The State of South Carolina

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The Honorable Joyce C. Hearn
Member, South Carolina House of Representatives
503-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Hearn:

You have asked the opinion of this Office whether Richland County is authorized to enact a zoning and licensing ordinance that provides for regulation of "adult hotels and motels." The proposed ordinance defines adult motel as:

> ...a hotel, motel or similar commercial establishment which:
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> (A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or
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> (B) offers a sleeping room for rent for a period of time that is less than 10 hours; or
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> (C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

By way of background, I reference the earlier opinion of this Office wherein we concluded that Richland County likely had the authority to "enact a license ordinance directed at the regulation of a specific industry, such as the adult entertainment industry, without concomitantly imposing a similar licensing requirement on all businesses operating within the county." Op.Atty.Gen. February 3, 1987. We noted therein that our

conclusion was not completely free from doubt and explained our reservations; thus, we will not restate here the reasoning in that opinion. For reasons which I explain hereafter, I believe the Richland County has the authority to regulate adult hotels and motels by zoning and licensing for the purpose of governing their locations within the county.

The proposed ordinance recites comprehensive and detailed legislative findings that present a convincing picture of the adverse secondary effects that certain sexually oriented businesses have had in Richland County. Included in these recitals are findings that such businesses are frequently used for unlawful sexual activities such as prostitution, that such businesses have a deleterious effect upon their surroundings, and that such businesses contribute to urban blight. The ordinance further makes it clear that the county's intent is not to surpress any protective speech or proscribe its dissemination. As earlier mentioned, adult hotels and motels as defined in the ordinance are regulated as sexually oriented businesses. I advise that in the issuance of its opinion, this Office cannot independently investigate or weigh facts; however, I am advised by county officials that the county has reviewed several related studies and, moreover, has evidence from local enforcement authorities that crime and blight problems attend sexually oriented businesses located in Richland County.

The ordinance proposes to regulate adult hotels by licensing and zoning. While the licensing scheme is pervasive in its regulatory scope and requirements, we will not herein address the manner in which the licensing scheme is implemented or the qualifications the scheme imposes licensees. Our opinion today is limited to your question of the authority of the county to subject adult hotels and motels to regulation by licensing and zoning.

At the outset, I advise that the regulation of adult hotels and motels, as defined in the ordinance, implicates first amendments considerations. These facilities are placed within the scope of the regulation either because they advertise and disseminate motion pictures or other photographic reproductions, or they rent sleeping rooms for short periods of time. While we doubt that the regulation of motels or hotels based upon the length of time they rent their rooms implicates the first amendment[1], the dissemination of nonobscene motion pictures or photographs is protected by the first amendment. Patel and Patel v. City of San Francisco, 606 F.Supp. 666 (N.D. Cal., 1986).

With regard to the validity of a municipal zoning ordinance that regulates the location of purveyors of sexually oriented

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[1] See, e.g., Bowers v. Hardwick, 54 U.S.L.W. 4919 (1986); Arcara v. Cloud Books, Inc., 54 U.S.L.W. 5060 (1986).

publications, the United States Supreme Court has recently provided guidance and instruction. Renton v. Playtime Theaters, Inc., ____ U.S. ____, ____ S.Ct., 89 L.Ed.2d 29 (1986). In Renton adult theaters challenged upon first and fourteenth amendment grounds the city's zoning ordinance that regulated the location of adult theaters. The Court instructed that such ordinances, that are designed to combat the secondary effects of sexually oriented businesses and regulate their location, are to be reviewed under the standards applicable "to 'content-neutral' time, place, and manner regulations." 89 L.Ed.2d, at 39. The appropriate constitutional inquiry was stated to be whether the zoning ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Id. The Court emphasized that a municipality's interest in preventing crime, protecting property values, and preserving the quality of its neighborhoods and commercial districts was both substantial and important.

Further, the Court concluded that a local government "is entitled to rely upon the experiences of...other cities to support its legislative findings" so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problems that the city addresses. 89 L.Ed.2d, at 40.

In determining whether alternative locations are available the Court's opinion provides specific guidance.

> In our view, the First Amendment requires only that [the local government] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city..."

89 L.Ed.2d, at 42. Of course, it is plainly held that the local government may not use its broad power to zone "as a pretext for suppressing expression", Young v. American Mini-theaters, Inc., 427 U.S. 50, 84, 96 S.Ct. 2440, 49 L.Ed.2d 672 (1976), and the local government's zoning authority would require different constitutional scrutiny if the ordinance proscribes completely the operation of adult hotels and motels. See, Schad v. Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981).

Promulgation of a zoning ordinance additionally involves considerations of state law. While it is clear that counties have broad authority to provide for land use and prescribe regulations therefore, South Carolina Code § 4-9-30(9) and § 6-7-710 et. seq., the legislative findings of the zoning authority must be supported by substantial evidence. 101A C.J.S. Zoning and Land Planning, § 23(a).

> A finding not supported by evidence will be considered arbitrary and will not be sustained and the court may set aside decisions not supported by substantial evidence, or clearly contrary to the overwhelming weight of the evidence. The discretion of the Council must be based upon fact and

> supported by reasoned analysis. The zoning authority must consider only the facts and logic it relies upon. Williams v. Sumter School District Two, 255 F.Supp. 397, 403 (D.S.C. 1966), 101(a) C.J.S. Zoning and Land Planning, Section 277 at 821 (1979).

