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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

July 15, 1998

Gregory A. Hoover, Chief of Police
Moncks Corner Department of Public Safety
118 Carolina Avenue
Moncks Corner, South Carolina 29461

Re: Informal Opinion

Dear Chief Hoover:

You have asked whether a person can be convicted for violating S.C. Code Ann. Sec. 16-17-530 "if the location of the offense is inside an establishment that operates as a Nonprofit organization (commonly called 'a private club')?" You indicate that "[t]he question arises because an element of the offense of Public Disorderly Conduct dictates that the violation occur 'at any public place or public gathering, yet according to Section 61-6-20(6) of the Alcoholic Beverage Control Act, a 'Nonprofit organization' is defined as an organization not open to the general public."

Law / Analysis

S.C. Code Ann. Sec. 16-17-530 reads as follows:

> [a]ny person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or **at any public place or gathering** or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, shall be deemed guilty of a misdemeanor and upon conviction

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> shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

Thus, the issue is what is meant by a "public place" for purposes of the statute and whether such term includes a so-called "private club." It is my opinion that, generally speaking, private clubs are included within the Disorderly Conduct statute.

Our Supreme Court, in State v. Williams, 280 S.C. 305, 312 S.E.2d 555 (1984) construed the term "public place" for purposes of the disorderly conduct statute. There, the Court found that the definition, included in Blacks Law Dictionary (4th ed.) was a "proper and satisfactory one." Quoting the Court, a "public place" is

> [a] place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. People v. Whitman, 178 App.Div. 193, 165 N.Y.S. 148, 149. Roach v. Eugene, 23 Or. 376, 31 P. 825. Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Steph. Cr. L. 115. Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro. Lewis v. Commonwealth, 197 Ky. 449, 247 S.W. 749, 750.

In Williams, the Court concluded that an assault upon a police officer which occurred in a waiting area at the Austin Wilkes Society Home transpired in a "public place" for purposes of the disorderly conduct statute. Applying the foregoing definition, the Court stressed that

> [r]ooms at the Austin Wilkes Society Home are rented to persons referred to in the record as tenants. The Appellant had paid in advance and the disturbance created related to his seeking a refund. He was free to leave as any guest in a hotel might depart. At the Home, there were some eight or nine tenants other than the Appellant. The area in which the assault took place was described as ".... a large waiting area or game room or something like a big living room with a TV, etc."

280 S.C. at 307.

Apparently, our courts have not yet addressed the issue of whether a so-called private club is a "public place" for purposes of the disorderly conduct statute. However, a number of courts in other jurisdictions have concluded that a private club constitutes a public place in a variety of contexts.

For example, in Club Ramon, Inc. v. U.S., 296 F.2d 837 (4th Cir. 1961), the Fourth Circuit held that an establishment selling food and liquor, providing music and permitting dancing was a "public place" for purposes of a statute imposing a cabaret tax, even though the club purported to be private. The Court found that "[t]he pretense set up in the charter and in the by-laws that the organization is a private club has no foundation in fact ...." 296 F.2d at 839.

In Hendricks v. Commonwealth, 865 S.W.2d 332 (Ky. 1993), the Supreme Court of Kentucky concluded that a nude dancing establishment was a "public place" within the scope of a Newport city ordinance. The Court noted that its question was whether the Newport ordinance "applied to a private club ...." Evidence presented below tended to show that

> ... the nonprofit corporation holds regular meetings and is a private club and that the club has a yearly membership fee of $25 which entitles a member to five visits. A member i charged $5 for each visit to the club thereafter while nightly guest passes are $7 and guests are limited to two visits per month. Prior to incorporation as a nonprofit entity, the Mousetrap was operated as an adult entertainment establishment. It was admitted that the nature of the dancing and adult entertainment had remained the same under the Society as it had previously been presented. There was testimony by Joan Craig, president, treasurer and principal incorporator of the Society, that she does not have the addresses of all the members and does not require members to give an address. The only method of notifying members of meetings is a leaflet which is kept in the Club. It was also stated by the president that the only means of enforcing the two visit limit for nonmembers is that they have the same doorman. She also admitted that she did not expect the doorman to remember how many times an individual came into the club on a monthly basis.

865 S.W.2d at 334. In analyzing whether the private club was a "public place," the Kentucky Supreme Court relied upon United States v. Landsdowne Swim Club, 713 F.Supp. 785 (E.D. Pa. 1989) which enunciated eight factors in determining whether a club was truly private or not. The Court in Hendricks stated:

> [t]he first factor is the substantiality of membership dues. Here, the membership is not substantial and only gives a $2 savings per visit to those who pay $25 initially instead of paying the nightly $7 entrance charge. A second factor is the numerical limit on club membership. The Mousetrap Society has no numerical limit on its membership. Next is the membership control over selection of new members. Mousetrap members have no control over the acceptance of other members. A fourth factor is the formality of the admission procedures of the club. In this case, there are no formalities to the admission of new members. Although there is a reference to a membership oath dispensing with formalities, there is no evidence of any oath being administered in this case. A final factor is the standard for admission and here there is none.
>
> Other elements described in Landsdowne, supra, are the membership's control over the operation of the establishment, the purpose of the club's existence, use of the facility by nonmembers and history of the organization.

865 S.W.2d at 334-335. Primarily based upon the fact that "admission to the Mousetrap Society and its entertainment was indiscriminately granted to any member of the public on the payment of an admission fee ...", and there was "no permanency in the alleged membership," the Court concluded that the club was a public place. Id. at 335.

And in City of Westland v. Okopski, 208 Mich. App. 66, 527 N.W.2d 780 (1994), the Michigan Court of Appeals determined that the rental of a Knights of Columbus Hall for a private wedding reception was a "public place" for purposes of a disorderly conduct ordinance. Noting that the hall was "available for rental by the general public" and that such hall was "a building where members of public go for entertainment ...", the Court concluded that the fact that the particular purpose for which the hall would be used did not serve to change the building's character.

Finally, in Op. Atty. Gen., Op. No. 3165 (August 12, 1971), this Office recognized that "... a restaurant, night club or bar would be a 'public place' within the meaning of the [indecent exposure] statute and this would seem to be so whether or not labeled 'private' for purposes of liquor licensing." Section 61-6-20(6) defines a "[n]onprofit organization" as "an organization not open to the general public, but with a limited membership and established for social, benevolent, patriotic, recreational or fraternal purposes." Thus, we have concluded that the fact that an establishment is characterized as "not open to the general public ..." for the purposes of alcohol licensure does not preclude the business from being deemed a "public place" for other purposes.

Of course, whether or not an establishment is a "public place" for purposes of **the disorderly conduct statute** is ultimately a question of fact. Each business will have to be looked at in its entirety, based upon all the circumstances. In making a case, the officer should be particularly guided by the definition set forth in State v. Williams, supra as well as the criteria enunciated by the Kentucky Supreme Court in the Hendricks case. However, generally speaking, the types of "private clubs" to which you are referring would likely be covered by the disorderly conduct statute. You will note that one of the definitions referenced by our Supreme Court in Williams was that the place was one "in which the public has an interest as affecting the safety, health, morals and welfare of the community." Clearly, the types of "private clubs" with which you are concerned would fall in this category. Moreover, usually membership in such clubs is open to anyone willing to pay a nominal fee. While each situation must be governed on its own facts, and I cannot make factual determinations in an opinion, more than likely, the typical "private club" would likely be a "public place" for purposes of disorderly conduct.

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