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HENRY MCMASTER
ATTORNEY GENERAL

May 15, 2006

The Honorable William D. Witherspoon
Member, House of Representatives
411 Blatt Building
Columbia, South Carolina 29211

Dear Representative Witherspoon:

You have requested our opinion as to "whether S.1205 (copy attached), which is currently pending before the House of Representatives, is valid and not violative of Home Rule since it specifically states that state law has preempted the regulation of agricultural facilities." By way of background, you provide the following information regarding S.1205:

> [t]he purpose of S. 1205 is to provide consistency in the regulation of agriculture facilities other than new swine operations in a time when homeland security and the availability and safety of food produced in South Carolina are issues we all must face. S. 1205 clarifies the intent of the General Assembly in enacting the Right to Farm Act to regulate agricultural facilities under state law and pursuant to the regulations of the Department of Health and Environmental Control, S.C. Regs. 61-43.
>
> Specifically, S. 1205 amends Section 46-45-10, to include the following finding:
>
> > (5) With the exception of new swine operations and new slaughterhouse operations, in the interest of homeland security and in order to secure the availability, quality, and safety of food produced in South Carolina, *it is the intent of the General Assembly that state law and regulations of the Department of Health and Environmental Control preempt the entire field of and constitute a complete and integrated regulatory plan for agricultural facilities and agricultural operations as defined in Section 46-45-20, thereby precluding a county from passing an ordinance that is not identical to the state provisions.* [Emphasis in the original letter].

Request Letter

You also note that S.1205 "does not in any way limit a local government's authority to zone." *See*, Section 46-45-60(B). As discussed more fully below, it is our opinion that the General Assembly possesses the power to enact S.1205 and that such legislation in its present form is not violative of Home Rule.

Law / Analysis

We begin by restating the general principles concerning the power of the General Assembly which govern the issue raised in your letter. As we have previously said on many occasions,

> ... any statute enacted by the General Assembly carries with it a heavy presumption of constitutionality .... [A]ny act of the General Assembly is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. *State ex rel. Thompson v. Seigler*, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional.

Op. S.C. Atty. Gen., May 2, 2005.

In addition, with respect to the construction of any statute, all rules of interpretation are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and such language must be construed in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). The words used in a statute must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984).

With these basic principles in mind, we turn now to an examination of the "Home Rule" Amendments to the State Constitution and whether S.1205 conflicts with these provisions. "Home Rule" for county (and municipal) governments is required by Article VIII of the South Carolina Constitution. Justice Littlejohn, writing for our Supreme Court in *Knight v. Salisbury*, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974), documented South Carolina's move toward Home Rule for counties, culminating in adoption by the voters of new Article VIII in 1972 and ratification thereof in 1973 as follows:

> [t]he quest for home rule at the county level and begun during the decade of the 1940's with Act No. 764 of the 1948 Acts of the General Assembly providing for establishment of the County Council of Charleston County. This body was given all of the powers that could be vested in it under the Constitution as then written. Following reapportionment many other counties adopted this plan and at this writing there are perhaps 18 counties whose governments are patterned after the fashion of the Charleston County Council Act. These changes were prompted by the feeling that

> Columbia should not be the seat of county government, and that the General Assembly should devote its full attention to [problems] at the state level. It was against this background that Article VIII was written. It is clearly intended that home rule be given to the counties and that county government should function in the county seats rather than at the State Capitol. If the counties are to remain units of government, the power to function must exist at the county level. Quite obviously, the framers of Article VIII had this in mind.

Thus, Article VIII "mandates 'home rule' for local governments." *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 37, 530 S.E.2d 369, 373 (2000). Pursuant to Section 17 of Article VIII, "all laws concerning local government shall be liberally construed in their favor." And, in *Glasscock v. Sumter County*, 361 S.C. 483, 490-491, 604 S.E.2d 718, 722 (Ct. App. 2004), our Court of Appeals again recognized the overarching purpose of Home Rule:

> [t]hat local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state's now firmly rooted constitutional principle of "home rule." By the ratification of Article VIII of our state constitution in 1973, substantial responsibility for city and county affairs devolved from the General Assembly to the individual local governments. "[I]mplicit in Article VIII is the realization that different local governments have different problems that require different solutions." *Hospitality Ass'n of South Carolina v. County of Charleston*, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995) ... .

