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Honorable P. Richard Hartley
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City of Greenville
415 East Commerce Street
Greenville, AL 36037

Municipalities - Municipal
Ordinances - Licenses and
Permits - Business Regulations

The City of Greenville may impose a license fee upon transient dealers doing business within the city if the fee is levied equally upon all transient dealers within a class and the tax on the transient dealers is not so disproportionate to the license fee imposed on the same dealers having fixed locations within the city, as to be unfair on the transient dealers. Whether the proposed ordinance of the City of Greenville meets these criteria is a factual determination to be made by the city officials or, if necessary, by a court of competent jurisdiction.

Dear Mr. Hartley:

This opinion is issued in response to your request for an opinion from the Attorney General.

QUESTION

Is the proposed ordinance of the City of Greenville valid and constitutional where such ordinance imposes a license fee on transient merchants offering merchandise for sale within the City of Greenville?

FACTS, LAW AND ANALYSIS

The ordinance in question reads:

"BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GREENVILLE that:

"Section 1. Section 10-17(124) of the Code of Ordinances, City of Greenville is hereby deleted in its entirety and substituted therefor is the following:

""(124) SELLING BY TRANSIENT MERCHANTS. Any salesman, dealer, drummer, business entity of any kind of other merchant of any type who has no permanent place of business within the City operated by such person or entity full time, on a year round basis, shall be deemed to be a transient merchant and shall pay the following license fee for each day such person or entity shall offer merchandise for sale at wholesale or retail within the City of Greenville:

"\$50.00 per day, in advance of such sale, plus one and one-half percent (1.5%) on all gross receipts in excess of \$100,000.00 for all merchandise sold within the City in each year. The gross receipts portion of this license fee shall be payable by each merchant during the first year,

in advance, based on the merchant's best estimate of anticipated gross receipts.

"A transient merchant as defined herein shall not be deemed to be entitled to the license specified in Sections 10-17(5), 10-17(88), 10-17(89), 10-17(124), 10-17(144) or entitled to a special license under Section 10-19 of this Code. However, any person or entity selling produce as defined in Section 10-17(112) of this section shall not be deemed to be a transient merchant under this section.

"Section 2. This Ordinance shall become effective upon its enactment and publication as required by law."

The ordinance was proposed particularly because of "tent sales" held within the City of Greenville by an out-of-town automobile dealer.

Initially, it must be stated that the Attorney General generally does not render opinions regarding the constitutionality and validity of ordinances, as it is the function of the courts to make such determinations. Therefore, while the Attorney General will not specifically answer your question regarding the validity of the proposed ordinance, this office will discuss the validity of such ordinances in general.

Code of Alabama 1975, § 11-51-90 authorizes a municipality to license the conducting of a trade, business or profession. It states in pertinent part:

"(a) All municipalities shall have the power:

"(1) To license any exhibition, trade, business, vocation, occupation or profession not prohibited by the Constitution or laws of the state which may be

engaged in or carried on in the city or town;

"(2) To fix the amount of licenses, the time for which they are to run, not exceeding one year, to provide a penalty for doing business without a license and to charge a fee of not exceeding \$.50 for issuing such license . . .

"(b) The license authorized by subsection (a) of this section as to persons, firms or corporations engaged in business in connection with interstate commerce shall be confined to that portion within the limits of the state and where such person, firm or corporation has an office or transacts business in the city or town imposing the license."

The federal and state appellate courts have concluded that a municipality may impose a license tax on transient or itinerant dealers doing business within the city, provided (1) the tax does not discriminate against interstate commerce, the tax being equally levied upon all transient or itinerant dealers within a class and (2) the tax on the transient dealer is not so disproportionate to the tax imposed on the same dealers having a fixed location within the taxing area, so as to bear unfairly on the transient dealers. Dunbar-Stanley Studios, Inc. v. State of Alabama, 393 U.S. 537, 21 L.Ed.2d 759, 89 S.Ct. 757 (1969); American Bakeries Co. v. City of Huntsville, 232 Ala. 612, 168 So. 880 (1936); West Point Wholesale Grocery Company v. City of Opelika, 38 Ala. App. 444, 87 So.2d 661 (1956).

The Attorney General has concluded that under the facts in the particular case, a municipality may require a bond from an applicant for a transient dealer's license although no bond is required from non-transient dealers. Opinion to Honorable Richard F. Calhoun, City Attorney, City of Troy, dated April 8, 1985, A.G. No. 85-00290.

The justification for imposing a license upon transient dealers was stated by the Alabama Supreme Court in American Bakeries Co. v. City of Huntsville, supra:

"Discussing such license, the Iowa court in *State v. Cater*, supra, said: "The usual justification offered for the imposition of a license upon transient merchants is to insure proper contribution from such merchants for police protection and to protect local dealers against unfair competition by transient dealers who come and go so quickly as to escape their share of general taxation in the community, and it may be admitted that the reasons so advanced are sound and that reasonable license fees so exacted can well be upheld."

"We are in full accord with the underlying principle stated in the *Cater Case*, supra, for recognizing the justification for the imposition of a license upon transient dealers."

It was concluded in *West Point Wholesale Grocery Company v. City of Opelika*, supra, that a schedule of license may be prescribed for an itinerant person, firm or corporation different from that prescribed from one having a place of business within the city, if the difference in licensing schedules is not disproportionately unfair.

Furthermore, the United States Supreme Court stated in *Dunbar-Stanley Studios v. State of Alabama*, supra, that the Commerce Clause of the United States Constitution precludes a flat sum privilege tax on an interstate enterprise whose only contact with the taxing area is the solicitation of orders and the subsequent delivery of merchandise within the taxing area. However, the engaging in a business activity within the taxing area by a transient dealer may be taxed.

CONCLUSION

The City of Greenville may impose a license tax or fee upon transient dealers doing business within the city if the fee or tax is levied equally upon all transient dealers within a class and the tax on the transient dealers is not so disproportionate to the license tax imposed on the same dealers having fixed locations within the city, as to be unfair on the transient dealers. Whether the proposed

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ordinance of the City of Greenville meets these criteria is a factual determination to be made by the city officials or, if necessary, by a court of competent jurisdiction.

I hope this sufficiently answers your question. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS
Attorney General
By:

A handwritten signature in cursive script, appearing to read "James R. Solomon, Jr.", written in dark ink.

JAMES R. SOLOMON, JR.
Chief, Opinions Division

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