Hampton, et. al. v. Richland County, et. al., S.C.App., Op.No. 0785, filed 8/25/86, at Slip.Op. 44, reh.pen.. Moreover, § 6-7-710 et. seq. prescribes the procedures, including public hearings, that are required prior to adopting or amending a local zoning ordinance.[2] Of course, the county must follow these procedurals requisites in the enactment of proposed zoning ordinances, and, moreover, the ordinance must be supported by adequate legislative findings. I refer specifically to § 6-9-720 wherein the removal of nonconforming uses is regulated. The removal of a nonconforming use of a location implicates the due process clause of the fourteenth amendment and any provision providing for discontinuance of an ongoing use must be reasonable. The federal courts have upheld as reasonable amortization periods from three months to three years in similar situations. See, Hart v. Edmistein, 612 F.2d 821 (4th Cir. 1981); Ebel v. City of Corona, 767 F.2d 635 (9th Cir. 1985); SDJ, Inc. v. City of Houston, 636 F.Supp. 1359 (S.D. Tex. 1986) Anno; 22 A.L.R. 3rd 1134 Validity of Provisions - Nonconforming Uses.

At least two federal district courts have reviewed zoning ordinances that regulate the location of "adult hotels and motels." In Patel and Patel v. San Francisco, supra, the Court struck as unconstitutional a zoning provision directed at hotels and motels that offer sexually oriented movies or publications. The Court found that the governing authority had made no factual findings to support its argument that adult hotels contribute to the deterioration of neighborhoods. Adult hotels was defined therein as a hotel that disseminated adult movies or publications. On the other hand, a district court in Texas recently upheld a zoning regulation directed at adult hotels and motels where the legislative findings were sufficient to substantiate that the regulation of such businesses served a substantial governmental interest on the part of the city. F.W./PBS, Inc., et. al. v. The City of Dallas, C.A. 3-87-1759-R (N.D. Tex. 9/12/86). These holdings, we believe, are consistent with our conclusion that a local government is authorized to zone adult hotels and motels where sufficient legislative findings are made, particularly where the zoning ordinance is narrowly tailored to serve governmental interest.

Thus, provided that the county acts in response to reasonable legislative findings that identify the secondary problems

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[2] I am advised that Richland County has adopted the alternative provisions found in Title 6, Chapter 7, of the South Carolina Code to govern its zoning authority.

associated with the unregulated operation of adult motels and hotels, narrowly tailors the ordinance to serve its purposes to reduce these adverse secondary problems, follows the procedures required by state law, and provides reasonable alternative locations for the operation of such businesses, we believe the county is authorized to regulate the location of adult hotels and motels by zoning.

With regard to the regulation of sexually oriented businesses by licensing, this Office has previously concluded that the county most probably is authorized to enact a licensing ordinance to complement a zoning ordinance and police locational requirements. Op.Atty.Gen., supra; Young v. American Mini-theaters, Inc., supra; Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980); Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986); S.D.J., Inc. v. City of Houston, supra; FW/PBS, et. al. v. City of Dallas, supra; Contra: City of Peducah v. Investment Entertainment, 791 F.2d 463 (6th Cir. 1986). In the enactment of a licensing ordinance for an activity that relates to first amendment expression, the ordinance must contain narrow, objective, and definite standards to guide the licensing authority. Shuttlesworth v. Birmingham, 394 U.S. 147 89 Sup.Ct. 935, 22 L.Ed.2d 162 (1969). This requirement remains the same where the revocation of the license is sought. Worthan v. City of Tucson, 624 P.2d 334 (Az. 1981).

To determine whether the licensing of adult hotels and motels meets first amendment scrutiny, the regulation must be analyzed pursuant to the standards articulated in U.S. v. O'Brian, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Pursuant to O'Brian,

> [a] Governmental regulation is sufficiently justified if it is within the constitutional power of the government and furthers an important or substantial governmental interest; if the governmental interest is unrelated to this suppression of free expression; and if the incidental restriction on first amendment freedoms is no greater than is essential to the furtherance of that interest.

SDJ Inc. v. City of Houston, supra, at 1366. This analysis tracts the inquiry necessary to determine the constitutional validity of a zoning ordinance and, thus, ordinarily if a local government can justify zoning regulation directed at sexually oriented businesses, including adult hotels and motels, it can justify a complementary licensing ordinance to aid in the policing of the zoning ordinance. See, e.g., Young v. American Theaters, Inc., supra; Airport Book Store, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978); Genusa v. City of Peoria, supra; SDJ, Inc. v. City of Houston, supra; Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140 (M.D. Fla. 1979); Wendling v. City of Deluth, 5 F.Supp. 1380 (D. Minn. 1980).

With regard to state law in the area of licensing, we again caution that, as expressed in our opinion of February 3, 1987, there is no express statutory provision delegating police power to counties, and moreover, there are no South Carolina judicial decisions clearly concluding that counties possess general police powers. Furthermore, § 4-9-13(14) provides with respect to counties "no ordinance including penalty provision shall be enacted with regard to matters provided for by general law, except as specifically authorized by such general law." See, Terpin v. Darlington County Council, ___ S.C. ___, 332 S.E.2d 771 (1985). Although we are aware of no general statutory provisions regulating adult hotels and motels, any county ordinance should be carefully crafted in this area to avoid imposing penalties for conduct proscribed or regulated by the general law.

In summary we believe that Richland County is authorized to regulate adult hotels and motels as defined herein by the use of its zoning and licensing authority. In so concluding we emphasize that we have not herein attempted to analyze the internal requirements of the proposed ordinance. In that regard, we advise that if you question the legality of any of the internal requirements of the proposed ordinance, we will be glad to provide further review.

Very truly yours,

Edwin E. Evans
Deputy Attorney General

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APPROVAL:

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