Hospitality Ass'n., supra, indeed described the development of "Home Rule" in South Carolina in considerable detail. The Court chronicled this history as follows:

> For generations, legislative delegations of the General Assembly controlled virtually every aspect of local government. Relinquishment of this control effectively began in April of 1966, when the General Assembly created a Committee to study the South Carolina Constitution and appointed then Senator John C. West as chairman. The major task assigned to the West Committee was to develop and recommend amendments to the Constitution that would eliminate archaic provisions and "strengthen it in such other areas, so that it [would] provide a workable framework with proper safeguards for sound State, County and local governments." ....
>
> In June of 1969, after three years of numerous hearings and conferences, the West Committee submitted its Final Report to the Governor and General Assembly. In the Report, the Committee unanimously recommended amendments to the Constitution that would place the control and management of county and municipal affairs in the hands of duly elected local officials. ....

> Following three years of legislative debate on the Report, the General Assembly placed upon the November 1972 general election ballot for referendum vote an Amendment of Article VIII of the Constitution. *See* Act No. 1631, 1972 S.C.Acts 3184. Acting upon a favorable vote of the people, the General Assembly, on March 7, 1973, ratified the Amendment. See Act No. 63, 1973 S.C.Acts 67.
>
> As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law. ... S.C. Const. art. VIII, §§ 7 and 9. In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government. S.C. Const. art. VIII, § 17.

320 S.C. at 224-225. As our Supreme Court in *Hospitality Ass'n.* further makes clear, "[n]ew Article VIII effectively abolished Dillon's Rule ...," a rule of interpretation which had required our courts to construe the powers of local governments strictly and narrowly, by mandating a liberal construction of the powers and duties of local government and by including all such powers which might be fairly implied "and not prohibited by the Constitution." *Id.*, 320 S.C. at 225, n. 4, quoting Art. VIII, § 17.

However, while the powers bestowed by Home Rule upon counties are now broad, it is clear not only from the language of Art. VIII itself, but the decisions of our Supreme Court, that neither Article VIII nor the concept of "Home Rule" bestows unlimited powers upon counties. The General Assembly, pursuant to Art. III, § 1 of the Constitution remains vested with "the legislative power of this State." The purpose behind "Home Rule," as stated above, was simply to remove the General Assembly from interference in the day-to-day local affairs of counties. Thus, in accord with Article VIII, § 7, "[n]o laws for a specific county shall be enacted ...." See, e.g. *Cooper River Park and Playground Comm. v. City of North Charleston*, 273 S.C. 639, 642, 259 S.E.2d 107, 109 (1979) (provisions of Article VIII "... divested the General Assembly of authority to deal *by special act* with special purpose districts performing functions now delegated to counties under 'Home Rule.'" (emphasis added). Clearly, however, Home Rule was never intended to preclude the General Assembly from legislating by way of a *general law* even if such general law might limit a county's powers or forbid counties from legislating in a specific area altogether. Art. VIII, § 7 makes such reservation of power to the General Assembly manifest, by thus providing:

> [t]he General Assembly shall provide *by general law* for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the *general laws* or laws applicable to the selected form of government.

(emphasis added). As the Court in *Hospitality Assn.* rightly observed, "Article VIII essentially left it up to the General Assembly to decide what powers local governments were to have." 320 S.C. at 226.

Pursuant to Article VIII, § 7's requirement that the General Assembly define the powers of counties by "general law," the Legislature enacted the Home Rule Act in the form of Act No. 283 of 1975. *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1999). As part of Act No. 283, counties were enumerated certain authority, now codified at § 4-9-25 as follows:

> [a]ll counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, *not inconsistent with the Constitution and general law of this State*, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

(emphasis added). Again, however, "Act No. 283 of the 1975 Acts of the General Assembly, the Home Rule Act, which was designed to effectuate the mandate of Article VIII, Section 7 of the South Carolina Constitution, did not transfer absolute authority over all matters of local concern to the counties." *Roton v. Sparks*, 270 S.C. 637, 639-640, 244 S.E.2d 214, 216 (1978) (Gregory, J., concurring).

Accordingly, it is clear that by virtue of Art. VIII, § 7, as well as § 4-9-25, any ordinance adopted by a county must be *consistent with the general law of the State*, as enacted by the General Assembly. Otherwise, the Ordinance is void. *Denene, Inc. v. City of Chas.*, 352 S.C. 208, 574 S.E.2d 196 (2002) (an ordinance which bans a business the State has made legal is unenforceable). Moreover, Art. VIII, § 14 of the Constitution mandates that a local ordinance or regulation may not "set aside" general law provisions applicable to certain specific areas such as criminal laws or the "structure and the administration of any governmental service or function, responsibility for which rests with the state government or which requires statewide uniformity." See, *Diamonds v. Greenville County*, 325 S.C. 154, 480 S.E.2d 718 (1997) (county ordinance may not set aside general criminal laws of the State, pursuant to Art. VIII, § 14); *Hospitality Assn of S.C. v. County of Charleston, et al., supra*; (local ordinance invalid if it conflicts with the Constitution or general law); *Terpin v. Darlington Co. Council*, 286 S.C. 112, 332 S.E.2d 771 (1985) (county fireworks ordinance conflicts with state criminal laws and is thus invalid); *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651 (2002); *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996) (local option legislation allowing counties to set aside the general criminal laws is invalid); *Brashier v. S.C. Dept. of Transp.* 327 S.C. 179, 490 S.E.2d 8 (1997), (overruled on other grounds) (Article VIII, § 14 "'precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subjects encompassed by that section.'")

Riverwoods, supra illustrates the principle that it is the Legislature, by general law, which determines the powers of counties. In *Riverwoods*, the County argued that, pursuant to Home Rule, and § 4-9-25, it possessed "wide discretion to decide how to apply the exemption [on property taxes of owner-occupied residences] .... However, the Supreme Court, in concluding that the Ordinance was invalid, noted that the County only possessed such power as the Enabling Act permitted. In the Court's opinion,

> [i]t is clear from a plain reading of the Enabling Act that the only real discretion which was conferred on the County was whether to adopt the ordinance. Once adopted, however, it must be consistent with the general law of the State, i.e. the enabling legislation. See *Bugsy's, Inc. v. City of Myrtle Beach*, [340 S.C. 87, 530 S.E.2d 890 (2000)] (to be valid, an ordinance must be consistent with the Constitution and general law of the State) .... As discussed above, the Ordinance is inconsistent with the Enabling Act. Consequently, the County's assertions regarding Home Rule provide it no refuge.

349 S.C. at 387.

Our Supreme Court has applied much the same analysis with respect to the Legislature's limitation upon the exercise of power by counties in a particular area. It is clear that the rule to be derived therefrom is that so long as the General Assembly exercises its power to limit local governments *by general law*, the exercise of such legislative authority is valid and does not conflict with Home Rule. A good example is *Town of Hilton Head v. Morris*, 324 S.C. 30, 484 S.E.2d 104 (1997). There, local governments brought an action challenging the constitutionality of a statute requiring real estate transfer fees collected by local governments to be remitted to the State. One argument mounted by the local governments was that the statute conflicted with Art. VIII, § 17 of the Home Rule Amendment. However, the Court rejected such contention, concluding as follows:

> [t]his argument is without merit. Under Home Rule, the General Assembly is charged with passing general laws regarding the powers of local government. S.C. Const. art. VIII, § 7 (counties); § 9 (municipalities). The authority of a local government is subject to general laws passed by the General Assembly. See S.C. Code Ann. § 5-7-30 (municipalities); § 4-9-30 (counties) (Supp. 1995). *The General Assembly can therefore pass legislation specifically limiting the authority of local government.* In this case, although § 6-1-70 does not prohibit the imposition of real estate transfer fees, it prohibits local governments from retaining the revenue generated by them. This limitation on revenue-raising does not violate article VIII, § 17, since *the General Assembly is constitutionally empowered to determine the parameters of local government authority.*

484 S.E.2d at 106-107 (emphasis added). The Court's ruling in *Town of Hilton Head v. Morris*, is consistent with the generally recognized principle that "... the home rule power exercised by a county cannot result in legislation which conflicts with an act of the legislature, and *it cannot be exercised*

in any area which has been preempted by the state." 20 C.J.S. *Counties* § 44 (emphasis added). See also, *Goodell v. Humboldt County*, 575 N.W.2d 486, 494 (Iowa 1998) (simply because local government regulation is permissible in an area "does not prevent the legislature from imposing uniform regulations throughout the state, should it choose to do so, nor does it prevent the state from regulating this area in such a manner to preempt local control." [livestock regulation]. After Home Rule, while the Legislature now cannot legislate as to a specific county, it certainly retains virtually plenary power to limit counties' power and authority by general law.

Accordingly, Home Rule does not prevent the General Assembly from exercising its broad constitutional power to preempt counties' power to regulate altogether in a given area. Of course, preemption is often thought of as "the principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation." *Horizon Homes of Davenport v. Nunn*, 684 N.W.2d 221, 228 (Iowa 2004) (quoting *Black's Law Dictionary*). However, preemption by the State of local government regulation can occur just as well, and in that context, "[p]remption takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature." *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2005). Our Supreme Court has set forth the requirements for such preemption in a number of decisions. Most recently, in *South Carolina State Ports Authority v. Jasper County*, ___ S.E.2d ___, 2005 WL 3941459 (2006), the Court comprehensively reviewed the law of preemption of local regulation in South Carolina. Noting that determination of whether a local ordinance is valid "is essentially a two-step process" (citing *Bugsy's supra*), the Court stated:

> [t]he 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. (citations omitted).

In terms of the preemption question, the Court concluded that state law may preempt local regulation in several ways, just as is the case with federal law's preemption of state law. The Court described these various forms of preemption as follows:

> [t]o preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990). ... We have not expressly followed the same preemption analysis in deciding whether a state law preempts a local law as we have applied in deciding whether a federal law preempts a state law or regulation. *Compare Fine Liquors, Ltd.*, 302 S.C. at 552-53, 397 S.E.2d at 663 *with State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 186, 525 S.E.2d 872, 877 (2000) (federal law may preempt a state law as follows: (1) Congress may explicitly define the extent to which it intends to preempt

> state law, (2) Congress may indicate an intent to occupy an entire field of regulation, or (3) federal law may preempt state law to the extent the state law actually conflicts with the federal law, such that compliance with both is impossible or the state law hinders the accomplishment of the federal law's purpose); *accord Michigan Canners Freezers Ass'n v. Agricultural Marketing Bargaining*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984). We find it appropriate to address the SCSPA's preemption arguments using the three categories previously recognized when discussing federal law preemption, any of which is a method by which the General Assembly's intent may be made manifest.

The Court further commented that "[e]xpress preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." *Id.* (citing as an example *Wrenn Bail Bond Service, Inc. v. City of Hahahan*, 335 S.C. 26, 515 S.E.2d 521 (1999)). Implied preemption occurs "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." *Id.* Conflict preemption, observed the Court, "occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." *Id.*

At least two decisions of our Supreme Court have concluded that the Legislature intended expressly to preempt local regulation of specific areas. In *Barnhill v. City of North Myrtle Beach*, 333 S.C. 482, 511 S.E.2d 361 (1999), the Court found that a state statute "manifests a clear legislative intent to preempt the entire field of regulation regarding the use of watercraft on navigable waters" when such regulation must, except under certain special circumstances, "in fact be identical to state law ...." 333 S.C. at 486. And, in *Wrenn Bail Bond Service, Inc. v. City of Hanahan, supra*, the Court held that a provision in the bail bondsman licensure law, which provided that "[no] license may be issued to a professional bondsman except as provided in this chapter," served to make it "clear from the plain language of § 38-53-80 that the legislature intended to preempt the entire field of professional licensing for bail bondsmen." 335 S.C. at 28.

Likewise, in an Opinion, dated February 27, 1990, we commented upon proposed legislation which would *expressly preempt* local regulation of smoking in public places. We noted that the legislation was "general in form" and contained an express preemption clause. There, we concluded:

> First: If the bill is adopted in its present form, with the proposed preemption clause, you have asked whether counties and municipalities would be barred from enacting and/or enforcing stricter ordinances, such as an outright ban on smoking in government-owned buildings within their boundaries, or ordinances to regulate smoking in the private sector. The proposed preemption clause expressly provides: "This act expressly pre-empts the regulation of smoking by all government entities and subdivisions including boards and commissions to the extent that regulation is more restrictive than state law."

> The preemption clause speaks for itself. With the preemption clause as proposed, the plain language of the clause would appear to preclude the adoption of an ordinance, by a county or municipality, more restrictive than state law. ....
>
> Second: Under the provisions of the State Constitution and existing statutes, you have asked whether the legislature could preempt a local government's authority to enact or enforce such stricter standards. This question was addressed in the opinion of February 8, 1990, particularly in the discussion of constitutional and statutory provisions .... Political subdivisions may not vary from the provisions of general law unless such variance is specifically authorized. In the context of your proposed bill, this would mean that the legislature could, if it wished, preempt further regulation in the same matter by local political subdivisions.

Conclusion

It is our opinion that S.1205 in its present form does not violate the Home Rule provisions of the South Carolina Constitution and, if enacted, would be valid under Home Rule. Pursuant to Article VIII, § 7 of the state Constitution, the Legislature retains the right to enact general laws to limit the power and authority of counties. Such power includes the preemption of counties from further regulation in a particular area. Our Supreme Court has stated that "[t]he General Assembly can ... pass legislation specifically limiting the authority of local government" and is "constitutionally empowered to determine the parameters of local government authority." *Town of Hilton Head v. Morris*, *supra*. "Generally, the home rule power exercised by the county ... cannot be exercised in any area which has been preempted by the State." 20 C.J.S. *Counties*, § 44. And, as we recognized in an Opinion dated September 18, 2001, "although under Home Rule, municipalities and counties enjoy a great deal of autonomy, the General Assembly can certainly pass legislation specifically limiting the authority of local government." Accordingly, the General Assembly's preemption of counties' power in a particular area of regulation does not violate Home Rule.

Of course, consistent with Home Rule, the Legislature must exercise its power of preemption by general law, not local legislation. Here, S.1205 is, on its face, general in scope, applying facially to all counties. Such legislation is "general in form." *Op. S.C. Atty. Gen.*, February 27, 1990, *supra*. With the exception of new swine operations and new slaughterhouse operations, State law and DHEC regulations are deemed, pursuant to S.1205, to "preempt the entire field of and constitute a complete and integrated regulatory plan for agricultural facilities and agricultural operations as defined in Section 46-45-20, thereby precluding a county from passing an ordinance that is not identical to the State provisions." Thus, S.1205 manifests a clear further intent to preempt local regulation. However, a local government's authority to zone is expressly preserved by § 46-45-60(B). The Legislature has recited "the interest of homeland security and ... the availability, quality and safety of food produced in South Carolina ..." as requiring preemption. Clearly, the Legislature desires statewide uniformity in this area.

Accordingly, such legislation in its present form is within the constitutional power of the General Assembly to enact.

Yours very truly,

Henry McMaster

HM/an