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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 18, 1995

John P. Henry, Esquire
Horry County Attorney
Post Office Box 1533
Conway, South Carolina 29526

Re: Informal Opinion

Dear Mr. Henry:

You have referenced a proposed Horry County Ordinance regulating public nudity. Your questions relate to whether the ordinance will withstand a constitutional challenge and whether it runs afoul of Article VIII, Section 14 of the South Carolina Constitution.

The proposed ordinance in question proscribes certain public nudity and sexual conduct in public. The ordinance finds that it is

> ... in the public interest to maintain the social order by encouraging the good morals of the citizens of Horry County; ... [that] this prohibition on public nudity and public sexual conduct is designed to protect the morals and public order, as well as to protect the health, welfare and safety of the citizens of Horry County; ... [and that] there is a substantial governmental interest in protecting public order, morality, and the health, welfare and safety of the citizens of Horry County.

Prohibited is the knowing or intentional engagement in a public place of "sexual conduct" or the appearance in a state of nudity. The terms "engages in" and "public place" are specifically defined. Also defined is the term "sexual conduct" which means

A. vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted, whether between human beings, animals or a combination thereof, or

B. actual or simulated acts of masturbation, excretory functions, or lewd exhibition of the genitals, pubic hair, anus, vulva, or female breast nipples, including male or female genitals in a state of sexual stimulation or arousal or covered male genitals in a discernible turgid state, or

C. An act or condition that depicts actual or simulated bestiality or sado-masochistic abuse.

"Sado-masochistic abuse" is defined as:

(i) flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples, or

(ii) the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

or

D. an act or condition that depicts actual or simulated touching, caressing, or fondling of or other similar physical contact with the covered or exposed genitals, pubic or anal regions or female breast nipples, whether alone or between humans, animals, or a human and an animal of the same or opposite sex, in an act of actual or apparent sexual stimulation or gratification, or

E. An act or condition that depicts the insertion of any part of a person's body other than a male sex organ, or any object, into another person's anus or vagina except when done as part of a recognized medical procedure.

> F. Nothing in this definition is intended to apply to natural acts between two animals.

This definition of "sexual conduct" is virtually identical to that contained in the obscenity statute, Section 16-15-305(C). Finally, the term "nudity" is defined as follows:

> ... the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque complete covering, the showing of the female breast below a point immediately above the top of the areola, or the showing of covered male genitals in a discernibly turgid state. Nothing in this definition regarding the showing of the female breast is intended to apply to a performer while performing in an adult entertainment establishment lawfully existing in compliance with Appendix B, Section 526 of the Horry County Code of Ordinances.

A severability clause is included in the ordinance in case any portion is declared unconstitutional and the penalty provision makes a violation punishable as a fine of up to Five Hundred ($500) Dollars or by a sentence of up to thirty (30) days in jail.

LAW / ANALYSIS

A county possesses police power to enact ordinances to further the health and welfare. See, S.C. Code Ann. § 4-9-30 and Art. VIII, Sec. 17 of the S.C. Constitution; AmVets v. Richland Co. Council, 280 S.C. 317, 313 S.E.2d 293 (1984); Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985); see also, Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943); City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963). In that regard, it is fundamental that a county ordinance is entitled to a presumption of constitutionality. As our Supreme Court stated in Rothchild v. Richland County Board of Adjustment, 309 S.C. 194, 420 S.E.2d 853, 856 (1992)

> [i]t is well settled that ordinances, as with other state legislative enactments are presumed constitutional; their unconstitutionality must be proven beyond a reasonable doubt.

While this Office may comment upon constitutional problems, only a court may declare an ordinance void as in conflict with the Constitution.

