

1984 S.C. Op. Atty. Gen. 236 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-101, 1984 WL 159908

Office of the Attorney General

State of South Carolina

Opinion No. 84-101

August 22, 1984

\*1 Honorable D. N. Holt, Jr.  
Member  
House of Representatives  
Charleston County Office Building  
Post Office Box 487  
Charleston, South Carolina 29402

Dear Representative Holt:

You have requested the opinion of this office whether the Charleston County Council may restrict the sale of beer and wine in unincorporated areas of Charleston County after the hours of 2:00 a.m.<sup>1</sup> Although for reasons hereinafter discussed our conclusion remains somewhat guarded, we believe that the Charleston County Council lacks the authority to regulate the hours beer and wine may be sold.

This office in a prior opinion [Op. Atty. Gen. (9/16/80)] concluded that a county governing body probably could not regulate the hours beer and wine may be sold within the county's borders because counties were not expressly granted police power pursuant to the Home Rule Act. This opinion, as well as others, was expressly overruled in a recent opinion of this office wherein we concluded that the Home Rule Act was intended to confer upon counties general police powers. Op. Atty. Gen. (6/11/84). We recognized, however, in that opinion that whether counties possess general police powers is not entirely free from doubt in that the enabling authorities are not clear and the courts of this jurisdiction have not definitively addressed the question.

This office has consistently opined that the state has preempted the field with regard to the regulation of 'alcoholic liquors', and thus local governing bodies are prohibited from regulating the hours alcoholic liquors may be sold. 1966-67 Op. Atty. Gen. No. 2282; 1974-75 Op. Atty. Gen., No. 4072; also, § 61-13-760 South Carolina Code, 1976. However, pursuant to South Carolina's statutory scheme beer and wine are declared to be 'nonalcoholic and nonintoxicating beverages' [§ 61-9-10] and as such are separately regulated by the state. We have generally concluded in the past that in contrast to alcoholic liquors, a municipality may reasonably regulate the hours beer and wine may be sold, provided that such regulation does not become prohibitory. See, 1966-67 Op. Atty. Gen., supra; 1974-75 Op. Atty. Gen., supra; Op. Gen. Atty. (1/26/76). This office's opinions have been primarily based upon the conclusions that the state has not preempted the field with regard to beer and wine regulation, and that regulation of the hours beer and wine may be sold by a municipality, while constituting additional regulations to those imposed by the State, does not generally create a conflict with state statutes governing the sale and distribution of beer and wine. See, City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963); Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943). We have recognized as well that the regulation of the hours beer and wine may be sold was a proper exercise of the police powers of a municipality. City of Charleston v. Jenkins, supra.<sup>2</sup> Since we have now determined that counties enjoy police powers similar to those bestowed upon cities, the reasoning in our prior opinions and in the Court's decisions in Jenkins and Arnold would appear applicable to counties as well. However, we believe that a recently enacted legislative provision preempts the regulation of hours that beer and wine may be sold and places that authority exclusively in the state. Thus, we doubt that a county may enact an ordinance restricting the hours beer and wine may be sold.

\*2 Section 33, Part II, of Act 512 of 1984 (the Appropriations Act) provides:

The South Carolina Alcoholic Beverage Control Commission is the sole and exclusive authority empowered to regulate the operation of all retail locations authorized to sell beer, wine, or alcoholic beverages and is authorized to establish conditions or restrictions which the commission in its discretion considers necessary before issuing or renewing any license or permit.

Nothing contained in this section may be considered as preventing judicial appeals from decisions of the commission, as allowed by law, nor as limiting in any way the authority of the courts in interpreting and applying the laws of this State relating to matters administered by the commission.

‘Whether the legislature has undertaken to occupy exclusively a given field of legislation is to be determined on an analysis of the statute and of the facts and circumstances on which it is intended to operate.’ 62 C.J.S. ‘Municipal Corporations’, § 143, at 292–293; 48 C.J.S. ‘Intoxicating Liquors’, § 30, at 325. See also, *AmVets v. Richland Co. Council*, Op. No. 22049 (S.C.Sup.Ct., Feb. 28, 1984). The express language of this provision evinces the legislative intent that the state, through the Alcoholic Beverage Control Commission, shall be the exclusive authority to regulate the operation of all beer and wine outlets. That this is the legislative intent there can be no doubt, as the words used are most clear. While we caution that we do not here attempt to define the limits of the state’s total occupation and preemption of this subject area, most clearly the hours a beer and wine outlet may sell such beverages comes with this exclusive authority ‘to regulate the operation’ of an outlet.<sup>3</sup>

Since we have determined that the state has preempted the field with regard to regulating the hours beer and wine may be sold, counties may not legislate in this area, regardless of whether such local legislation is in direct conflict with state law.

