June 9, 2000

I have Ordinance No. 411, that you faxed to me on June 7, and that regulates transient vendors. I also talked to you this morning about the question you had about that ordinance, which is: Does the distance regulation in Section 7 apply to with respect only to public property or to all property?

The answer is that it applies to all property; I find nothing in the ordinance that remotely indicates that it applies only to public property.

However, let me point to a more serious problem with Section 7, and some less serious problems with other sections, for the purpose of helping the city improve the ordinance.

Section 7 is fatally flawed on at least two grounds:

First, an ordinance must advance the government interest the ordinance was designed to advance [H.L. Messengers, Inc. v. City of Brentwood, 577 S.W.2d 444 (1979)]. Section 7 provides that, “No permit shall issue for use at a location which is within twenty-five hundred feet (2500') of any entity possessing a valid business license or business permit.” The second WHEREAS of the ordinance indicates the purpose of the ordinance relates to “increased traffic, safety risks, and a need for the protection of these locations due to their relatively open nature.” But the ordinance would not apply to any new permanent business located within 2500 feet of any entity possessing a valid business license or business permit. I can think of no logical reason that a transient vendor’s business within the proscribed distance would produce any traffic, safety or similar effect different than would a permanent business that locates within the same distance. In that respect the ordinance does not promote increased traffic safety, reduce safety risks, or require additional police protection.

Second, generally ordinances cannot discriminate unless the classification it establishes and that produces the discrimination is reasonable. Here the ordinance establishes a separate class of merchants (transient) and discriminates against that class by subjecting it to location restrictions that are not reasonable. In fact, the discriminatory intent of the ordinance to protect local businesses appears to me plain on its face.

For those reasons, that section (and probably the ordinance) would not survive a challenge in either the state or federal courts.

Section 1: This section defines “Transient vendor” as “Any person, [etc.] ...who engages in the temporary business of selling...” That definition does not say what is a “temporary business.” I have spent considerable time over the past years trying to find or write a better definition. The definition I used for the MTAS model Peddlers and Solicitors ordinance I drafted several years ago was taken from Tennessee Code Annotated, section 62-30-101, which regulates transient vendors in counties, and Tennessee Code Annotated, section 67-4-702, which defines that term for the purposes of Tennessee Code Annotated, section 67-4-709. The latter statute authorizes municipalities to impose a certain tax upon transient vendors. Those definitions contain a definition of “temporary premises” which is a sort of back-handed definition of a temporary business. You might consider adopting the definitions of “temporary premises” and “transitory vendor” contained in those statues so that your definition is consistent with those found in state law. I am enclosing a copy of the MTAS model Peddlers and Solicitors ordinance for your consideration.

Section 2: This section requires transient vendors to have a permit. I see nothing wrong with such a requirement because the permit is issued by the city in an exercise of its police powers. However, because Tennessee Code Annotated, section 67-4-709, authorizes municipalities to a levy tax on transient vendors in the amount of $50 for each 14 day period the vendor sells merchandise in the city. The ordinance needs to be clear that the fee for the permit ($50 for 30 days) and the transient vendor’s tax ($50 for each 14 day period) are separate impositions.

However, the permit fee might be high. Generally, permit fees must roughly reflect the cost of administering the program to which they apply. The ordinance does not indicate the city does anything with respect to administering the transient vendors permit system except take from the applicant his affidavit of application. In fact, it is not even clear that the city furnishes the application form. Presumably, police officers also check on permit holders, and sellers who have no permit, from time to time. But $50 for 30 days seems to me at least twice as high as it need be to cover the cost of the program.

If after you review this letter, let me know if the city needs any help with changes to the ordinance if it decides to make any.

Sincerely,

Sidney D. Hemsley

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