ALAN WILSON
ATTORNEY GENERAL

August 10, 2011

Marvin C. Jones, Esquire
Jasper County Attorney
Post Office Box 420
Ridgeland, South Carolina 29936

Dear Mr. Jones:

We understand you desire an opinion of this Office concerning the enforcement of a county ordinance within an incorporated municipality. In your letter, you provided the following information:

> Recently Jasper County Council adopted an ordinance which provides as follows: "Commercial establishments which allow for the on premises consumption of beer, ale, porter, and/or wine shall be prohibited from operating between the hours of 2:00 o'clock A.M. and 6:00 o'clock A.M. on Mondays through Saturdays." A question has arisen as to whether or not this Ordinance has any application within the incorporated portions of the County.

Law/Analysis

Our Supreme Court explained that

> [d]etermining whether a local ordinance is valid is a two-step process. The first step is to determine whether the [county] had the power to adopt the ordinance. If no power existed, the ordinance is invalid. If the [county] had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State.

Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000).

Section 4-9-25 of the South Carolina Code (Supp. 2010) provides the specific powers given to counties by the Legislature. This provision states as follows:

> All 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.

S.C. Code Ann. § 4-9-25.

Our Supreme Court and this Office recognize section 4-9-25 provides general police powers to counties. See Greenville County v. Kenwood Enterprises, Inc., 353 S.C. 157, 164, 577 S.E.2d 428, 431 (2003), overruled on other grounds by Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005); Ops. S.C. Atty. Gen., September 22, 2008; April 7, 2008. We believe Jasper County (the "County") has the authority, pursuant to its police power granted by this provision to pass an ordinance regulating the sale of alcohol during certain hours. In addition, we understand from our Supreme Court's decision in Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) that a local government's enactment of an ordinance further regulating the operations of retailers of alcoholic beverages is not preempted by State law. Therefore, we believe a court would likely find the County's ordinance valid.

Nonetheless, your question deals not with the validity of the County's ordinance, but its enforceability within a municipality located in the County. As you mentioned in your letter, in 1988, this Office addressed the applicability of a county ordinance within the incorporated areas of the county. Op. S.C. Atty. Gen., February 25, 1988. Although the passage of the Home Rule Act granted police powers to counties, the opinion states "it is doubtful, that counties have the power to extend their regulatory authority to areas that are within the confines of incorporated municipalities." Id. We stated the Constitution does not provide for such power. Id. In addition, we noted that through the Home Rule Act, the Legislature acknowledged limitations on a county's authority within incorporated areas. Id.

> This Office has, on several occasions, expressed its belief that a county's exercise of police power is restricted to the unincorporated areas of the county. In an opinion dated October 2, 1984, the 'intent of the General Assembly to recognize the autonomy of a municipality within its borders and likewise recognizes the autonomy of the county within the unincorporated areas of the county' was discussed. Likewise, in an opinion dated May 21, 1987, we concluded that a Richland County anti-smoking ordinance would be of no effect for facilities of the Richland County Recreation Commission located within a municipality of the county.

> Our beliefs are in accordance with the general law on this issue. Counties and cities are viewed as co-equal political subdivisions which are independent of each other politically, geographically, and governmentally. City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 101 S.E.2d 641 (1958); Murray v. City of Roanoke, 194 Va. 321, 64 S.E.2d 804 (1951). As stated in 62 C.J.S. Municipal Corporations § 114:
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> > Constitutions and statutes providing for different types of government for the counties and cities of the state establish the policy of placing urban areas under city government and keeping rural areas under county government. A county has no legal right to legislate for a municipal corporation located within its limits on any subject which is within the scope of the powers granted the corporation, and particularly on any matters involving the police power of the state. When a municipal corporation is organized within the limits of a county, then as much of the territory of such county as is comprehened within the municipal limits of such corporation is, so far as local government is concerned, withdrawn from the county, and any ordinance or regulation passed by the county has no binding force on the municipality as to any matters or subjects as to which the municipality is vested with the power to enact. Constitutional provisions authorizing municipalities to transfer powers to a consenting county do not relate to or affect state powers. [Footnotes omitted.]
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> See also Hobb v. Abrams, 104 Idaho 205, 657 P.2d 1073 (1983).

Id. We continued on to explain that we believe article VIII, section 13 of the South Carolina Constitution, allowing local governmental bodies to enter into agreements for the joint administration of governmental functions and exercise of powers, further supports the understanding that "a county could not exercise power within an incorporated municipality unless such an agreement existed or, in effect, the municipality has assented to the county's exercise of power." Id. Furthermore, we explained that municipalities are afforded their own sovereign police powers and just because the municipality has not chosen to exercise its powers in a particular area does not give the county the inherent power to regulate the matter within the municipality. Id.

In your letter, you mentioned that we issued this opinion prior to the enactment of section 4-9-25, quoted above, and question whether or not its enactment would change our 1988 opinion. The Legislature enacted section 4-9-25 in 1989. However, we believe our opinion remains valid. While section 4-9-25 gives counties general police powers, we do not believe it gives counties

any specific authority over municipalities. Thus, for the same reasons we explained in our 1988 opinion, we believe that despite the passage of section 4-9-25, county ordinances are not generally enforceable within the incorporated areas of a county. However, as we pointed out in 1988 opinion, as well as several subsequent opinions, a municipality may choose to enforce a county ordinance within its boundaries by entering into an agreement with the county.

Our determination is in accord with our more recent opinions. In a 1996 opinion, we concluded that a Pickens County ordinance concerning demonstrations and protest would not be applicable within the Pickens city limits unless Pickens County and the City of Pickens enter into an intergovernmental agreement recognizing the enforceability of the county's ordinance. Op. S.C. Atty. Gen., May 20, 1996. See also Op. S.C. Atty. Gen., February 8, 2011 (finding "[c]ounties and other municipalities may agree to jointly administer services or exercise powers, but a county could not exercise power within an incorporated municipality unless such an agreement existed or, in effect, the municipality has assented to the county's exercise of power.").

Conclusion

The Legislature's enactment of section 4-9-25 certainly affords general police powers to counties, and we believe a court would likely find the County has the authority to regulate the hours in which alcohol may be sold pursuant to this provision. However, we do not believe that section 4-9-25 affords counties any additional authority over the incorporated areas within their boundaries. Therefore, based on the reasoning of our 1988 opinion, we continue to believe county ordinances generally are not enforceable within municipalities unless the county and the municipality enter into an agreement. Accordingly, we believe the County ordinance you reference is not enforceable within the County's municipalities unless such an agreement exists.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General