



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 17, 1976

ATTORNEY GENERAL OPINION NO. 76- 65

Mr. Lawrence E. Christenson
City Attorney
Post Office Box 731
Winfield, Kansas 67156

Re: Zoning--Classification--Home Occupancy

Synopsis: A zoning ordinance which excludes massage parlors from the classification of "home occupation" is not unreasonable on its face, as the "home occupancy" is defined in Ordinance No. 2512 of the City of Winfield. However, a requirement in said ordinance that operators of massage parlors be licensed and certified by the State Board of Healing Arts as a condition to obtaining a certificate of occupancy under the zoning ordinance of said city is unreasonable and beyond the scope of the zoning ordinance, for the Board is not authorized by law to license and certify such operators, and thus the requirement is prohibitory rather than regulatory.

* * *

Dear Mr. Christenson:

You inquire concerning the validity of an ordinance adopted by the Winfield governing body amending a zoning ordinance, no. 2512. Paragraph 22-103 (48), defining "home occupation" provides thus:

"Any occupation or activity which is clearly incidental and secondary to use of the premises for dwelling and which is carried on wholly within a main building, or a permitted accessory building, by a member of a family

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residing on the premises in connection with which there is no advertising other than an identification sign of not more than three square feet in area, fixed flat to a wall of the building, and no other display or storage of materials or generation of substantial volumes of vehicular or pedestrian traffic or parking demand or other exterior indication of the home occupation or variation from the residential character of the building, and in no connection with which no persons outside of the immediate family are employed and no equipment used which creates offensive noise, vibration, smoke, dust, odor, heat or glare. When within the above requirements, a home occupation includes but is not limited to the following: (a) art studio; (b) dressmaking; (c) professional office of a physician, dentist, lawyer, engineer, architect, accountant, salesman, real estate agent, insurance agent or other similar occupation; (d) teaching, with musical instructions limited to one or two pupils at a time; (3) beauty parlors; however, a home occupation shall not be interpreted to include retail stores, restaurants and massage parlors."

Section 5 of the ordinance amends section 2 of article 23 of chapter 22 as follows:

"22-2302(4). A certificate of occupancy in compliance shall be obtained by the operator of a massage parlor, which operator shall have been a resident of the City for at least six months and be licensed and certified by the State Board of Healing Arts."

The validity of any zoning ordinance turns primarily upon the question of reasonableness, which is a mixed question of fact and law. The definition of "home occupation" as excluding massage parlors is on its face a reasonable definition and exclusion, and I have no basis upon which to conclude that it is prima facie unreasonable, arbitrary or without a rational foundation in the context of the ordinance in which the definition and exclusion appears.

Section 5 of the ordinance imposes other problems. Under its present law, the State Board of Healing Arts has no authority to license persons other than physicians and surgeons, osteopathic physicians, and

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chiropractic physicians. It has no statutory authority to license and certify persons to perform massages. Thus, the requirement that the operator of a massage parlor be certified and licensed by the State Board of Healing Arts is legally impossible to satisfy, as a condition of obtaining a certificate of occupancy in compliance. As such the requirement operates as a prohibition rather than a regulatory measure, and is beyond the permissible scope of a zoning measure.

In addition, the latter section requires the operator of a massage parlor to have been a resident of the City for at least six months. There are a great many cases in which durational residence requirements have been challenged on constitutional grounds. In *Hanson v. Unified School District No. 500, Wyandotte County, Kansas*, 364 F. Supp. 330 (1973), there was challenged a regulation of the school district requiring all certificated employees to reside within Wyandotte County. The opinion sets forth a very careful analysis of the regulation and justifications offered for it, and concluded that the regulation

"violates the Fourteenth Amendment's equal protection guarantee, because the classification of residents versus non-residents of Wyandotte County is essentially arbitrary and does not rest on any reasonable basis" 364 F. Supp. at 334.

The residence requirement in that case was not durational. Courts have reached differing conclusions regarding durational residence requirements for licensure to practice certain professions and occupations, most notable the practice of law. However, there appears to have been few cases involving durational residence requirements necessary to obtain an occupational license from a municipality, and still fewer concerning durational residence requirements as a condition for obtaining a necessary zoning or occupancy permit. The durational residence requirement is highly questionable, although it is difficult to conclude purely as a matter of law, without reference to possible justifications for it considered by the city governing body, that it is unconstitutional under the Fifth Amendment to the United States Constitution.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj