HENRY MCMASTER
ATTORNEY GENERAL

October 8, 2008

The Honorable K. Allen Deaton
Mayor, Town of Surfside Beach
115 US Highway 17 North
Surfside Beach, South Carolina 29575-6034

Dear Mayor Deaton:

In a letter to this office you requested an opinion regarding banning of smoking on a beach.

In Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), the State Supreme Court held that this State's Clean Indoor Air Act of 1990, codified as S.C. Code Ann. §§ 44-95-10 et seq., did not preempt the entire field of regulating indoor smoking in this State. At issue before the Court was an ordinance enacted by the City of Greenville which prohibited smoking in all enclosed areas, including bars and restaurants, places of employment and particular outdoor areas, such as stadiums and zoos. The City asserted that the ordinance was not preempted by State law and was consistent with both the State Constitution and State general law provisions.

In its review, the Court noted that

> [a] two-step process is used to determine whether a local ordinance is valid. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. Id. If, however, the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State. Id. 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)).

377 S.C. at 361. The Supreme Court in the Greenville case found no preemption by the State noting that

> ...the Clean Indoor Air Act did not preempt the entire field of indoor smoking. There simply is no expressly stated intent in the statute that the State chose to exclusively regulate the subject of indoor smoking.

377 S.C. at 364. Having found no preemption of the City legislating in the area by the State, the Court determined that the City was empowered to enact the ordinance.

The Court next had to determine whether the particular Greenville ordinance was inconsistent with the Constitution and general law of the State. The Court stated as follows:

> [b]ecause we find the Ordinance does not criminalize conduct, we hold it does not run afoul of Article VIII, section 14 of the Constitution. Although Article VIII deals generally with the creation of local government, Article VIII, section 14 limits certain powers of local governments. See City of North Charleston v. Harper, 306 S.C. 153, 155-56, 410 S.E.2d 569, 570 (1991). Section 14 provides, in pertinent part: "In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: ... (5) criminal laws and the penalties and sanctions for the transgression thereof." S.C. Const., art. VIII, § 14.
>
> We have observed that this subsection of the Constitution requires "statewide uniformity" regarding the criminal law of this State, and therefore, "local governments may not criminalize conduct that is legal under a statewide criminal law." Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272, 274 (1996) (emphasis added); accord Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) (where the Court held that a municipality cannot criminalize nude dancing when State law does not).
>
> While the Ordinance in this case does make smoking in certain areas "unlawful" where the Clean Indoor Air Act does not, it is our opinion the Ordinance does not criminalize such behavior. Instead, the Ordinance states that a violation constitutes "an infraction." "Infraction" is defined as:

> A breach, violation, or infringement; as of a law, a contract, a right or a duty. A violation of a statute for which the only sentence authorized is a fine and which violation is expressly designated as an infraction.

Black's Law Dictionary 537 (6th ed.1992). Put simply, the plain language of the Ordinance is non-criminal in nature. This contrasts with the Clean Indoor Air Act's "misdemeanor" language which clearly indicates that a violation of the State law is considered a criminal offense.

377 S.C. at 365. As a result, having found that a violation of the Greenville ordinance constituted an "infraction", the Court further found that the ordinance did not attempt to criminalize conduct. The Court, therefore, found that the ordinance did not "set aside" this State's criminal laws and there was no violation of Article VIII, Section 14 of the State Constitution.

The Court, noting that municipalities are granted police powers pursuant to S.C. Code Ann. § 5-7-30, next agreed that the ordinance was "...a proper exercise of municipal power because it seeks to protect citizens from second-hand smoke." 377 S.C. at 367. The Court particularly found that

> [u]nder the State Constitution, "all laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, § 17. "A municipal ordinance is a legislative enactment and is presumed to be constitutional." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 425, 593 S.E.2d 462, 467 (2004). Furthermore, "[a]s a general rule, 'additional regulation to that of State law does not constitute a conflict therewith.' " Denene, 352 S.C. at 214, 574 S.E.2d at 199....

377 S.C. at 366-367.

Based upon its review, the Supreme Court determined that the Greenville ordinance was consistent with the State Constitution and the general laws of this State. In a subsequent case, Beachfront Entertainment, Inc. v. Town of Sullivan's Island, 2008 WL 4109723 (2008), the Court noted that its decision in Foothills Brewing and

> ...concluded that State law does not expressly preempt the regulation of smoking by a local government...(The Court reiterated that)...the State has not preempted the regulation of indoor smoking; a local government may therefore criminalize indoor smoking, but only to the extent consistent with State law....

The Court noted that as to the ordinance before the Court, it determined that the ordinance was invalid because it imposed a criminal penalty for smoking in locations where smoking is not illegal under State law. As a result, the Court determined that the penalty provision of the ordinance were unconstitutional "...because it conflicts with State criminal law by imposing a criminal penalty for conduct that is not illegal under State law."

Consistent with the above, in the opinion of this office, an ordinance banning smoking on a beach may be properly enacted by a municipality in that there is no preemption of a municipality enacting such an ordinance by the State. As stated in Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 94, 530 S.E.2d 890, 893 (2000), the Supreme Court determined that to achieve field preemption, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." There is no such apparent legislative intent as to a ban on smoking on a beach. Also, as noted, the ordinance before the Court in Foothills Brewing, supra, prohibited smoking in particular outdoor areas such as stadiums and zoos and the Court upheld that ordinance finding no preemption by the State in such regard. A ban on smoking on a beach would be a similar outdoor area.

However, as noted, it must also be determined as to whether such an ordinance, if it made smoking on a beach criminal, would be inconsistent with the Constitution and general law of the State. As noted above, pursuant to Article VIII, Section 14 of the State Constitution, "local governments may not criminalize conduct that is legal under a statewide criminal law." See: Martin v. Condon, supra. As in Beachfront Entertainment, supra, in the opinion of this office, if the act of smoking on a beach were made criminal, it would be unconstitutional "...because it conflicts with State criminal law by imposing a criminal penalty for conduct that is not illegal under State law." As a result, inasmuch as outdoor smoking is not illegal under State law, a violation of such an ordinance should not be criminalized but should be treated as a civil infraction, a noncriminal action.

I would further note that S.C. Code Ann. § 5-7-140 states that

> (A) The corporate limits of any municipality bordering on the high-tide line of the Atlantic Ocean are extended to include all that area lying between the high-tide line and one mile seaward of the high-tide line. These areas are subject to all the ordinances and regulations that may be applicable to the areas lying within the corporate limits of the municipality, and the municipal courts have jurisdiction to punish individuals violating the provisions of the municipal ordinances where the misdemeanor occurred in the area defined in this section.

Consistent with such statute, a prior opinion of this office dated June 14, 2005 determined that the corporate limits of a municipality which borders on the Atlantic Ocean includes that area between the high-tide line and one mile seaward. As set forth by Section 5-7-140, the ordinances of a

municipality would be applicable within such defined area. I would assume that the beach areas referenced in your letter are referring to beach areas bordering the Atlantic Ocean.

If there are any questions, please advise.

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General