HENRY MCMASTER
ATTORNEY GENERAL

June 12, 2009

The Honorable Vida O. Miller
Member, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Miller:

We understand from your letter that you desire an opinion of this Office as to the validity of Williamsburg County Ordinance No. 2000-02, as amended by Ordinance No. 2005-002 (the "Ordinance"). According to your letter, you believe the Ordinance is unlawful because "(a) it conflicts with the Emergency Medical Services Act of South Carolina (EMS Act) (Section 44-61-10 et seq.); (b) it is an unreasonable restraint on trade; and (c) it violates a Medicare patient's basic freedom of choice."

Law/Analysis

Along with your request, you include a copy of both the original ordinance, as adopted in 2000, and the amended version of the ordinance adopted in 2005, collectively referred to as the Ordinance. According to the Ordinance, in order to operate a private ambulance service providing convalescent transportation within Williamsburg County (the "County"), the ambulance service must submit an application, providing information as to the entity, its personnel, licenses, and certifications, to the County for a franchise to operate a private ambulance service. Williamsburg County, S.C., Ordinance No. 2005-02 (December 27, 2000). The Ordinance requires applicants to submit an annual fee of $3,000 and limits the number of franchisees to four. Id.

Initially, you are concerned that the Ordinance is invalid due to a conflict with State law. However, we must begin with the presumption that ordinances are presumed valid and enforceable and will not be struck down by a court unless they are "palpably arbitrary, capricious or unreasonable." U.S. Fidelity & Guar. Co. v. City of Newberry, 257 S.C. 433, 438-39, 186 S.E.2d 239, 241 (1972) (citations omitted). Our courts employ a two-step process to determine the validity of a local ordinance. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

> The first step is to ascertain whether the county had the power to enact the ordinance. If the state has preempted a particular area of

> legislation, then the ordinance is invalid. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the county had the power to enact the ordinance, then the Court ascertains whether the ordinance is inconsistent with the Constitution or general law of this state.

South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006).

> To preempt an entire field, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Bugsy's, 340 S.C. at 94, 530 S.E.2d at 893 (citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990)). Furthermore, "for there to be a conflict between a state statute and a municipal ordinance 'both must contain either express or implied conditions which are inconsistent or irreconcilable with each other. . . . If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.'" Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at 553, 397 S.E.2d at 664 (quoting McAbee v. Southern Rwy., Co., 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932)).

Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

Section 4-9-30 of the South Carolina Code (1986 & Supp. 2008) provides a listing of the specific powers afforded to counties. While the list of powers enumerated is not exclusive, amoung the powers expressly granted is the power to "grant franchises and make charges in areas outside the corporate limits of municipalities within the county in the manner provided by law for municipalities and subject to the same limitations, to provide for the orderly control of services and utilities affected with the public interest . . . ." S.C. Code Ann. § 4-9-30(11) (Supp. 2008). In a prior opinion, this Office concluded the phrase "services and utilities affected with the public interest" used in this provision "most probably include ambulance services." Op. S.C. Atty. Gen., October 13, 1976. Thus, pursuant to section 4-9-30(11), we believe the County has the authority regulate and grant franchises for the operation of non-emergency ambulance services in the County.

Nonetheless, you argue that this authority is preempted by the Emergency Medical Services Act of South Carolina (the "EMS Act"). The EMS Act is located in chapter 61 of title 44 of the South Carolina Code. The EMS Act gives the Department of Health and Environmental Control ("DEHEC"), with the advice of the Emergency Medical Services Advisory Council created by the EMS Act, the authority to "develop standards and prescribe regulations for the improvement of emergency medical services . . . ." S.C. Code Ann. § 44-61-30(a) (Supp. 2008). In addition, the

EMS Act states: "All administrative responsibility for this program is vested in the department" Id. § 44-61-30(a).

