appear to envision any constitutional prohibition imposed by the 5th and 14th Amendments to the federal Constitution (or the State Constitution) if the General Assembly enacted an outright ban upon "cruises to nowhere." While the issue was not raised or argued the District Court stated the following in ruling against the State:

> [t]he South Carolina General Assembly could outlaw day cruises tomorrow and Plaintiff and any business like **it would be lawfully put out of business**. (emphasis added).

Order of the District Court, October 16, 1998. The District Court clearly read the Johnson Act amendments and the accompanying legislative history as authorizing any State, including South Carolina, to enact prohibitory legislation to "opt out" of the Congressional amendment. The Court stated in the same Order that

> South Carolina has not enacted any statute opting out of the 1992 amendments to the Johnson Act and the statutes South Carolina adopted prior to the 1992 amendments to the Johnson Act ... do not meet the criteria of the opt out provisions of 15 U.S.C. § 1175 ....

Id.

While the State in no way concedes that the District Court was correct in its ruling that "opt out" legislation is necessary to ban "cruises to nowhere," assuming arguendo the ruling's correctness, neither the Court in interpreting the Johnson Act amendments, nor Congress in adopting those amendments, envisioned that the passage of legislation similar to H.3002 would create any constitutional "takings" problems or would deter the enactment of such legislation. As was stated by Congressman Lent during the debate on the Johnson Act amendments,

> [t]he committee was aware that a number of coastal States have elected not to allow gambling on vessels in their waters **and this legislation retains the right of States to continue to prohibit gambling**.

137 Cong. Rec. H 11021-04 at 11022 (1991) (remarks of Rep. Lent). Thus, the State's closing of the "loophole" which Judge Norton found that Congress had created in 1992 was never thought either by Congress or the Court to be barred by the "takings" clause of the federal or State Constitution.

Furthermore, in the brief time available since your request was made, I have been able to do some quick research in the "takings" area. Consistent with the position maintained by the State in the ongoing litigation and, consistent with the District Court's Order and the legislative history of the 1992 Johnson Act amendments, the authorities appear to support that a "takings" problem is not created by H.3002. As stated above, South Carolina has banned the possession of gambling equipment, paraphernalia and activities from time

immemorial. The proposed legislation would simply restore that longstanding status in the one area where Congress may have created a loophole in 1992. In other words, even if the District Court is correct, South Carolina is now doing exactly what Congress told every state it could lawfully do – enact legislation banning "cruises to nowhere." Thus, it is very difficult to see how that action initiated in accordance with Congressional authority would constitute a "taking" without just compensation.

While ultimately only a court could so decide based upon the specific facts shown, the case law which I have collected is supportive of Congress' belief that a State's legislative prohibition of "cruises to nowhere" would be constitutional. Although the courts have employed a variety of forms of analysis, almost all seem to be supportive of the State's police power in this area. These authorities include the following: South Carolina Department of Revenue and Taxation v. Rosemary Coin Machines, Inc., 331 S.C. 234, 500 S.E.2d 176 (Ct. App., 1998) [there is no fundamental right to gamble and the State may modify the existing license agreement at any time]; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) [recognizing an exception to the "Takings" Clause where the State's common law deemed the prohibited activity a "nuisance"; "[t]he use of these properties for what are now expressly prohibited purposes was always unlawful ..."]; Mugler v. Kansas, 123 U.S. 623 (1887) [state statute which prohibited the sale or manufacture of alcohol did not constitute a taking of brewery owner's property because such statute promotes the public health and safety of the community]; Andrus v. Allard, 444 U.S. 51, 65, 100 S.Ct. 318, 62 L.Ed. 210 (1979) ["Where an owner possesses a full 'bundle' of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety ... A reduction in the value of property is not necessarily equated with a taking."]; Penn Central Transp. Co. v. City of N.Y., 438 U.S. 104 (1977) [Court applies three part test: (1) the severity of the regulation's economic impact on the claimant; (2) the extent of the regulation's interference with the property owner's investment backed expectations; (3) the character of the governmental action]; Cohen v. City of Hartford, 244 Conn. 206, 710 A.2d 746 (1998) [street closing did not constitute a taking because of the "limited impairment" involved]; Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996) [loss of residential dwelling license by landlord because of repeated drug activity did not constitute a compensable taking]; Lake Tahoe Watercraft Recreation Association v. Tahoe Regional Planning Agency, 24 F.Supp. 2d 1062 (E.D. Cal. 1998) [referencing Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), concluding that plaintiffs must demonstrate that the regulation at issue "does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land."; Court finds that ordinance prohibiting discharge of unburned fuel and oil from

watercraft propelled by carbureted two-stroke engine does not confiscate the watercraft itself but simply imposes restrictions on their use]; Pogodas De Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986) [State possesses a substantial interest in the health, safety and welfare of its citizens in prohibiting casino gambling]; Myers v. Real Property at 1518 Holmes St., 306 S.C. 232, 411 S.E.2d 209 (1991) [statute providing for civil forfeiture of property used in criminal activities did not violate State Constitution's "Taking Clause"; this constitutional provision applied only to the exercise of the State's eminent domain power and forfeiture was accomplished pursuant to its police power]; Tracy v. Deschler, 253 Neb. 170, 568 N.W.2d 903 (1997) [revocation of garbage business with City is not a "taking" requiring "just compensation"].

As I stressed to the subcommittee last week, the Attorney General's Office takes no position on H.3002 because of our involvement in the ongoing litigation, which argues that "cruises to nowhere" are prohibited by existing state gambling laws. As I also commented, the proposed legislation does not impair or undermine the State's ongoing appeal. Within those limitations and caveats, the District Court's conclusion that new legislation could "lawfully put ['cruise to nowhere' owners] out of business" provides strong support for the conclusion that no compensable "taking" is created by this legislation. This conclusion of constitutional validity is buttressed by the authorities referenced herein.

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/an