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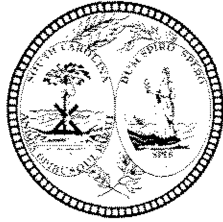

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 19, 1996

Timothy M. Cain, Esquire
Oconee County Attorney
Post Office Box 698
Seneca, South Carolina 29679

Re: Informal Opinion

Dear Mr. Cain:

You have enclosed a draft of an ordinance prepared at the direction of the Oconee County Council. You seek an opinion from the Attorney General "with respect to whether or not a County Council may enact such an ordinance regulating public nudity in light of the decision of the South Carolina Supreme Court in the case of Connor v. Town of Hilton Head, 442 S.E.2d 608 (S.C. 1994)." Also, you have enclosed a copy of your letter addressed to the County Supervisor and the Oconee County Council briefly summarizing your own research of this question. You stated therein:

> [i]n summary, as you can see, local governments, to include County governments, face many legal challenges in attempting to regulate or prohibit public nudity. It is for these reasons, that it is the recommendation of this office that council proceed carefully prior to enacting an ordinance which regulates this type of conduct at the local level.

In an Informal Opinion, dated October 18, 1995, I addressed the precise issue raised by you. Therein, I considered the constitutional validity of a proposed Horry County Ordinance regulating public nudity. Following a lengthy analysis based upon the United States Supreme Court decision of Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), United States v. O'Brien, 391 U.S. 367, 88 S.Ct.

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1673, 20 L.Ed.2d 672 (1968) and Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641 (M.D. Fla. 1994), I concluded:

> [i]n short, it is my opinion that the proposed ordinance is valid on its face under both 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 [v. Town of Hilton Head] and [City of North Charleston v.] Harper.

However, I expressed considerable concern not only about our Supreme Court's ruling in Connor, but also the Circuit Court's decision in Diamonds et al v. Greenville County, CA# 95-CP-23-2144 (October 5, 1995). I noted that if Diamonds, which struck down a public nudity ordinance on the basis of Connor, is indeed "the law in South Carolina ..., the authority of local governments to further regulate public nudity and public sexual conduct is virtually removed." As you indicate, Diamonds has been appealed to the South Carolina Supreme Court and has already been argued. The case is awaiting a decision and, hopefully, with all respect to the lower Court, the Diamonds ruling will be altered.

As I stated in my October 18, 1995 Opinion, I believe the appropriate analysis is that "[n]otwithstanding the language in Connor and until Conner 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." I think the case of City of Portland v. Jackson, 316 Or. 143, 850 P.2d 1093 (1992), which upheld an ordinance which went beyond the State's indecent exposure statute best expresses the law in this area:

> "[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. 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.

Since my October 18, 1995 letter was written, the case of Pap's A.M. v. City of Erie, 674 A.2d 338 (Pa. 1996) was decided. There, the Court upheld a nudity ordinance as not being violative of the First Amendment and not being preempted by state law. The Court noted that the statute in Barnes "is virtually identical to the one in our case." Applying the four-part test of Barnes, the Court concluded that each prong was met. It is particularly interesting to note that, unlike Connor and Diamonds, the Court analyzed the first prong of the Barnes test - that the restriction must be within the constitutional power of the state - was met. The Court noted that

> [g]overnmental attempts at controlling secondary effects associated with adult entertainment serve the government's substantial interest in promoting the health, safety and welfare of the people.

674 A.2d at 343.

Continuing to apply Barnes, the Court held that the ordinance "furthers the City's substantial interest in safeguarding the public from these harmful secondary effects", that it "is related to the avowed purpose of safeguarding the public from the harmful secondary effects associated with adult entertainment", and the ordinance "is narrowly tailored." Accordingly, said the Court,

> ... the ordinance satisfies the requirements of O'Brien and does not violate Pap's First Amendment rights, despite the incidental limitations on some expressive activity.

Moreover, unlike Diamonds, the Court in Pap's, held that state law did not preempt the right of local governments to further legislate in this area. Reasoned the Court,

> [t]he obscenity statute at issue does not state that it preempts the field, and in fact, subsection (K) of the statute permits local governments to enact laws in the area of obscenity as long as they are consistent with the statute. The indecency Ordinance and obscenity statute may overlap in some areas, but they regulate different activities. The Ordinance was enacted to prohibit public nudity, not obscene behavior, and was designed to protect the public from secondary effects associated with nude dancing, not lewd behavior. It was not enacted for the purpose of criminalizing obscene behavior; in fact, the Ordinance does not mention obscenity. ... According-

> ly, we hold that the Ordinance is not preempted by the Pennsylvania obscenity statute.

Based upon the foregoing, I reiterate my Informal Opinion of October 18, 1995, concluding that the proposed Horry County Ordinance was constitutionally valid, and enclose a copy of the Opinion for your information. My advice would be to await the Supreme Court's decision in Diamonds which, hopefully, will conclude that counties may proscribe public nudity in accordance with Barnes and subsequent cases cited 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/ph

Enclosure