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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 30, 1996

Robert L. Williams, Chief of Police
Town of Santee
Post Office Box 757
Santee, South Carolina 29142

Re: Informal Opinion

Dear Chief Williams:

You have asked for an Opinion concerning interpretation of the municipal business license ordinance of the Town of Santee. You present a number of questions with respect to application of the Ordinance to a particular business known as Spinners, Inc. Apparently, Spinners applied for a business license to operate a lounge and video poker operation in May of this year and such license was granted. In addition, you state that

> [a]round the latter part of September, first week of October 1996, SPINNERS INC. added adult entertainment to its business. The manager nor his partner applied for a business license for this type of entertainment.
>
> The Town of SANTEE does not have a zoning ordinance.

You have presented a lengthy list of questions concerning this situation. Your questions include:

1. Does SPINNERS INC. violate Section # two of the ordinance?

2. Does SPINNERS INC. violate Section # four, where they would need to obtain a license for each girl that dances nude?

3. Does SPINNERS INC. violate Section # one of the ordinance?

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4. Does SPINNERS INC. violate Section # six of the Santee Business License Ordinance?

5. Does SPINNERS INC. violate Section # ten of the Santee Business License Ordinance?

   [This Section states that a business license shall not be transferrable and a transfer of ownership shall be considered a termination of the old business requiring a new business license based on the old business income?]

6. Does SPINNERS INC. violate Section # fourteen of the ordinance by having nude dancers without first purchasing a license or making application?

7. Can the town of Santee revoke SPINNERS INC. license for operating a sexual[ly] oriented business without a license [Section # thirteen]?

8. Can SPINNERS INC. use their lounge and video poker license to operate a sexual[ly] oriented business?

9. Can the town of Santee require each dancer to obtain a business license?

10. Does Section # eleven give the Chief of Police a right to close a place of business without consulting his town council and placing penalty for each day the business operated without a license?

11. Does lounge mean any type of entertainment?

LAW/ANALYSIS

Section 1 of the Santee License Ordinance for 1996 extends a business license from the first day of July, 1996 to the thirtieth of June, 1997. If Council fails to pass an Ordinance imposing license taxes for the next year, those taxes imposed for the preceding year are carried forth.

Section 2 makes it unlawful to engage in, prosecute or carry on "any business, trade or profession in whole or in part" within the corporate limits of the Town without having paid the license tax.

Section 3 requires a separate license fee for "each place of business and every class of business for which a license tax is required ...". Section 3 further provides that

> [w]here (2) or more kind[s] of business are conducted in the same place, it shall be the duty of the licensee to keep an accurate account of the affairs of each kind of business and to satisfactorily separate the affairs of each so that the paper amount of tax imposed and payable on each type of business may be readily ascertained, otherwise the maximum rate applicable to any type of business being operated shall apply to the whole.

Section 4 of the Ordinance requires payment of the tax within the time limits prescribed and Section 5 provides for prorating license fees. Section 6 requires business to be hooked to Santee's water and sewer system prior to purchasing a business license.

Pursuant to Section 10 of the Ordinance, a business license is not "transferable and a transfer of ownership shall be considered a termination of the old business and the establishment of a new business requiring a new business license, based on the old business income." It is the duty of the Chief of Police, pursuant to Section 11, to "aid and assist in the detecting [of those] who fail to procure [a] license as herein required ... ." All businesses are mandated to keep the business license "at all times of business in a conspicuous part of the business place" and produce such license on demand.

Section 12 sets a charge of ten percent for late payment of license fees. Pursuant to Section 13, Council is empowered to revoke a license for cause. Finally, Section 14 establishes penalties for engaging in business without a license.

Clearly, the State or the General Assembly has the power "to delegate to municipal corporations ... authority to levy and collect license charges, for either revenue or regulation ... ." 51 Am.Jur.2d, Licenses and Permits, § 89. Moreover,

> "[l]iability for a license, privilege or occupation fee or tax, and the nature and extent of such liability, depend on the terms of the statute or ordinance by which the fee or tax is imposed.

