The State of South Carolina

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The Honorable Larry A. Martin
Member, House of Representatives
418C Blatt Building
Columbia, South Carolina 29211

Dear Representative Martin:

In a letter to this Office you raised several questions regarding proposed legislation, H.3513, which deals with "bottomless entertainment" at establishments which sell alcoholic beverages. As expressed in the title, such legislation amends Sections 61-5-60 and 61-9-410 which deal with the grounds for suspension, revocation or nonrenewal of a license to sell liquor and the acts which are prohibited on premises licensed to sell beer and wine so as to prohibit "bottomless entertainment" at premises licensed to sell alcoholic beverages. You asked whether the proposed legislation is constitutional or in conflict with existing relevant case law. You also questioned whether the "Chippendolls" decision, a case which arose in Richland County, would apply in situations addressed by the proposed legislation.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this state to declare an act unconstitutional.

As referenced above, H.3513 provides for suspension or revocation of liquor licenses at locations which permit "bottomless entertainment" and prohibits such activity at locations which sell beer and wine. In several cases, the United States Supreme Court has upheld legislation which prohibits nudity or lewd behavior in

locations licensed to sell alcoholic beverages. The Court has indicated that pursuant to the Twenty-First Amendment to the United States Constitution, a state is granted broad authority to regulate the sale of alcoholic beverages and such authority includes the authority to regulate sexual expression at locations which sell alcoholic beverages. See: California v. LaRue, 409 U.S. 342 (1972); New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981); City of Newport, Kentucky v. Iacobucci, 479 U.S. 92 (1986). 1/

In LaRue, the Supreme Court in determining that the challenged regulation did not violate the federal Constitution commented

> The substance of the regulations ... (before the Court) ... prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

409 U.S. at 118.

In Bellanca, the Supreme Court again recognized the broad authority of a state to regulate liquor sales and referenced the language in its decision in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) where the Court determined that the authority given to the states by the Twenty-First Amendment "... outweighed any First Amendment interest in nude dancing and that a state could therefore ban

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1/ The Twenty-First Amendment provides:

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

such dancing as part of its liquor license control program." 452 U.S. at 717. The Court in Bellanca stated further

> ... (p)ursuant to its power to regulate the sale of liquor within its boundaries, ... (the State) ... has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs ... (W)hatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-First Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-First Amendment makes that a policy judgment for the state legislature, not the courts.

452 U.S. at 717-718. In the Iacobucci decision the Supreme Court similarly upheld an ordinance which prohibited nude or nearly nude dancing at locations licensed to sell liquor by the drink. 2/

In State ex rel. Richardson v. Pierandozzi, 784 P.2d 331 (1989), the Idaho Supreme Court referenced

> LaRue should not be understood to stand for the proposition that the Twenty-First Amendment overrides the First Amendment, but rather for the notion that "the Twenty-First Amendment power over alcohol consumption is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served "... Thus, although nude dancing does involve First Amendment considerations ... in the narrow context of liquor licensing the state has the

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2/ In Walker v. Kansas City, Mo., 911 F.2d 80 (1990) the Eighth Circuit Court of Appeals concluded that the owner of a bar had no First Amendment rights to display "go-go girls", girls attired in bikini bottoms and "pasties" in his establishment. The Court similarly concluded that states had broad authority under the Twenty-First Amendment to "impose an almost limitless variety of restrictions on drinking establishments." 911 F.2d at 91. That case is presently under review by the United States Supreme Court.

> power to regulate nude and sexually explicit conduct in licensed establishments without offending the Constitution.

784 P.2d at 336.

While the above-referenced cases concern liquor and not beer, the same analysis would apply. See: Opin. Atty. Gen. of Tenn. 87-20. Therefore, a court would probably uphold the constitutionality of H.3513 as being consistent with the authority granted a state by the Twenty-First Amendment.

As to your concerns regarding the Chippendolls case, that decision was the decision of a trial court based on the facts before that court. It should not be considered as controlling as to the legislation referenced by you.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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