According to the EMS Act, the EMS program shall include:

> (1) the regulation and licensing of public, private, volunteer, or other type ambulance services; however, in developing these programs for regulating and licensing ambulance services, the programs must be formulated in such a manner so as not to restrict or restrain competition;
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> (2) inspection and issuance of permits for ambulance vehicles;
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> (3) the licensing of EMT first responder agencies;
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> (4) training and certification of EMS personnel;
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> (5) development, adoption, and implementation of EMS standards and state plan;
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> (6) the development and coordination of an EMS communications system; and
>
> (7) designation of trauma centers and the categorization of hospital emergency departments.

Id. § 44-61-30(b).

Section 44-61-40 of the South Carolina Code (Supp. 2008), included in the EMS Act, requires persons or entities providing ambulance services must be licensed and that ambulances must be permitted by DHEC. According to this provision, persons or entities seeking licensure must submit an application to DHEC demonstrating their "ability to conform to the standards and regulations established by the board and such other information as may be required by the department." S.C. Code Ann. § 44-61-40. Section 44-61-50 of the South Carolina Code (Supp. 2008) explains the permitting requirement for ambulances stating the ambulance "shall meet all requirements as to vehicle design, construction, staffing, medical and communication equipment and supplies, and sanitation as set forth in this article or in the standards and regulations established by the board." Section 44-61-60 of the South Carolina Code (Supp. 2008) explains the ambulance equipment requirement. Section 44-61-105 of the South Carolina Code (Supp. 2008) also places size requirements on convalescent transport units, but allows counties to exempt ambulances used for convalescent transport from these size requirements and any regulations related to size requirements as promulgated by DHEC. Section 44-61-80 of the South Carolina Code (Supp. 2008) contains the

requirement that all emergency medical technicians obtain certification from DHEC, unless specifically exempt by DHEC regulation. Section 44-61-90 of the South Carolina Code (Supp. 2008) requires licensees to "maintain records that include approved patient care report forms, employee/member rosters, and training records." Additionally, this provision requires that "[t]hese records must be available for inspection by the department at any reasonable time and copies must be furnished to the department upon request." S.C. Code Ann. § 44-61-90.

In our review of the EMS Act, we did not find a provision expressly preempting counties from enacting ordinances with regard to ambulance services. Thus, we must determine whether the Legislature implied such preemption. "Under implied preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." South Carolina State Ports Auth., 368 S.C. at 397, 629 S.E.2d at 628 (2006).

As you mentioned in your letter, this Office issued an opinion in 1996 in which we considered whether a local law creating a special purpose district to provide ambulance service and restricting the operation of ambulance services in a particular county is preempted by the EMS Act. Op. S.C. Atty. Gen., August 14, 1996. In our review of the EMS Act, we determined the Legislature intended for "the act be comprehensive and state-wide in applicability." Id. We cited various provisions of the EMS act indicating that the provisions of the EMS Act apply on a state-wide basis and the provisions giving DHEC authority to regulate the operation of ambulance services within the State. Ultimately, we concluded as follows:

> Considering all of the foregoing principles, I am of the opinion that Act No. 819 of 1970, as to certain aspects of provision of ambulance services in Pickens County, would be required to yield to the state-wide statutory scheme regulating the provision of ambulance services provided in §44-61-10 et seq. I am further of the opinion that section 5 of Act No. 819 of 1970 probably would not be given effect by the courts of this State because such would be inconsistent with the licensing and regulatory statutes of §44-61-10 et seq., as Pickens County Council would effectively have veto power over operation of ambulance services which the Department of Health and Environmental Control would have licensed and permitted; that would be an absurd result at best.

Id. Thus, as you point out, this opinion supports a contention that the Legislature intended to preempt any local laws governing ambulance services.

Although, we continue to believe the EMS Act is comprehensive with regard to the licensure and regulation of ambulance services, we do not believe the EMS Act completely preempts a county's ability grant franchises to operate private ambulance services within its boundaries. First,

section 44-61-105 of the South Carolina Code (Supp. 2008) specifically allows counties to exempt convalescent transport units from the size requirements provided pursuant to that provision. This provision indicates the Legislature did not intend to prohibit counties from passing ordinances related to ambulance service. Second, in recent cases, our Supreme Court has determined that "just because an ordinance imposes additional requirements does not necessarily mean the ordinance is irreconcilable with State law. Denene, Inc. v. City of Charleston, 352 S.C. 208, 214, 574 S.E.2d 196, 199 (2002).

In Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990), our Supreme Court considered whether an ordinance enacted by the Town of Hilton Head Island prohibiting the use of internally illuminated signs is preempted by State law stating that the South Carolina Alcohol Beverage Control Commission has sole authority to regulate the operation of liquor stores. The appellant argued that the Legislature intended to preempt the field and precluded the Town from passing an ordinance that affects the operation of a liquor store. Id. at 552, 397 S.E.2d at 663. However, the Court stated: "in order to pre-empt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way" and concluded that the State law did not preempt the Town's ordinance. Id.

In Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000), the Supreme Court considered whether a City of Myrtle Beach ordinance limiting where and how video poker machines are used within the City's limits is preempted by a State law prohibiting municipalities from limiting the number of machines located within its boundaries. The Court found no express preemption of such an ordinance in the State law governing video poker. Id. at 94, 530 S.E.2d at 893. In addition, the Court stated:

> [W]hile the General Assembly has enacted a comprehensive scheme regulating many aspects of video poker machines, the scheme does not manifest an intent to prohibit any other enactment from touching on video poker machines. State regulation of video poker machines does not preclude a municipality from passing a zoning ordinance which impacts businesses which have video game poker like the State's regulation of the sale of beer, wine, and alcohol does not preclude a municipality from passing a zoning ordinance which impacts a business which sells those products.

Id. Thus, the Court concluded that the ordinance was not preempted by the State law. Id.

In the two cases cited above, a comprehensive scheme to regulate a particular industry existed under State law, yet the courts did not believe it precluded local governing from passing ordinances touching on the subject matter addressed by State law. With regard to ambulance services, we believe that while the EMS Act governs the regulation and operation of ambulance services, it does

not preclude counties from passing ordinances that impact ambulance services. As such, we do not believe that the Ordinance is preempted by the EMS Act.

You also argue that the Ordinance creates an unreasonable restraint on trade due to the fact that it limits the number of franchises granted to four. By unreasonably restraint on trade, we presume you are indicating that the Ordinance is in violation of antitrust laws. Our United States Supreme Court, in Parker v. Brown, 317 U.S. 341, 352 (1943), recognized that federal antitrust laws do not prohibit a state from imposing certain anticompetative restraints "as an act of government." However, the Supreme Court clarified in Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39(1985) in order from a municipality or other governmental entity to qualify for the state action exemption from antitrust laws it "must demonstrate that their anticompetitive activities were authorized by the State pursuant to state policy to displace competition with regulation or monopoly public service." (quotations omitted). The Court concluded that a governmental entity does not have to point to express legislative authorization to prove a state policy to displace competition exists, but it must show that the Legislature contemplated that the governmental entity may engage in anticomptitive conduct. Id. at 42.

The Wisconsin Supreme Court dealt with an issue similar to the one you pose in American Medical Transport of Wisconsin, Inc. v. Curtis-Universal, Inc., 452 N.W.2d 575 (Wis. 1990). In that case, the City of Milwaukee passed an ordinance pursuant to which all private ambulance services must be certified. Id. at 576. However, of those certified, only four could be assigned to serve different areas of the city. Id. at 577. The remaining certified companies were to serve as backup service providers. Id. Initially, the Court held that the city could not rely on the Home Rule provisions in the Wisconsin Constitution and Wisconsin statutes, generally giving municipalities authority to govern their own affairs, to establish a state policy to displace competition. Id. at 580. In addition, the Court found neither state statutes authorizing counties and municipalities to operate emergency medical services, nor state statutes allowing municipalities to contract for emergency services, established a state policy to displace competition. Id. at 582. Accordingly, that Court concluded that the City of Milwaukee was not immune from Wisconsin anititrust law. Id. at 583.

