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Notes on Zoning and Electronic Sweepstakes Operations

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I. **Session Law 2010-103 (H 80)** makes criminal the use of electronic machines and devices for sweepstakes purposes, effective December 1, 2010

A. Effective December 1, 2010, it is unlawful to operate an "**electronic machine or device**" so as either to "conduct" or "promote" a **sweepstakes** "through the use of an **entertaining display**, including the entry process or the reveal of a prize" (G.S. 14-306.4(b))

B. "Electronic machine or device" defined in part as a machine or device possessed by the sweepstakes sponsor "that is capable of displaying information on a screen or other mechanism" (G.S. 14-306.4(a)(1)(effective Dec. 1, 2010)

C. "Sweepstakes" defined in part as a promotion which, **with or without consideration**, a person may enter to win a prize "**the determination of which is based upon chance**" (G.S.14-306.4(a)(5)

II. Zoning regulations affecting electronic sweepstakes operations (ESOs) will apparently become ineffective once criminal ban becomes effective

A. Zoning is inconsistent with state law (i.e., preempted) to the extent that

i. The ordinance makes lawful those actions expressly made unlawful by state statute (see G.S. 160A-174(b)(3))

ii. The ordinance defines elements of an offense that are identical to the elements of a State offense (see G.S. 160A-174(b)(6))

iii. The statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation (see G.S. 160A-174(b)(5))

B. Note that section 5 of the ESO act provides in part that "(n)othing in this act shall be construed to make lawful any machine or device that it unlawful under any other provision of law." Zoning enforcement actions for ordinance violations prior to Dec. 1, 2010 apparently are saved.

III. Application of zoning to electronic sweepstakes operations until Dec. 1, 2010

A. Zoning applies only to the extent that gaming operations are otherwise legal.

B. Ordinance terminology not well tailored to ESOs may not fit. Is an electronic sweepstakes operation an arcade, an indoor commercial recreation establishment, a business center?

C. If list of permitted uses does not include ESO, then use is presumptively excluded.

D. Sample electronic gaming operation definition for zoning purposes:

- "Any business enterprise, whether as a principal or an accessory use, where persons utilize electronic machines, including but not limited to computers and gaming terminals, to conduct games of chance, including sweepstakes, and where cash, merchandise or other items of value are redeemed or otherwise distributed, whether or not the value of such distribution is determined by electronic games played or by predetermined odds. This term includes, but is not limited to internet cafes, internet sweepstakes, beach sweepstakes or cybercafés. This does not include any lottery approved by the State of North Carolina." Southport Unified Development Ordinance, art. 2, sec. 2-2 (2009).

E. Many ordinance definitions are not as encompassing (or as well-drafted) as the definitions in SL 2010-103 (H 80).

IV. Zoning standards for video sweepstakes operations

A. Zoning districts in which operations allowed

- In Bugsy's Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000), the city allowed video poker machines as a principal use in seven different zoning districts, virtually all commercial districts.
- In Southport Unified Development Ordinance, electronic gaming operations allowed only in HC (Highway Commercial) District.

B. Distinction between principal and accessory uses

- Electronic sweepstakes operations may function as the principal use of premises if permitted as such in a zoning ordinance. Alternatively, the operation of gaming machines may be allowed as an accessory use to the extent that the use functions as a use accessory, customary, incidental, and subordinate in area, extent, and purpose to the principal use of the premises.
- In Bugsy's Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000), video poker machines were allowed as an accessory use only in the AC-2 (Accommodations/Commercial) district. In the AC-2 district, no more than five machines were allowed as an accessory at any single premises. Machines were allowed as an accessory use in only those bars and restaurants with at least 1,000 square feet of gross floor space and in only those retail facilities with at least 2,000 square feet of gross floor space. In the case of commercial or business uses, the machines could not produce

gross proceeds which exceeded forty percent of the combined gross proceeds produced by the accessory use and the permitted principal use; and could not occupy in excess of forty percent of the available floor space of the premises.

C. Separation between gaming establishments

- Some ordinances establish separation distances between gaming centers See Southport Ordinance (1,000-foot minimum distance between different establishments).
- Valid exercise of the police power to establish minimum separate distances between otherwise legal gambling operations (Rodriquez v. Jones, 64 So.2d 278 (Fla. 1953)).

D. Separation from protected uses

- See Southport Ordinance (1,000-foot minimum distance between establishment and any "established religious institution/synagogue, school, daycare center, home, library, public park, recreation area or motion picture establishment where "G" or "PG" rated movies are shown to the general public on a regular basis.")
- H 2020 and S 1407 (bills that fialed in the 2010 General Assembly) would have required 50 feet between electronic gaming establishments and churches and schools.

E. Limits on scale of operations

- See Southport Ordinance (maximum number of machines/terminals at any one establishment is twenty).

F. Hours of operation

- Some gaming operations are open until midnight or all night long.
- Zoning ordinance (or zoning permit) or general police-power ordinance may limit hours of operation.
- Query: may new hours-of-operation rule be made effective immediately? *See* Sutter's Place v. City of San Jose, WL 316648771 (Cal. App. 6th Dist. 2002)(unpublished) (general ordinance prohibition against operating certain allowable gambling activity between hours of 2:00 and 6:00 a.m. was effective immediately where zoning permit did not limit hours of operation but required permittee to comply with all provisions of the city code).

