ALAN WILSON
ATTORNEY GENERAL

October 11, 2011

H. Fulton Ross, Jr., City Attorney
City of Gaffney
P. O. Box 308
Gaffney, South Carolina 29342

Dear Mr. Ross,

We received your letter requesting an opinion of this Office concerning the validity of municipal ordinances regulating fireworks. You ask whether such regulation is preempted by State law providing for the regulation of fireworks in S.C. Code §§ 23-35-10 et seq., and if the "Fireworks Prohibited Zones" established in § 23-35-175 constitute the only areas where the discharge of fireworks can be banned. By way of example, you ask whether a municipal ordinance could lawfully ban the discharge of fireworks within city limits, or could limit the hours during which fireworks may be discharged. This opinion addresses relevant case law, statutes, and prior opinions of this Office.

Law/Analysis

A local ordinance is a legislative enactment and presumed constitutional. Southern Bell Tel. And Tel. Co. v. City of Spartanburg, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). The burden of proving the invalidity of a local ordinance rests with the party attacking it. Id. We caution, as we have before, that only a court may declare an ordinance invalid:

> [W]hile this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state law. Accordingly, an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction.

Op. S.C. Atty. Gen., March 21, 2003.

For an ordinance to be valid, it must have been enacted by a local governing body with the authority to do so and it must not conflict with State law. As stated by the Supreme Court of South Carolina:

> Determining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.

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Hospitality Ass'n of S. Carolina, Inc. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116-17 (1995).

The power to regulate matters of local concern began devolving to counties and municipalities with the amendment of Article VIII of the South Carolina Constitution in 1973. "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." Id. at 225-26, 464 S.E.2d at 117 (citing S.C. Const. Art. VIII, §§ 7 and 9). In addition, § 17 of Article VIII now provides:

> *The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor.* Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

S.C. Const. Art. VIII, § 17 (emphasis added).

In accordance with the mandates of §§ 7 and 9 of Article VIII, the General Assembly enacted legislation in 1975 setting forth, among other things, the powers of county and municipal governments. See Act No. 283 of 1975. The provisions concerning the powers of counties and municipalities were later codified at S.C. Code §§ 4-9-10 et seq., and 5-7-10 et seq. (1976), respectively. Counties and municipalities possess police power to enact ordinances, to the extent consistent with State law, to promote safety, general welfare, and convenience, or to preserve health, peace, order, and good government. See § 4-9-25; § 5-7-30.

The Terpin Decision - 1985

Our Supreme Court specifically addressed whether local governments have the authority to regulate fireworks in the seminal case of Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985). The County enacted an ordinance prohibiting the sale, possession, or discharge of fireworks within a one mile radius of a racetrack twenty-four hours before or after an event. In addition, the ordinance classified violations as a misdemeanor, punishable by a $500 fine or thirty days in jail.

The Court recognized that "Article VIII was intended to return county government to a local level," and the General Assembly had granted counties certain enumerated powers pursuant to § 4-9-30. However, the Court placed emphasis on the limiting language of section (14): "*No ordinance including penalty provisions shall be enacted with regard to matters provided for by the general law, except as specifically authorized by such general law.*" § 4-9-30(14). In reviewing the general law on fireworks, the Court examined §§ 23-35-10 *et seq.* and found the General Assembly had created "an extensive system for controlling the possession, sale, storage, and use of fireworks":

> This legislation defines the permissible classes of fireworks. It requires retailers and others to obtain state and municipal licenses. Issuance of a county license is allowed after inspection of the premises by the county sheriff. § 23-35-70(3). The Code also establishes the proper manner of storage of fireworks and prohibits sales to minors. It

> prohibits explosions near churches, hospitals, schools, motor vehicles, and locations where fireworks are stored. Section 23-35-160 forbids the sale or use of most fireworks in counties with populations between 205,000 and 215,000 and provides a penalty for its violation. Section 23-35-140 authorizes the State Fire Marshall to issue rules and regulations, and § 23-35-150 creates penalties for violation of the Act.

In accordance with the express terms of § 4-9-30(14), the Court found the ordinance contained penalty provisions, concerned a matter provided for by general law, and no provision authorized local regulation of the matter. The Court rejected the argument that county acted within its police powers and the ordinance is valid if it does not conflict with the general law, noting it was bound by the express terms of 4-9-30(14). Thus, the ordinance was declared invalid.

In 2003, this Office addressed whether the law had changed in the intervening years since 1985 to the extent that Terpin had been undermined or altered. Op. S.C. Atty. Gen., March 21, 2003. We observed that since Terpin, the Court had recently applied the so-called "manifest intent" test, stating that "[i]n order to pre-empt 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, 397 S.E.2d 662 (1990) (holding Alcoholic Beverage Control Commission's "sole and exclusive authority" to regulate operation of locations that sell alcoholic beverages did not preempt town ordinance prohibiting internally illuminated signs in stores). We noted that Court had applied this "manifest intent" test in several more recent cases and found no preemption despite the existence of comprehensive regulatory schemes at the state level and strong statutory language supporting preemption. See Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 94, 530 S.E.2d 890, 893 (2000) ("while the General Assembly has enacted a comprehensive scheme regulating many aspects of video poker machines, the scheme does not manifest an intent to prohibit any other enactment from touching on video poker machines"); Denene, Inc. v. City of Chas., 352 S.C. 208, 574 S.E.2d 196 (2002) (ordinance prohibiting certain businesses from operating during early morning hours not preempted even though state agency had "sole and exclusive authority" to regulate the operation of businesses).

