

Memorandum

To: Thomas Ansbro, City Attorney
From: Johanna M. Lundgren, AICP, Esq.
Date: November 13, 2012
Re: Ordinance Prohibiting Simulated Gambling Establishments

A. Introduction

The proposed ordinance provides for an amendment to Article II “Gambling” of Chapter 17 “Offenses-Miscellaneous” of the Code of Ordinances, to create Division 4 “Simulated Gambling Devices,” in order to prohibit simulated gambling devices within the City.

B. Background

In recent years, there has been an increasing statewide proliferation of business establishments which are often identified as adult arcades, internet cafes or sweepstakes redemption centers, and similar establishments which involve the use of “simulated gambling devices.” Upon the customer’s purchase of internet time or phone cards, the establishment loads “sweepstakes entries” on to a customer’s card or electronic account. The results of these entries are pre-determined, and these pre-determined entries are recorded on the card or in the customer’s account. The customers then use a computer terminal or slot-machine- like cabinet to determine whether they have won cash or prizes.

1. Impacts

Simulated gambling establishments have been associated with significant negative community impacts. These establishments maintain large amounts of cash on-site, without the security measures found at state-licensed gaming establishments. These establishments have been associated with significant criminal activities, including several armed robberies at Central Florida simulated gambling establishments. These establishments target the elderly, the poor and minorities, who believe that they are engaging in state-regulated gaming. In May 2011, the Florida Council on Compulsive Gambling reported an increase in calls to its Problem Gambling Helpline from persons who frequent simulated gambling establishments. The Council reported

that the average debt associated with simulated gambling was more than 50 percent of the callers' earnings, and that these persons reported difficulty in avoiding simulated gambling establishments due to their locations within general commercial areas of the community.

2. Legality

These businesses take advantage of a legal gray area which raises doubt as to whether the activity can be criminally prosecuted as illegal gambling, in violation of Section 849.15, Florida Statutes, which prohibits possession or operation of a slot machine except as specifically authorized by the Florida Constitution. The operators claim that these activities are lawful "sweepstakes" or "promotions" allowed under Section 849.094, Florida Statutes, or "charitable drawings" authorized under Section 849.0935, Florida Statutes.

Neither statute expressly authorizes or prohibits conducting promotions or drawings through the use of these devices, and these games are not otherwise regulated or overseen by any state agency. To date, no Florida court has ruled on the legality of simulated gambling devices. Although the Florida Legislature considered several bills which proposed to regulate and to prohibit the devices during the 2011 and 2012 sessions, no legislation has been adopted. On July 19, 2011, the Florida Attorney General provided an opinion that simulated gambling devices constitute illegal gambling devices in violation of Chapter 849, Florida Statutes.

C. Proposed Ordinance

The proposed ordinance amends Chapter 17 by creating Division 4, to broadly prohibit the possession, provision or use of simulated gambling devices, with the exception of non-commercial usage and devices that are expressly permitted by Florida Statutes and not prohibited by the Florida Constitution (such as gaming devices within a licensed pari-mutuel facility).

Following Seminole County's adoption of an ordinance which bans the use of simulated gambling devices, the Allied Veterans of the World, a major operator of the establishments, challenged that ordinance in the U.S. District Court for the Middle District of Florida. The Allied Veterans argue that the computer games are sweepstakes permitted under Florida law, and that banning them violates the First Amendment. The plaintiffs sought an injunction against enforcement of the ordinance, which was denied. The lower court's denial was upheld by the 11th Circuit Court of Appeals, which ruled on March 23, 2012 that the district court had not abused its discretion in denying the injunction and finding that the Seminole County ordinance did not regulate First Amendment speech. The lawsuit remains pending, and a jury trial is currently scheduled for the fall of 2013. Following Hillsborough County's adoption of an ordinance banning the devices, that ordinance was challenged in late December 2011 by simulated gambling establishment operators on similar grounds as in the Seminole County

challenge. The Hillsborough County lawsuit is also pending in the U.S. District Court for the Middle District of Florida.

The attached proposed ordinance is based on the Seminole County ordinance, which withstood the challenger's initial request for injunction, with the 11th Circuit Court of Appeals ruling that Seminole County could continue enforcing the ordinance pending a final decision by the Middle District. Since the adoption of the Seminole County ordinance, several other municipalities have followed Seminole County in adopting similar bans modeled on the ordinance. Other municipalities have adopted temporary moratoria prohibiting the devices.

Due to the Florida Legislature's inaction and the need to move quickly to address simulated gambling devices, adoption of the proposed ordinance is recommended. Although the lawsuits challenging the Seminole County and Hillsborough County ordinances remain pending, in the event that the challengers prevail in either lawsuit, enforcement of this ordinance may be halted and the ordinance amended or repealed as necessary.

Additionally, although the Florida Legislature has failed to take action on simulated gambling devices during the past several years, it is possible that legislation could result during the 2013 legislative session. Section 17-67 of the proposed ordinance provides that, in the event of a direct and express conflict between the ordinance and the Florida Constitution or Chapter 849, Florida Statutes, the Constitution or state statute will control. Under this provision, if the Florida Legislature adopts legislation conflicting with the ordinance, the state legislation would govern.