Of course, an ordinance must, first of all, conform with state law to be valid. The Court in Connor v. Town of Hilton Head, _____, 442 S.E.2d 608 (1994), recently warned:

> Article VIII, Sec. 14 of our State Constitution provides that criminal laws and the penalties and sanctions for the transgression thereof shall not be set aside. We recently construed this constitutional provision to hold that a municipality may not impose a greater punishment than that provided under State law for the same offense. City of No. Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991). We now construe Article VIII, Section 14 to prohibit a municipality from proscribing conduct that is not unlawful under State criminal laws governing the same subject. (emphasis added).

In Connor, the Court analyzed the ordinance in question in the specific context of whether the ordinance violated the First Amendment as governed by the United States Supreme Court case of Barnes v. Glenn Theatre, 501 U.S. 560, 111 S.Ct. 2456, 115 L.E.2d 504 (1991). The Connor Court found that Hilton Head's ordinance which banned "sexually oriented" businesses where nude or semi-nude dancing is performed, was beyond the power of the municipality to adopt. The Court also found that the ordinance was not rendered valid by virtue of the State's power to regulate alcohol under the Twenty-first Amendment.

Barnes had required the courts to analyze the State's efforts at proscribing conduct such as public nudity under a four-part test, which will be discussed in detail later. The first prong of that analysis -- whether the regulation was within the constitutional power of the State to adopt -- thus constituted the reason the Court in Connor analyzed the validity of the ordinance pursuant to Article VIII, Section 14 of the South Carolina Constitution. That provision specifically forbids local governments from setting aside certain general law provisions, among them, "criminal laws and the penalties for the transgression thereof ...".

"State laws governing nudity do not prohibit nude dancing per se ...", reasoned the Court, and since "Town has criminalized conduct that is not criminal under relevant State law, we conclude Town exceeded its power in enacting the ordinance in question." 442 S.E.2d at 610. Thus, held the Connor court, the Hilton Head ordinance did not meet the first prong of the Barnes test. It is significant, however, that Connor went on to conclude that, notwithstanding that the ordinance did not meet the first rung of the Barnes

test, such ordinance was clearly invalid under other aspects of the Barnes criteria because the ordinance was not "content-neutral", but was specifically aimed at a particular form of speech -- nude dancing.

Turning now to the proposed ordinance at hand, in analyzing its validity, under state law, we note that Section 16-15-365 proscribes the exposure of "private parts of his person in a lewd and lascivious manner." With respect to the meaning of the terms "lewd and lascivious", our Supreme Court has determined that these terms are not overly vague. In State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983), for example, the Court stated that terms such as "lewd and lascivious" were "commonplace terms which [are] easily found in dictionaries and other source books and did not render" a statute utilizing these terms as vague and overbroad. A "lewd and lascivious" act is one tending to excite lust in a sexually immoral context. State v. Stamper, 615 So.2d 1359, 1363 (La. App. 1993). The terms "lewd" and "lascivious" are considered synonymous. Schmidtt v. State, 590 So.2d 404, 410 (Fla. 1991). Courts have further defined a "lewd" or "lascivious" act as one which is sexually unchaste, suggesting of or tending to moral looseness, inciting to sensual desire or imagination, inclined to lechery or tending to arouse sexual desire. People v. Wallace, 11 C.A. 4th 568, 14 Cal.Reptr.2d 67, 70 (1972).

Another pertinent statute is that relating to indecent exposure generally, found at Section 16-15-130. That provision, which in large part, codifies the common law crime of indecent exposure, states:

> [i]t is unlawful for a person to wilfully, maliciously or indecently expose his person in a public place, on property of others, or to the view of any person on a street or highway.
>
> A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both.

Our Supreme Court has held in State v. Rouse, 262 S.C. 581, 206 S.E.2d 873 (1974), that this statute proscribes the exposure of "private parts" to public view.

A third statute, Section 16-15-305 proscribes the dissemination, procuring or promotion of obscenity. Included within the statute's reach is a prohibition of presenting or directing an obscene "play, dance, or other performance, or participat[ing] directly in

that portion thereof which makes it obscene." Section 16-15-305(A)(2). For purposes of the obscenity statute, material is obscene if

> (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;
>
> (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex;
>
> (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and
>
> (4) the material as used is not otherwise protected or privileged under the Constitution of the United States or of this State.

The first question here is whether the proposed ordinance "imposes a greater punishment than that provided under State law for the same offense." Connor, supra. We conclude that it does not.

The Court in Connor cited to City of North Charleston v. Harper, supra. There, the Court found that a city ordinance "set aside a penalty the legislature has found to be appropriate," by imposing a thirty day jail sentence where state law set a thirty day sentence or a fine not less than one hundred dollars nor more than two hundred dollars. Noting that "local governments may not enact ordinances that impose greater or lesser penalties than those established by [the] ... parameters [of state law]," the Court held that such ordinance violated Art. VIII, Sec. 14. In addition, the Court found that the ordinance conflicted with state law in that, under state statutes, municipal judges possessed the power to suspend sentences, whereas, the ordinance made jail time mandatory.

Here, the ordinance imposes criminal penalties of a $500 fine or 30 days in jail, a magistrate's court offense. Sections 16-15-365 and 16-15-130, as well as Section 16-15-305, impose greater penalties. Section 16-15-365 imposes a potential sentence of six months imprisonment or a $500 fine, or both. Likewise, a person who violates Section

16-15-130 must be fined in the discretion of the court, or imprisoned not more than three years, or both. A violation of the obscenity statute is a felony and upon conviction requires an imprisonment of not more than five years or fined not more than ten thousand dollars, or both.

In my judgment, the facts of Harper are distinguishable from this situation. The North Charleston ordinance actually increased the penalty over and above the state statutes in Harper, whereas, here, the ordinance penalty is less than the relevant statutes. While the Court does state that "lesser penalties" cannot be imposed either, the actual holding of the case involved greater penalties, as demonstrated by the fact that Connor subsequently stated that the Court had held in Harper that "a municipality may not impose a greater punishment than that provided under State law for the same offense." Connor, supra, 442 S.E.2d 609.

Moreover obviously, if the ordinance goes beyond state law in the regulation of conduct, then the ordinance does not set aside any penalties which state law imposes. This will be discussed more fully below. I must candidly state, however, that while I believe the ordinance does not violate Art. VIII, Sec. 14, the language in Harper is particularly troubling and we must await further case law before we can reach a final assessment.

A second question under Connor is whether the proposed ordinance proscribes "conduct that is not unlawful under state criminal laws governing the same subject."

In contrast to the Connor case, where the Court held that nude dancing was not unlawful per se, this ordinance, at least facially, appears to deal with conduct which is not "legal" under state law. Required for a violation of the ordinance is that a person must have knowingly or intentionally in a public place engaged in "sexual conduct", as defined, or appeared in a state of "nudity" as defined.

With regard to the "nudity" element, this appears little different from state law proscribing indecent exposure, codified at Section 16-15-130. The ordinance specifically defines "nudity" to include "the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast below a point immediately above the top of the areola, or the showing of covered male genitals in a discernibly turgid state." In Op. Atty. Gen., July 8, 1991, we concluded that the female breasts were "private parts" for purposes of Section 16-15-365 [lewd and lascivious exposure of "private parts"]. We also held that female breasts were encompassed in the indecent exposure statute in Op. Atty. Gen., No. 3165 (August 12, 1971). And in People v. Garrison, 82 Ill.2d 444, 412 N.E.2d 483, 490 (1980), the Illinois Supreme Court

stated that "a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others" include "the genitals, buttocks and female breasts." (emphasis added). While there are authorities that hold that female breasts are not "private parts", see, State v. Jones, 7 N.C. App. 166, 171 S.E.2d 468 (1970), State v. Parenteau, 55 Ohio Misc.2d 10, 11, 564 N.E.2d 505 (1990), this Office has always taken the position that the public exposure of these areas of the female body are subject to the state laws governing indecent exposure.