We then addressed two cases in which the Court invalidated local ordinances on the basis they conflicted with State law:

> The Court has also examined the issue of a case where state law does not make criminal certain conduct thereby arguably rendering the conduct "legal." In such event, the Court has relied upon Article VIII, § 14(5) of the South Carolina Constitution which mandates that an ordinance of a county or municipality shall not "set aside ... (5) criminal laws and the penalties and sanctions for the transgression thereof ...." Examples which fall into this category are a county's "general ban on public nudity" in the context of nude dancing. See Diamonds v. Grvlle. Co., 325 S.C. 154, 480 S.E.2d 718 (1997); Connor v. Town of Hilton Head, 314 S.C. 251, 442 S.E.2d 608 (1994). In both these cases, the Court rejected the argument that the fact that the ordinances in question did not conflict with state law allowed the county to engage in further regulation. In essence, the Court concluded that "all conduct is lawful unless made unlawful by enactment of the General Assembly." See Diamonds, 480 S.E.2d at 772. (Burnett, J., dissenting).

Although at the time we acknowledged that some cases since 1985 provided support for the undermining of the Terpin decision, we concluded Terpin remained good law and still precluded local regulation of

fireworks. We reasoned that Terpin could be reconciled with the "manifest intent" preemption test: "A fair reading of Terpin is that the Court concluded that the Legislature intended to preempt local regulation of fireworks through a comprehensive, statewide regulatory scheme." We noted Terpin also essentially held that the ordinance conflicted with § 4-9-30(14) because it provided a penalty. We advised that either express authority from the General Assembly, or a decision from the Supreme Court altering or modifying its conclusion in Terpin, would be necessary for us to change our opinion.

Thus, the question before us is whether the law has changed since Terpin was decided in 1985, and since our 2003 opinion, to the extent that Terpin's holding has been undermined or altered. We now conclude that it has.

Recent Statutory Changes Relating to Fireworks

Since 2003, significant changes have been made to the statutes relating to fireworks, §§ 23-35-10 et seq. In 2005, the General Assembly amended this chapter to include § 23-35-175. See 2005 Act No. 6. The title of the act indicates it was enacted "so as to provide a process for establishing fireworks prohibited zones within counties and municipalities."[1] It is unlawful to "knowingly and willfully discharge fireworks from, in, or into a Fireworks Prohibited Zone." § 23-35-175(B). Violations are classified as a misdemeanor, punishable by a fine of $100 to $200 or thirty days in jail. § 23-35-175(B). The power to establish these zones lies with the owner, lessee, or managing authority of real property, and the zone extends no further than the boundaries of the property. § 23-35-175(C). However, "*if authorized by a decision of the local governing body*," such a zone may be extended the beyond the boundaries of their respective real property:

(a) to the low-water mark of all oceanic bodies of water adjoining the subject property;
(b) to the center line of any street or thoroughfare that abuts the subject property; or
(c) *onto any public land* sharing a common boundary with the subject property for a distance not to exceed five hundred feet.

§ 23-35-175(E) (emphasis added).

Most recently, the General Assembly enacted 2010 Act No. 196, effective June 1, 2010 ("2010 Act"). §2 of the 2010 Act repealed most of §§ 23-35-10 et seq. relating to fireworks.[2] Significantly, this repealed most of the sections upon which Terpin found "an extensive system for controlling the possession, sale, storage, and use of fireworks" at the state level. Among those sections repealed were § 23-35-120,[3] prohibiting the discharge of fireworks with proximity of certain facilities statewide, § 23-35-

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[1] *See* Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999) ("it is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature").

[2] The 2010 Act specifically repealed the following sections in this chapter: §§ 23-35-10, -20, -30, -40, -50, -60, -70, -80, -90, -100, -110, -120, -140, and -160.

[3] Pursuant to § 23-35-120 (repealed 2010), it was unlawful to:

(1) To offer for sale or to sell permissible fireworks to children under the age of fourteen years unless accompanied by a parent;

160, prohibiting the discharge of fireworks in counties with certain populations, and § 23-35-140, providing the State Fire Marshal with regulatory power over the "storage, transportation, sale and use" of fireworks. The few remaining provisions, notwithstanding § 23-35-175, now generally concern: the use of indoor pyrotechnics before a proximate audience (§ 23-35-45); the manufacture, storage, transportation, or possession of certain fireworks (§ 23-35-130); penalties for violations of provisions of Chapter 35 (§ 23-35-150); and the sale, delivery, or disposal of explosives (§ 23-35-170).