This being the case, the scope of a business license ordinance may not be extended by implication. City of Cola. v. Niagara Fire Ins. Co. 249 S.C. 388, 154 S.E.2d 674 (1967). Such ordinances must be construed liberally in favor of the citizen and strictly against city government. Triplett v. City of Chester, 209 S.C. 455, 40 S.E.2d 684 (1946).

As to whether Spinners, Inc. is or is not "violating" a particular section or sections of the Ordinance in question is, of course, ultimately a question of fact. This Office is not able to make factual determinations in an Attorney General's Opinion. However, in an effort to be of as much assistance as possible, I will attempt to address your questions generally.

The following principle is often recognized:

> when a person or corporation is engaged in a primary business, an activity merely incidental thereto ... and which serves no other person or business is engaged in, the incidental and restricted activity is not intended to be separately or additionally taxed ... .
>
> Another test applied under appropriate circumstances is whether or not the subject of the license tax is engaged in his own business, the business of his employer, or in his business such as would constitute him an independent contractor. If he is an independent contractor holding himself out to be employed by others for a charge, he is subject to the license tax but if he is the mere servant or employee of another, he is not subject to the license tax.

State ex rel. Dawes v. Nelson, 155 Fla. 399, 20 So.2d 394, 395 (1945). Put another way, it has been stated that the

> [p]ower to impose a license tax upon a business does not authorize a division of the business into its constituent elements, parts or incidents, and the levy of a separate tax on each element, part or incident. A single taxable privilege may not be separated into its various component elements as ordinarily recognized and a separate license tax imposed on each element. For example, dividing a single merchandising privilege into many and requiring separate licenses to sell special articles which necessarily belong to one legal privilege,

> and which the law permits to be sold under one license is improper.

McQuillin, Municipal Corporations, § 26.39.

On the other hand, however,

> [m]any types of businesses may be and often are conducted from the same premises by the same owner, resulting in the lawful imposition of more than one license tax. If the businesses are additional and different and are not merely component parts of a single licensed privilege, they may be subjected to different license taxes or fees, although it frequently is a close question whether particular business enterprises, operations or activities of the same owner are inseparable components of a single business or are different businesses within this rule. (emphasis added).

This same reasoning was applied by this Office in an Opinion dated December 20, 1965. There, the question was whether Hartsville Oil Mill was required to pay an additional license tax imposed by the City of Hartsville. The Oil Mill manufactured cotton seed oil, soybean oil and other products and was required to pay a business license tax imposed by the City on manufacturing corporations. The Company then began operating a warehouse used to store the cotton of its customers, such cotton later going into the manufacturing process at the mill. The company argued that an additional business license was necessary as a "warehouse, with storage for hire."

This Office referenced the general rule that a "'person engaged in several district occupations or businesses in the same licensing territory may be required to pay a license tax for each ... .'" Noting that "South Carolina apparently follows this general rule", we also cited the decision of the South Carolina Supreme Court, Wood-Mendenhall Co. v. City of Greer, 88 S.C. 249, 70 S.E. 724 (1911). In that instance, an individual was engaged in the general merchandise business and operated in connection with such business a general repair shop under the same roof, where blacksmithing, woodwork and painting were done. The Court had held that the City of Greer could require the company to obtain a license for operating a paint shop as well as the one it had previously gotten for carrying on the business of "merchandise" and "blacksmith". The Court explained its reasoning thusly:

> [i]t is true that the painting which is merely incidental to the finishing job of blacksmithing might properly be included in and covered by a license to carry on the business of "blacksmithing", but it appears that plaintiff did painting outside of and not connected with the business of "blacksmithing." That was a business separate from and independent of that of "blacksmithing", and was not covered by the license. (emphasis added).

Applying that reasoning, we thus stated with respect to the Hartsville Oil Mill situation, that

> [u]nder the Greer case, the ability of the City of Hartsville to require the second license apparently turns on whether the company's warehouse operation is separate and independent from its manufacturing operation or is merely incidental thereto. This involves a question of fact. This office is not a judicial tribunal and is not authorized to decide disputed issues of fact relative to municipal taxing powers. However, the information before [us] indicates that the courts would declare the warehouse operation of the Hartsville Oil Mill separate and distinct from its manufacturing operation, and thereby uphold the additional license tax imposed on the company. The storage rates are competitive with other warehouses in the area, and it appears that the company is ... [providing] storage facilities available to its customers with a profit potential to it for such services. Further this storage is not a necessary step in the manufacturing process, nor is the company owner of the goods during the storage period.

Thus, the issue is whether the provision of adult entertainment is a separate and independent business requiring a second business license or whether such activity would be considered as merely incidental to the operation of a lounge and video poker parlor. This is obviously a factual determination, based upon all the existing circumstances. However, there is a good argument that so-called "adult entertainment" featuring nudity would not be considered as part of or incidental to the operation of a lounge and video poker parlor.

In this regard, I call your attention to a number of cases. First and foremost, is Barnes v. Glen Theatre, Inc., 501 U.S. ____, 111 S.Ct. ____, 115 L.Ed.2d 504 (1991).

There, the United States Supreme Court upheld an Indiana statute prohibiting public nudity. Such statute was deemed by the Court as valid in the context of nude dancing at an establishment where the dancers wore only G-strings and pasties. The Court applied the four-part test enunciated in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) to find constitutional a statute designed to protect "societal order an morality." The Court recognized that public nudity or indecency was a crime at common law and that statute prohibiting such behavior were part of the States authority "to provide for the public health, safety, and morals ... ." 115 L.Ed.2d at 513. Viewed as "the evil the State seeks to prevent", the Court concluded that the statute was a valid exercise of the power reflecting "societal disapproval of nudity in public places and among strangers." Id. at 515. Concurring with the plurality, Justice Souter recognized that "[i]t ... is no leap to say that live nude dancing of the sort at issue ... is likely to procure ... pernicious secondary effects ..." in the community. 115 L.Ed.2d at 523.

Other cases also represent the distinct nature of nudity in public and society's strong desire to prohibit such behavior. In City of Las Vegas v. Nevada Industries, 15 Nev. 174, 772 P.2d 1275 (1989), the Nevada Supreme Court upheld a decision to revoke Nevada Industries' business license on the basis of the applicant's misleading the City regarding its operation. Nevada Industries operated a lounge with a jacuzzi and meeting rooms but did not state on its application that, in reality, it was a "sexually oriented business, i.e. a 'nude show.'" the fact that the nude show aspect of the business was not revealed to the City amounted to the "perpetration of a fraud" by Nevada Industries upon the public. Obviously, the underlying principle of this case is that a "nude show" is not deemed by anyone to be part and parcel of the operation of a lounge.

Also, in City of Las Vegas v. 1017 South Main Corporation, 110 Nev. 1227, 885 P.2d 552, 555 (1994), the Nevada Supreme Court, referencing Barnes, said that "... we consider nude dancing for what it is; prurient entertainment only marginally within the outer perimeters of First Amendment protection."

And in Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the United States Supreme Court upheld a city's zoning ordinance "designed to prevent the occurrence of harmful secondary effects, including the crime associated with adult entertainment, by protecting approximately 95% of the city's area" from the placement of motion picture theaters. See, Barnes, supra at 522 (Justice Souter, concurring). Renton stressed that the purpose of the ordinance was to protect the City's patrons from "'rather depicting, describing or relating to "specified sexual activities" or "specified anatomical areas ... ."

In short, there is no doubt that "adult entertainment" in the form of public nudity is viewed by courts and legislatures everywhere as a distinct subject of regulation and/or prohibition. Thus, a good argument could be made that, pursuant to the ordinance in question, a separate business license would be necessary because adult entertainment is a separate and independent business from the other operations of Spinners. Again, such is ultimately a factual determination which the Town of Santee and its attorney will have to make.