Moreover, other authorities interpret indecent exposure or similar laws to include the various parts of the human anatomy which are expressly mentioned in the ordinance. See, Hart v. Commonwealth, Va.App., 441 S.E.2d 706, 707 (1994) [term "private parts" includes buttocks and groin]; State v. Blount, 60 N.J. 23, 286 A.2d 36, 40 (1972) [term includes not only organs of reproduction, but immediate vicinity thereof]; State v. Anderson, 128 Ariz. 91, 623 P.2d 1247 (1980) [male genitalia]; Clark v. People, 224 Ill. 554, 79 N.E. 941 (1906) [female genitalia]. Moreover, if exposure of "private parts" is done in a "lewd and lascivious manner", Section 16-15-365 is operative. Thus, as to the "nudity" element of the ordinance, even if Connor requires that the conduct must be illegal under state law in order for the local government to regulate it, such would appear to fit within that mandate.

With regard to the "sexual conduct" element of the ordinance, likewise, at least on its face, the ordinance complies with the Connor language. Virtually every act in the ordinance defined as "sexual conduct" requires the exposure of "private parts" in public, and thus indecent exposure, or the exposure of private parts in a "lewd and lascivious manner" or even obscenity would be a corollary state crime. Obviously, sexual intercourse in a public place would normally necessarily entail the exposure of one's "private parts". People v. Baus, 16 Ill.App.3d 136, 305 N.E.2d 592 (1973) [oral sex in a public place constitutes indecent exposure]. Other acts of sexual conduct in public have been held to constitute indecent exposure or obscenity. Burton v. State, 253 Ark. 312, 485 S.W.2d 750 (1972) [man fondling himself]; People v. Randall, 711 P.2d 689 (Colo. 1985) [masturbation in public]; State v. Strong 446 So.2d 506 (1984 La.App. 4th Cir.) [charge of obscenity for masturbation]; Fultz v. State, 473 N.E.2d 624 (Ind.App. 1985) [prosecution for obscenity for masturbation while standing in front of window of large apartment complex].

Furthermore, assuming arguendo that the proposed ordinance regulates conduct beyond that proscribed by state law, in my judgment, Connor should not be read to say that an ordinance can never further regulate sexual conduct or nudity beyond the State's prohibitions. As noted above, the ordinance in Connor was obviously invalid under the

First Amendment whether or not the municipality had the power under state law to enact it. The question of the ordinance's validity under state law was thus not necessary for the Court to decide.

Indeed, in City of North Charleston v. Harper, supra, which is cited with approval in Connor, the Court while recognizing the well-settled doctrine that a "local government may not forbid what the legislature expressly has licensed, authorized or required", also noted that "more stringent regulation often is needed in cities [or counties] than in the state as a whole." 410 S.E.2d at 571, citing City of Charleston v. Jenkins, supra ("mere fact" that the state has passed certain regulations "does not prohibit a municipality from enacting additional requirements.") That there must be some flexibility between the point where state regulation stops and where local regulation begins was clearly recognized in City of Portland v. Jackson, 316 Or. 143, 850 P.2d 1093 (1992), where the Supreme Court of Oregon had this to say concerning a local ordinance's relation to a state criminal provision:

> "[i]n determining whether the ... provisions of a city criminal ordinance conflict with a state criminal statute, the test is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits." ... Statutes defining crimes normally are not written in terms of permitted conduct; they normally are written to prohibit conduct. If the criminal statutes ... are interpreted to permit all conduct not prohibited, the interpretation would bar all local governments from legislation in the area of criminal law unless the local legislation was identical to its state counterpart.

316 Or. at 146-147. In upholding an ordinance which went beyond the State's indecent exposure statute, the Court in Jackson examined whether the Legislature had by statute expressly permitted the conduct which the ordinance was now prohibiting and, if not, whether the Legislature "has otherwise manifested its intent to allow such conduct."

Likewise, our own Supreme Court has made the same analysis as Jackson in McAbee v. Southern Ry. Co. There, the Court stated:

> [i]n order that there be a conflict between a state enactment and a municipal regulation both must contain either express or implied conditions which are inconsistent and irreconcilable with each other. Mere differences in detail do not render

> them conflicting. If either is silent where the other speaks there can be no conflict between them. Where no conflict exists, both laws stand. (emphasis added).

164 S.E. at 445. See also, 56 Am.Jur.2d Municipal Corporations, 374.

In this instance, nothing in the relevant criminal statutes, Section 16-15-130, 16-15-365 or 16-15-365, indicates an intent to preclude further regulation by local governments to "fill the gaps" left by state law. See, e.g. Op. Atty. Gen., November 17, 1972 (municipality further regulating obscenity). Compare Terpin, supra (extensive state system for regulating fireworks indicates intent that no county ordinance regulating fireworks be enacted); AmVets, supra (bingo ordinance valid as imposing requirements beyond state law). Thus, notwithstanding the language in Connor, and until Connor is further clarified, I do not believe that local governments have lost the authority to further regulate conduct beyond the State's regulation so long as such regulation is not in conflict with state law. Harper, supra; Jenkins, supra.

While I believe this proposed ordinance is facially consistent with state law, still, a word of caution is in order. Conceivably, the definition of "sexual conduct" could be applied in such a way that it proscribes conduct which is in fact completely legal. Use of the phrase "simulated" throughout the definition could fall into that category. For instance, the ordinance defines "sexual conduct" as including vaginal, anal or oral intercourse. One can conceive of situations involving "simulated" intercourse that could pose potential problems. As the Tennessee Attorney General has concluded, a proposed amendment to that state's indecent exposure statute prohibiting the engagement "in simulated sexual intercourse or other sex acts in public ... [is] without regard to whether the person is clothed." For that reason, the Attorney General concluded that, while the proposed amendments were facially valid, the outright prohibition of "simulated" sexual conduct in public could be applied in certain situations to entirely legal or constitutionally protected conduct and, thus, was suspect. See, Tenn. Op. Atty. Gen., No. 92-15 (February 21, 1992).

I must caution you also that at least one Circuit Court in this State has read Connor expansively. In Diamonds et al. v. Greenville County, CA 95-CP 23-2144 (October 5, 1995), the Circuit Court has construed Connor as virtually forbidding a county's adoption of an ordinance proscribing public "nudity". There, "nudity" was even more narrowly defined in the ordinance than here, as "the showing of the human male or female genitals, pubic area or buttocks cavity with less than a fully opaque covering", in other words, virtually parallel to the offense of indecent exposure under state law. Nevertheless, the Circuit Court, reading Connor as prohibitory, held:

> Greenville County Ordinance 2727 provides that it is unlawful for any person to knowingly or intentionally appear nude in a public place or in any other place that is readily visible to the public or for any person or entity maintaining, owing or operating any public place to knowingly or with reason to know, permit, or allow any person to appear in a state of nudity in such public place .... This ordinance, which by its own terms, seeks to prohibit the conduct of being nude in public places, has the effect of criminalizing conduct that is not defined as criminal under the applicable general laws of this state. In enacting Ordinance 2727, Greenville County has exceeded its constitutional power to enact local legislation and Ordinance 2727 fails to meet the first prong of the test enunciated in Barnes and Connor

Order at 4.

As I understand it, consideration is being given by Greenville County to an appeal. If, however, the law in South Carolina is now represented by the Greenville case, the authority of local governments to further regulate public nudity and public sexual conduct is virtually removed. I certainly hope that this is not the case.

Nevertheless, mindful of these problems regarding the potential application of the ordinance to certain situations, I am still of the view that the proposed ordinance would be facially valid under state law.

FIRST AMENDMENT

The remaining issue is whether the proposed ordinance comports with the First Amendment. On its face, the ordinance is, in my judgment, constitutionally valid.

