

7140 Liberty



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON  
ATTORNEY GENERAL

August 15, 2001

C. Heath Ruffner, Esquire  
Chesterfield County Attorney  
Post Office Drawer 1449  
Cheraw, South Carolina 29520

**Re: Proposed County Ordinance - Hunting From Public Roads**

Dear Mr. Ruffner:

In a letter to this Office, you indicate that “[a] group of citizens has requested that Chesterfield County Council enact an ordinance concerning hunting from public roads.” You have requested that this Office provide “an opinion as to the constitutionality of the proposed ordinance and this type of regulation by a county governing body.” You have also enclosed a copy of the proposed ordinance which provides in pertinent part as follows:

Sec. I: Road Hunting is illegal in Chesterfield County on all roads where vehicular traffic is permitted.

Sec. II: Transporting loaded weapons in vehicles is illegal on all roads in Chesterfield County where vehicular traffic is permitted.

Sec. III: Violations as Misdemeanors: Any person convicted of refusing to comply with the provisions of these ordinances or violating any of the provisions of these ordinances shall be guilty of a misdemeanor and upon conviction shall be fined not more than two hundred (\$200.00) dollars or imprisoned for not more than thirty (30) days for each offense ...

In examining your questions, a number of statutory and constitutional provisions, as well as case law, concerning a local government’s authority to enact ordinances must be reviewed. A county possesses police power to enact ordinances to further the health and welfare of its residents. See, S.C. Code Ann. § 4-9-30 and Art. VIII, Sec. 17 of the S.C. Constitution. In that regard, it is fundamental that a county ordinance is entitled to a presumption of constitutionality. See Rothchild v. Richland County Board of Adjustment, 309 S.C. 194, 420 S.E.2d 853, 856 (1992). With that

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presumption in mind, it should be noted that, while this Office may comment upon constitutional problems, only a court may declare an ordinance void as in conflict with the Constitution.

In commenting on the specific proposed ordinance in this case, our review should begin with Art. VIII, §14 of the S.C. Constitution which relates to local government and provides in pertinent part that:

In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: ... criminal laws and the penalties and sanctions for the transgression thereof ...

This Constitutional provision has been construed by our Supreme Court to provide that local governments may not enact ordinances that impose greater or lesser penalties than those established by state law, City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991), and they may not prohibit conduct that is not unlawful under State criminal laws governing the same subject. Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994). See also Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997), and; Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996).

It appears that our Legislature has addressed in State Law the subject matter addressed in the proposed ordinance. S.C. Code Ann. § 50-11-760 is titled "[h]unting from certain public roads and railroad rights-of-way prohibited; exceptions; penalties" and, as amended by 2001 South Carolina Laws, Act 69 (effective July 18, 2001), states as follows:

- (A) It is unlawful for a person to hunt from a public road or railroad right-of-way if the person does not have permission to hunt the land immediately adjacent to the public road or railroad right-of-way.
- (B) (1) For purposes of this section, "hunting" includes:
  - (a) taking deer by occupying stands for that purpose; and
  - (b) possessing, carrying, or having readily accessible:
    - (i) a loaded centerfire rifle; or
    - (ii) a shotgun loaded with shot size larger than number four.
- (2) For purposes of this section, "loaded" means a weapon within which any ammunition is contained.
- (3) For purposes of this section, the terms "possessing", "carrying", and "having readily accessible" do not include a centerfire rifle or shotgun which is contained in a:
  - (a) closed compartment;
  - (b) closed vehicle trunk; or a
  - (c) vehicle traveling on a public road.

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(C) A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned for not more than thirty days.

(D) In addition to any other penalties, the department must suspend the hunting privileges of a person convicted of violating this section for one year from the date of the conviction.

It is further apparent that there may be some conflicts between the proposed ordinance and Section 50-11-760. The proposed ordinance would prohibit "Road Hunting" on all Chesterfield County roads "where vehicular traffic is permitted" while Section 50-11-760 prohibits the same conduct by only those without "permission to hunt the land immediately adjacent to the public road." The proposed ordinance would prohibit the carrying of loaded weapons in vehicles on public roads whereas Section 50-11-760 does not. Further, the proposed ordinance provides for a punishment of "not more than two hundred (\$200.00) dollars or imprisoned for not more than thirty (30) days for each offense" whereas Section 50-11-760 provides that a guilty party "must be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned for not more than thirty days."

To the extent that the proposed ordinance makes illegal conduct which state law does not prohibit and alters the potential punishment for such conduct, it is my opinion that a court would probably hold the ordinance to be in violation of Art. VIII, §14 of our Constitution. However, should the County choose to amend the provisions of the proposed ordinance such that it is not inconsistent or irreconcilable with state law, it appears that both could coexist. See ATTY. GEN. OP. (Dated September 1, 1988). Moreover, as the Court held in Town of Hilton Head v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990), in order for there to be a conflict between state statute and a local law, "both must contain either express or implied conditions which are inconsistent or irreconcilable with each other; mere differences in detail do not render them conflicting and if either is silent where the other speaks, there can be no conflict between them ... [w]here no conflict exists, both laws stand." 397 S.E.2d at 664. It must be noted that, even though both local ordinance and state statute may address the same action, depending on the elements of each law, the constitutional prohibition of double jeopardy may be implicated if both are charged in the same case. See State v. Lewis, 321 S.C. 146, 467 S.E.2d 265 (Ct. App. 1996).

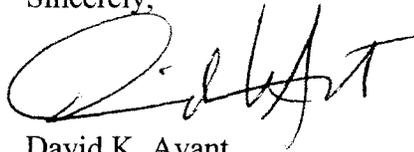
I have enclosed a copy of the amended version of S.C. Code Ann. §50-11-760 for your review. I have also enclosed a copy of §50-1-85 which makes it a criminal violation "for any person to use a firearm or archery tackle while in preparation for, engaged in the act of, or returning from hunting in a criminally negligent manner." It appears that these statutes may be employed to address the citizens' concerns in your case. Further, I have enclosed previous opinions from this Office dated February 16, 1988, September 1, 1988 and October 18, 1995, which address similar concerns as those raised in your letter. I hope that these materials will prove useful to you.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked.

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It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Avant", written in a cursive style.

David K. Avant  
Assistant Attorney General

DKA/an