G. Signs and advertising

- Signs advertising electronic gaming operations generally subject to sign limitations applicable to other similar commercial uses.
- But note Kannapolis ordinance provision which prohibits gaming operations from posting any type of sign on or in windows that maybe visible from exterior of establishment.
- A comprehensive state system for regulating electronic gaming may limit the extent to which gaming proprietors may advertise. See West Virginia Association of Club Owners and Fraternal Services, Inc. v. Musgrave, 553 F.3d 292 (4th Cir. 2009) (restrictions on limited video lottery advertising by retailers imposed by West Virginia's Limited Video Lottery Act did not violate First Amendment commercial speech protections).

H. Claims of selective enforcement

- Does singling out particular illegal operations amount to selective enforcement? *See* complaint at 11, Mt. Airy Business Center, Inc. v. City of Kannapolis, (M.D.N.C. April 21, 2010)
- Difficulties of establishing express regulations for video sweepstakes operations after operations were formerly found to be disallowed.

V. Use of moratorium ordinance

- City without adequate regulations or that are experiencing other deleterious conditions or problems in connection with electronic gaming operations may adopt a temporary moratorium "on any city development approval required by law." (G.S. 160A-381(e)).
- Moratorium may apply to zoning permits, if zoning regulations in place already apply to gaming operations, or to building permits, if applicable.

VI. Nonconforming establishments

- Land uses that are legally nonconforming under a zoning ordinance may be required to come into full compliance under current regulations within fixed period of time. (State v. Joyner, 286 N.C. 366, 211 S.E.2d 320 (1975) (requiring amortization of zoning nonconformities is not unconstitutional in concept and is authorized under zoning enabling authority)).
- Electronic gaming establishments may gain nonconforming status under zoning if legally established before local prohibition becomes effective
- Amortization period must be sufficiently long to allow owner of machines to recover initial investment (<u>Bessemer City Express, Inc. v. City of Kings Mountain</u>, 172 N.C. App. 591, 616 S.E.2d 692, 2005 WL 194824 (unpublished)).
- Amortization period of a little over six months found adequate where machines purchased for $6,000 each were found to be easily movable, revenue from each machine averaged $1,300 per month for six months ($7,800), where residual value of machines figured in, each machine worth $9,300 at end of amortization period --$3,3000 above purchase price (*Bessemer City Express, Inc.).*
- Two-year amortization period applicable to businesses operating video poker machines was reasonable where record showed that business was allowed to recoup rental cost of its machines, which cost $7,500. <u>Bugsy's Inc. v. City of Myrtle Beach</u>, 340 S.C. 87, 530 S.E.2d 890 (2000).

VII. Total exclusion of new operations

- General police power may not be used to prohibit entirely certain uses, particularly residential uses, which are not nuisances per se. (Town of Conover v. Jolly, 277 N.C. 439, 443, 177 S.E.2d 879, 881 (1970) (community with a population of 3,000 and a mix of land uses is not authorized to use general police power ordinance to prohibit all trailers, including "mobile homes," from being used as residences anywhere within town limits in absence of evidence of a threat to public health or safety).

- But city "may prohibit all commercial off-premise signs or billboards for aesthetic and safety reasons" Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1168 (4th Cir.1991) (quoting Major Media of the S.E. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir.1986)). *See also* Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F.Supp.1068 (M.D.N.C.,1992); R. O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388 (1982).
- No clear presumption under North Carolina zoning law that any total ban on particular land use is unconstitutional. (See Robins v. Town of Hillsborough, 361 N.C. 193, 639 S.E.2d 421(2007), vacating portion of the Court of Appeals opinion, 176 N.C. App. 1, 625 S.E.2d 813 (2006), because it unnecessarily addressed the constitutionality of a zoning text amendment that would ban the construction of manufacturing and processing facilities involving petroleum products, including asphalt plants). (Court of Appeals opinion would have remanded matter for further fact-finding on question of whether such a ban was arbitrary and capricious and a violation of due process, in the absence of clear evidence from the local government that might prove otherwise).

VIII. Comparing ESOs with other entertainment and amusement uses

A. Legal forms of gambling

- Legally authorized gambling "is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those enterprises over which the exercise of the police power is not so essential for the public welfare." Hialeah Race Course, Inc., v. Gulfstream Park Racing Association, Inc., 37 So.2d 692, 694, (Fla. 1953).

B. No significant First Amendment protections apparently associated with electronic gaming operations.

C. An ESO may qualify as an "adult business" under some ordinances

- Establishments providing electronic gaming machines, like adult businesses, typically prohibit minors from entering premises or from using machines.
- Common regulatory practice of separating both adult businesses and gaming establishments from schools, churches, and residential communities.

D. ESOs and alcohol

- A gaming establishment that is the principal use of the premises generally does not qualify for an ABC permit to serve alcoholic drinks on the premises. However, premises where machines are accessory uses may so qualify.
- Note G.S. 18B-1005(a)(6), part of North Carolina's alcohol control law, was enacted to prevent illegal and disorderly conduct that may arise where alcohol is served to the public requires permit holders to take steps in connection with adult live entertainment to prevent, among other things, prostitution, gambling, fights, and nudity. (*See* Carandola v. Bason, 303 F.3d 507 (2002)).

Query: what impacts, then, are associated with electronic gaming operations that may allow them to be treated differently from other indoor recreational and entertainment establishments?