It should first be emphasized that public sexual conduct is not protected by the First Amendment. As the United States Supreme Court stated in Arcara v. Cloud Books, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568, 577 (1986),

> [i]n Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 37 L.Ed.2d 446, 93 S.Ct. 2628 (1973), we underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous

> device of attributing protective expressive attributes to that conduct.

And as the Court stated in Paris I,

> [c]onduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

413 U.S. at 67. In a recent opinion, the Tennessee Attorney General examined portions of a Tennessee statute which prohibited public sexual conduct. The Tennessee statute made criminal engaging in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions or other ultimate sex acts in public. The Attorney General found that the First Amendment was not implicated by such prohibitions and thus there was no need to analyze that portion of the statute under Barnes v. Glenn Theatres. Said the Tennessee Attorney General,

> [a]lthough that portion of the statute is analogous to a portion of the Indiana statute reviewed in Barnes, it was not a portion of the statute which was specifically addressed in Barnes. The United States Supreme Court has held that engaging in actual sexual intercourse or ultimate sex acts in public may be prohibited. The Court has held that because such live public sexual activity has no element of protected expression, prohibitions of such activity are not subject to scrutiny under the First Amendment. Thus, those portions of Tennessee's statute would not be required to withstand analysis under ... [Barnes] ... As a result, it appears that the statute's prohibition against public sexual intercourse or ultimate sex acts is not violative of the First Amendment.

We come now to examination of the public nudity aspect of ordinance. The seminal case in this area is, as has been referenced throughout, Barnes v. Glenn Theatres, Inc., supra. In Barnes, the United States Supreme Court upheld an Indiana public

indecency statute, applied in the context to prevent totally nude dancing. The Indiana statute at issue in Barnes provided:

> (A) A person who knowingly or intentionally, in a public place:
>
> (1) engages in sexual intercourse;
>
> (2) engages in deviate sexual conduct;
>
> (3) appears in a state of nudity; or
>
> (4) fondles the genitals of himself or another person; commits public indecency.

"Nudity" was defined by the Indiana statute using the precise wording used in the proposed ordinance.

The Court's plurality noted that "[s]everal of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment." However, noted the Court,

> Indiana, of course has not banned nude dancing as such, but has proscribed public nudity across the board.

111 S.Ct. at 2460.

The Court noted that the "time, place, or manner" test was "developed for evaluating restrictions on expression taking place on public property which had been dedicated as a public forum ...". Id. Thus, since the public indecency statute was aimed at what are "essentially places of public accommodation", it was appropriate to apply the test previously enunciated by the Court in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). O'Brien involved the burning of a draft card on the steps of the South Boston courthouse in the presence of a crowd. There the Court stated:

> This Court has held that when "speech" and "nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms ... (W)e think it clear that a

> government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

111 S.Ct. at 2461. Applying the O'Brien test, the plurality determined that the public indecency law was "justified despite its incidental limitations on some expressive activity. With respect to application of the statute to nude dancing, the plurality stated:

> ... we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is prescribing nudity because of the erotic message conveyed by the dancers ... (w)hile the dancing to which it applied has a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

Requiring the dancers to wear pasties and a G-string thus did not violate the First Amendment.

Justice Souter separately concurred in an opinion, thereby providing the Court's majority. The differing views of the plurality and Justice Souter has been described in Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641 (M.D.Fla. 1994) as follows:

> [f]ive of the Justices in Barnes had no difficulty in finding that a public indecency statute is within the constitutional power of the State. Indeed, Justice Scalia concurred in the judgment on the basis that a law regulating conduct, and not specifically directed at expression, is not subject to First Amendment scrutiny at all. The only difference between the plurality and Justice Souter related to identification of the substantial governmental interest served by the anti-nudity proscription. The plurality found such interest to be the protection of order and morality, tracing the history and purpose of such laws to the ancient common law. Justice Souter, on the other hand, believed the governmental interest served by the statute to be "the State's substantial interest in combating the secondary

> effects of adult entertainment establishments of the sort typified by respondent's establishments."