Where the legislature has occupied the field, an ordinance may be invalid as in conflict with a statute notwithstanding the absence of any actual grammatical conflict between the two . . . . In such case the invalidity arises, not from a conflict of language, but from the conflict of jurisdiction which would result from dual regulation covering the same subject . . . .

62 C.J.S. *supra*, § 143, at 292; see also, 6 McQuillin *Municipal Corporations*, §§ 21.34, 24.165 (1983 Supp.); *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973); ‘[m]oreover, even when cities have been given powers to act, if the state has preempted the field in a specific area, then in that area cities have no power despite the wording in the enabling act on which they rely.’ *United Tavern Owners v. School District of Philadelphia*, 441 Pa. 274, 272 A.2d 868, 870 (1971); ‘a municipality may not deal with a subject if the legislature intends its own action, . . . to be exclusive . . . .’ *State v. Ulesky*, 54 N.J. 26, 252 A.2d 720, 722 (1969).

\*3 For these reasons we conclude that § 33, Part II of Act 512 of 1984 preempts the area of regulation of the hours beer and wine may be sold and thus counties may not restrict by local ordinance these hours. In reaching this conclusion, we are mindful that this provision is presumed to be constitutional in all respects. Moreover, an act of the legislature will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. *Thomas v. Macklen*, 186 S.C. 290, 195 S.E. 539 (1937); *Townsend v. Richland County*, 190 S.C. 270, 2 S.E.2d 777 (1939). We do caution however that because of the requirements of *Article III, § 17 of the State Constitution*<sup>4</sup>, there exists some uncertainty as to the constitutionality of § 33, Part II of Act 512. This provision is a part of the General Appropriations Act, and with regard to such Act the Court has held that the pertinent question under *Article III, § 17* is ‘whether the challenged legislation [is] reasonably and inherently related to the raising and expenditure of tax monies.’ *Maner v. Maner*, 278 S.C. 377, 296 S.E.2d 533, 536 (1982). Whether this statutory provision is sufficiently related to the raising or expenditure of state funds to meet this test is questionable. Again, we do not conclude that § 33, Part II, of Act 512 violates *Article III, § 17* and we note that the Court has been very reluctant to find legislation to be in conflict with this provision.

Very truly yours,

Edwin E. Evans  
Senior Assistant Attorney General

Footnotes

- 1 In your request letter you reference the sale of alcoholic beverages and liquor; however, through discussions with you we have clarified your request and understand that your inquiry concerns the regulation of beer and wine.
- 2 [Section 5-7-30 of the Code](#) bestowed police powers upon municipalities.
- 3 Although the legislative history upon § 33, Part II of Act 512 is scarce, we recognize two external factors supportive of this interpretation. This provision, at least in the minds of the Alcoholic Beverage Control Commission, was intended to correct legislatively the decision in [Byers, et al. v. S.C. Alcoholic Beverage Control Commission](#), 281 S.C. 566, 316 S.E.2d 705 (S.C.App. 1984). In [Byers](#), the Court of Appeals found that 'respondents' plans for the establishment have little bearing on the determination of suitability of location.' [Supra](#), at 707. Thus, the decision severely limited the Commission's considerations with regard to whether a beer and wine permit should issue. The statutory language expressly authorizes the commission 'to regulate the operation of all retail locations' and establish 'conditions or restrictions' upon that operation. We note parenthetically that the Court of Appeals appears to have corrected its language in the more recent decision of [Palmer v. S.C. Alcoholic Beverage Control Commission](#), Davis's Advance Sheets, Op.No. 0201 (S.C.App., June 18, 1984). Also, the Alcoholic Beverage Control Commission has construed § 33, Part II of Act 512 as preempting the field with regard to local regulations affecting the hours of operation of beer and wine outlets. [See](#), Memorandum of the South Carolina Alcoholic Beverage Control Commission to all employees dated August 3, 1984. The contemporary construction of a statutory provision by the agency charged with its administration is entitled to deference. 2A [Sutherland Statutory Construction](#), § 49.04 (4th Ed. 1979); 3 Davis, [Administrative Law Treatise](#), § 7.14 (2nd Ed. 1979).
- 4 [Article III, § 17](#), provides:  
Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.  
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