As you mention in your letter, this Office issued an opinion in 1996 discussing a municipality's ability to create a monopoly. Op. S.C. Atty. Gen., November 18, 1996. The municipality in question passed an ordinance stating that unless approved by the town's council and its mayor, no other person or entity could sell chitlins at the town's annual chitlin festival. Discussing the Supreme Court's decisions in Parker and Town of Hallie, we concluded that the ordinance "is of questionable validity." Id.

> As mentioned above, this Ordinance, like any validly adopted ordinance, will be presumed valid and this Office possesses no authority to declare an ordinance invalid. Only a court may do so. However, I cannot absolutely assure you that if the Ordinance were challenged in court, it would be upheld. I question whether the

> Ordinance would be entitled to the "state action" immunity from antitrust liability and, as I have discussed herein, the Ordinance could be subject to a serious constitutional challenge as well. It would appear to me that the purpose of the Ordinance is primarily economic rather than an exercise of the police power. If health and safety are involved, such purpose is not apparent because the sale of chitlins is regulated only one day in the year. I would thus urge non-enforcement by the Town with respect to the portion of the Ordinance relating to the Town's exclusive right to sell.

Id.

While we believe that section 4-9-30 of the South Carolina Code gives the County the ability to issue franchises to those providing ambulance service within the County, we do not find any provision of State law giving counties the authority to limit the number of franchises granted. Moreover, we did not find any provision in the law governing counties that could be construed to give counties authority with regard to ambulance service that foreseeably results in counties being allowed to restrict the operation of private ambulance service to four providers. Thus, we doubt that a court would find that the County is entitled to state action immunity from antitrust laws. Therefore, if a court found that the Ordinance creates a monopoly by limiting the number of franchises granted to four, it could find such a monopoly in violation of the Sherman Act. Nonetheless, we must treat the Ordinance as valid until or unless a court declares it invalid.

Lastly, you argue that the Ordinance violates a Medicare patient's basic freedom of choice. Specifically, you cite to section 1395a of title 42 of the United State Code, which provides: "Any individual entitled to insurance benefits under this subchapter may obtain health services from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to provide him such services." As described in a federal district court decision, this provision "guarantees Medicare beneficiaries the freedom to choose health care providers, who would then be paid by Medicare at the program's prescribed rates. Section 1395a(a) bars interference by the Secretary of Health and Human Services (or his subordinates in the administration of the Medicare program) with a beneficiary's selection of a physician." MacArthur v. San Juan County, 416 F.Supp.2d 1098, 1141-42 (D. Utah 2005). Pursuant to the Ordinance, the County, not the Secretary of Health and Human Services or anyone involved in the administration of the Medicare program, is limiting who can operate an ambulance service in County. Thus, we do not believe county or State restrictions on the operation of ambulance services would create a violation of section 1395a of title 42.

Conclusion

Pursuant to section 4-9-30(11), the County has authority to grant franchises for ambulances services operating within the County. Moreover, we did not find a provision in the EMS Act

expressly prohibiting counties from passing ordinances relating to the operation of ambulance services within their boundaries. Although we believe the EMS Act is comprehensive and applicable statewide, we do not believe the Legislature intended to preclude counties from passing ordinances that govern who may provide ambulance service within their boarders. Thus, we are of the opinion that the EMS Act does not preclude the County from requiring those entities operating ambulance services within its boarders to obtain a franchise.

However, we do not believe the County has the authority to limit the number of franchises granted to those operating convalescent transport services within the county. Moreover, we do not believe the County would be entitled to state action immunity from federal antitrust laws. Accordingly, a court could find the Ordinance creates an illegal monopoly. However, a court must make the determination on the validity of the Ordinance in this respect.

Lastly, we are of the opinion that the freedom of choice provision in the federal law governing Medicare protects medicare patients from interference in their selection of health care provides by the administrators of the Medicare program and does not impact local or state regulation of ambulance services. Therefore, we do not believe this provision impacts a County's ability to require franchises for ambulance services operating within its boarders.

Very truly yours,

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