856 F.Supp. at 644, citing 111 S.Ct. at 2468-2469.

Our Supreme Court in Connor found that Hilton Head's ordinance did not pass muster under the Barnes test. The ordinance before the Court made it unlawful to own or operate a "sexually oriented business" defined as a nightclub or bar where nude or semi-nude dancing is performed and alcoholic beverages are served. The Court held that the Hilton Head ordinance "targets the sexual or erotic message of nude dancing which is constitutionally protected expressive conduct. Unlike the statue in Barnes, the ordinance here is not a valid restriction on nude dancing because it is not content-neutral." 442 S.E.2d at 607.

Here, however, the ordinance is, on its face, indeed content-neutral. In fact, the ordinance specifically is deemed not "to apply to a performer while performing an adult entertainment establishment lawfully existing in compliance with Appendix B, Section 526 of the Horry County Code of Ordinances." Nothing in the proposed ordinance appears to target nude or semi-nude dancing per se. Like Barnes, the proposed ordinance is aimed at nudity and sexual conduct in public.[1]

Again, with respect to the public nudity aspect of the ordinance, the recent Tennessee Attorney General's opinion is instructive. The Horry County definition of "nudity" is virtually identical to the Tennessee statute reviewed in that opinion as well as to the Indiana statute scrutinized by the United States Supreme Court in Barnes. As stated by the Tennessee Attorney General, "the public nudity portion of the Tennessee statute, which is virtually identical to the Indiana statute is not violative of the First Amendment." Thus, the Tennessee Attorney General found that the statute proscribing public nudity, as well as public sexual conduct was facially valid under the United States Constitution. Other courts are in accord. See, D. G. Rest. Corp. v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1994); O'Malley v. City of Syracuse, 813 F.Supp. 133 (N.D. N.Y. 1993); Bright Lights, Inc. v. City of Newport, 830 F.Supp. 378 (E.D. Ky. 1993).

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[1] Moreover, I do not believe the Court in Barnes intended, as was held in the Greenville case, to strike down an otherwise valid ordinance under the First Amendment based upon an analysis of whether the ordinance comported with state law. In fact, the Circuit Court recognized that the nudity ordinance if adopted in the form of a state statute, would probably be constitutionally valid in terms of the First Amendment.

As noted earlier, however, the Tennessee Attorney General found potential constitutional problems as to use of the term "simulated" with respect to sexual conduct in public. In that regard, he wrote:

> [b]ecause simulated, as opposed to actual sexual intercourse has not been held to be unprotected by the First Amendment, it appears at a minimum that portion of the statute would be required to meet the four-prong test of O'Brien [and Barnes]. Because the language in question singles out a particular form of movement, it might be found to fail the third prong of the O'Brien test is that it is not unrelated to the suppression of free expression. The result under O'Brien is unclear.
>
> If that portion of the proposed amendment is required to meet the more stringent requirements of the regulation of obscenity, it would be found to violate the First Amendment because it does not incorporate the three part test set forth in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) for regulating obscenity.

In light of the fact that the Court in Barnes upheld against First Amendment attack, a statute proscribing nudity and sexual conduct in public, it is my conclusion that the ordinance here is facially valid. While the same caveats expressed above with respect to state law, can be made with equal force with respect to First Amendment analysis, and thus it is conceivable that the ordinance could be applied in certain situations to protected conduct, it is instructive to remember what the United States Supreme Court said in Broaderick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) about overly broad regulation as it affects conduct rather than pure speech. The Court noted that when First Amendment overbreadth claims have been invoked against ordinary criminal laws that are sought to be applied to protected conduct, the usual remedy is to reverse any criminal conviction flowing from the law as unconstitutionally applied, rather than adjudicating the law itself to be facially invalid. Said the Court,

> [b]ut the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the unprotected behavior that it forbids moves from "pure speech" toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws the reflect legitimate state

> interests in maintaining comprehensive controls over harmful constitutionally unprotective conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.... To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep ... [w]hatever overbreadth may exist should be cured through case by case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

93 S.C. at 2917-2918.

CONCLUSION

The proposed ordinance proscribing public nudity and sexual conduct in public regulates conduct rather than speech. Like the statute in Barnes, supra and unlike the ordinance in Connor, supra, the ordinance appears content-neutral.