I would note also that a municipality may install a zoning or licensing scheme for so-called "adult entertainment". Our Supreme Court has upheld an ordinance requiring that sexually oriented businesses be situated in a specified zoning district and be at least 1,000 feet from a church, school, park or another sexually oriented businesses. Rothschild v. Richland Co. Bd. of Adjustment, 309 S.C. 194, 420 S.E.2d 853 (1992). As the Court stated in Wolff v. City of Monticello, 803 F.Supp. 1568 (D.Minn. 1992),

> [i]n FW/PBS, Inc. v. City of Dallas [493 U.S. 215, 224-27, 110 S.Ct. 596, 604-05, 107 L.Ed.2d 603 (1990)], the Court set forth three requirements for licensing ordinances governing sexually-oriented businesses. First, the regulation cannot place unbridled discretion in the hands of a government official or agency ... . Second, the licensor must decide whether to issue the license within a specified and reasonable time ... . Third, there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

803 F.Supp. at 1573.

Moreover, our Supreme Court has upheld a county ordinance which contained certain licensing provisions of "sexually oriented businesses" as not being in conflict with the First Amendment. In Centaur, Inc. v. Richland County, South Carolina, 301 S.C. 374, 392 S.E.2d. 165 (1990), the Court stated:

> [s]pecifically, Centaur argues that Sec. 8A-5(3) vests the Zoning Administrator with unfettered discretion to deny licenses when an applicant fails to supply information "reasonably necessary" for their issuance. We disagree. The Ordinance provides the Administrator with a standard "susceptible of objective measurement," thus adequately circumscribing his discretion. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298

> (5th Cir.1988), rev'd on other grounds, ___ U.S. ___, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).
>
> Centaur further contends the provisions covering suspension and revocation of licenses are not narrowly tailored. These provisions, however, are "not substantially broader than necessary to achieve the [County's] interest." Ward v. Rock Against Racism, ___ U.S. ___, ___, 109 S.Ct. 2746, 301 S.C. 381, 2758, 105 L.Ed.2d 661, 681 (1989). We uphold their constitutionality.

301 S.C. at 380 - 381.

With respect to your specific list of questions, again these are ultimately mixed issues of law and fact and, as we concluded in the 1965 opinion referenced above, only a judicial tribunal can decide factual issues. Your questions may be boiled down to this: whether a separate business license is required of the so-called "adult entertainment" aspect of this business because such operation is separate and independent from one classified as an "amusement center, arcade or place whose business is primarily to provide entertainment with video games, pinball games, etc." In short, one would not expect to find nude dancing in this type of establishment and thus a good argument can be made that a separate license is required pursuant to Section 2 of the Ordinance. I am not certain, however, what the appropriate classification of this aspect of the business would be, unless it would be as a "Dance Hall" or some similar classification. I would suggest you consult carefully with your attorney in this matter as he is much closer to the situation and is aware of all the existing facts and circumstances.

Of course, a business license ordinance, even if controlling, is primarily a revenue raising tool, rather than being one regulatory in nature. I would thus note that the type of "adult entertainment" establishment with which you are concerned is typically more fully regulated to protect the community from the secondary effects of sexually oriented business through a zoning ordinance. As noted, the United States Supreme Court, as well as our own Supreme Court, have upheld such properly drafted zoning ordinances, which seek to regulate adult businesses. See, Renton, supra; Rothschild, supra; Centaur, supra.

Moreover, I am also enclosing copies of two Informal Opinions, written by me, and dated September 19, 1996, and October 18, 1995 which discuss in considerable detail the adoption of ordinances which prohibit public nudity in light of the Barnes case, discussed above. These informal letters, fully express the serious concerns which so-called "adult entertainment" (nude dancing) present to every community. The Greenville case,

discussed in those two opinions, is still pending before our State Supreme Court, and when an Opinion is issued by the Court, municipalities and counties should have a much better idea of how far they will be able to go in adopting prohibitory ordinances relative to public nudity and "sex-oriented" businesses.

Again, I would advise that you work closely with your attorney in resolving this matter. I sympathize with your concerns and trust the enclosed information will be helpful to you.

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