The ordinance is not inconsistent with state law by imposing a greater punishment than does state law. And notwithstanding Connor and the recent Greenville County case, I do not believe the ordinance seeks to prohibit conduct which state law permits. McAbee v. Southern Ry. Co., supra; AmVets Post 100 v. Richland Co. Council, 280 S.C. 317, 313 S.E.2d 293 (1984). Even assuming Connor now forbids a county or municipality from regulating conduct which is not illegal under state law, the ordinance here, in my judgment, regulates conduct which is proscribed by the indecent exposure and obscenity statutes.

In short, it is my opinion that the proposed ordinance is valid on its face both under state and federal law. This is based upon the fact that the ordinance, if enacted, would be entitled to a presumption of validity as well as the fact that the ordinance generally comports with Barnes and is distinguishable from Connor and Harper.

I must recognize several caveats, however. First, there are conceivable circumstances where the Ordinance could be applied to situations where the conduct is

either constitutionally protected or is legal. I have in mind the use of the word "simulated" and the county may wish to delete that word or further define it.

In light of Connor, the County may also wish to further clarify that the prohibited conduct must be reasonably capable of being seen by members of the public.[2]

Third, while I do not believe it required, see, Cafe 207 v. St. Johns County, supra, the County may wish to make specific findings as to the secondary adverse effects of public nudity consistent with Justice Souter's concurring opinion in Barnes (see Greenville County Ordinance No. 2727, supra). Of course, any of the foregoing changes are merely suggestions for the County to consider.

Finally, I must again note that particular language in Harper and Connor is troubling, and we must await further court review before we can predict with certainty the future of these types of ordinances. I am hopeful that the Court did not intend to go as far as this language suggests. In that light, you may wish to consult with Greenville County officials as to whether the Circuit Court order, referenced above, will be appealed and, if so, whether Horry County wishes to await further clarification from the Courts, or to proceed with its ordinance. This again, is a matter for the County to determine.

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[2] Assuming arguendo, that Connor requires that the conduct must be illegal under state law, then presumably the ordinance may not be applied to situations where indecent exposure or obscenity laws do not apply. Indecent exposure requires occurrence at a time and place where a reasonable person knows or should know his act will be seen to the observation of others. State v. Borchord, 24 Ohio App.2d 45, 264 N.E.2d 646, 650 (1970). No one need have seen the exposed person so long as exposure was intentionally made in a public place and could have been seen by persons present had they looked. 67 C.J.S. Obscenity, § 11. Bottomless dancing in a bar where the dancer simulates sexual intercourse has been held to constitute the crime. People v. Newton, 9 Cal.App.3d Supp. 24, 88 Cal.Reptr. 343 (1970) as has nude dancing generally where the vaginal area was exposed. Young v. State, 286 Ark. 413, 692 S.W.2d 752 (1985); Threet v. State, 710 S.W.2d 98 (Tex. App. 1986) [removal of g-string]. The performance of oral sex in a clump of bushes at 7:00 a.m. has been held sufficient, People v. Baus, supra, as well as where a child has to walk up to a pick-up truck and look down at the lap of the person sitting inside and exposing himself. State v. Artrip, 112 N.M. 87, 811 P.2d 585 (1991). Courts distinguish between motor vehicles which can be seen into without difficulty and other places such as bathroom stalls which are, when closed, removed from public view to the casual observer. See, Chubb v. State, 627 N.E.2d 842 (1994).

Accordingly, I would conclude that the proposed ordinance is facially valid.

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