Although § 2 of the 2010 Act repealed numerous firework statutes, § 1 amended Chapter 56 of Title 40 of the S.C. Code relating to the State Board of Pyrotechnic Safety ("Pyrotechnic Board") and the regulation of pyrotechnics. The "policy and purpose" of the act provides:

> It is the policy of this State, and the purpose of this chapter, to promote the safety of the public and the environment by effective regulation of pyrotechnics. Public safety requires that persons who handle pyrotechnics have demonstrated their qualifications, that they adhere to reliable safety standards, and that the sites where pyrotechnics are *manufactured, stored, and sold* adhere to reliable safety standards. It is neither the policy of this State nor the purpose of this chapter to place undue restrictions upon entry into the business of handling pyrotechnics.

§ 40-56-1 (Supp. 2010) (emphasis added). In addition, the duties of the Pyrotechnic Board are described as follows:

> (A) It is the duty and responsibility of the board to promulgate . . . regulations relating to pyrotechnics in this State, including the *manufacture, sale, storage, and fire safety* of these products. . . .
> (B) The board may conduct hearings on alleged *violations by licensees* of this chapter or regulations promulgated pursuant to this chapter and may *discipline these licensees.*
> (C) The board shall also recommend to the General Assembly legislation it considers necessary for the safety and control *of the sale* of pyrotechnics.

§ 40-56-70 (Supp. 2010) (emphasis added).

The remaining provisions of Chapter 56, Title 40, generally regulate the manufacture, sale, and storage of fireworks. Pursuant to § 40-56-30, it is unlawful for someone "to engage in the manufacturing, storage, or sale of pyrotechnics unless in compliance with this chapter." Any person who manufactures, sells, or stores fireworks must first be licensed by the Pyrotechnic Board to do so. § 40-56-35. The duty to investigate complaints and violations of this chapter lies with the Department of Labor, Licensing and Regulation, and certain law enforcement officials are given authority to inspect facilities where fireworks are manufactured, stored, or sold. § 40-56-80. The jurisdiction of the Pyrotechnic Board is limited to

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(2) **To explode or ignite fireworks within six hundred feet of any church, hospital, asylum or public school;**
(3) **To explode or ignite fireworks within seventy-five feet of where fireworks are stored, sold or offered for sale;**
(4) To ignite or discharge any permissible fireworks within or throw the same from any motor vehicle; and
(5) To place or throw any ignited fireworks into or at any motor vehicle.

"actions of licensees and former licensees." § 40-56-115. Violations of this chapter are misdemeanors, punishable by fine or jail time. § 40-56-200. All facilities where fireworks are manufactured, sold, or stored must comply with regulations promulgated by the Pyrotechnic Board. § 40-56-220. An application for a retail fireworks sales license requires proof of liability insurance coverage which meets certain requirements. § 40-56-230. However, no provision in §§ 40-56-1 et seq. concerns the discharge of fireworks. Accordingly, § 23-35-175 is the only remaining State law which currently concerns the discharge of fireworks.

Validity of Ordinance in Light of Recent Supreme Court Cases

The Court has recently issued a number of decisions addressing the validity of local ordinances. Although the determination of whether an ordinance is valid is still described as "essentially a two-step process," the analysis employed in most of these recent cases is divided into three section which generally address: whether the county or municipality had the authority to enact the ordinance; whether the ordinance is preempted by State law; whether the ordinance conflicts with State law.[4] Accordingly, we will address the validity of a local ordinance regulating the discharge of fireworks under each of these separately.

1) Authority to Enact Ordinances

The Court has recently construed the police powers of local governments to enact ordinances pursuant to § 4-9-25 and § 5-7-30, in conjunction with Article VIII's mandate of liberal construction, in a manner more favorable to counties and municipalities. See S.C. State Ports Authority v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006) (county had authority to pass resolution and enact ordinance promoting welfare of residents by building and maintaining public marine terminal); Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008) (municipality had authority to enact ordinance banning public smoking because it promotes general welfare and preserves health by protecting citizens from second-hand smoke); Sandlands C & D, LLC v. County of Horry, Op. No. 27042 (2011) (county had authority to enact ordinance regulating flow of solid waste in furtherance of police powers in light of counties' longstanding involvement in field). The nature and purpose of these ordinances held to be within the police power of local governments support the conclusion that they also possess the authority to prohibit the discharge of fireworks in certain locations or at certain times. Certainly, the purpose of such an ordinance could promote the security, general welfare, and convenience of counties and municipalities, or preserve peace and order within them.

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[4] See, e.g., S. C. State Ports Authority v. Jasper County, 368 S.C. 388, 394-95, 629 S.E.2d 624, 627 (2006). The Court restated the "two-step process" as follows:

> Determining whether a local ordinance is valid is essentially a two-step process. The 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) (emphasis added).

However, an ordinance is not automatically valid simply because it was passed under the guise of police powers. See Sandlands C & D, LLC v. County of Horry, No. 27042 (S.C. Sept. 19, 2011) ("mere mention of police power rhetoric as part of the preamble to an ordinance does not guarantee that a local government action is a valid exercise of such powers"). "If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid." Foothills Brewing Concern v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

2) Preemption

As the Court recently noted, it has not always followed the same preemption analysis. See Ports Authority, 368 S.C. at 395, 629 S.E.2d at 627. Although the "manifest intent" preemption test has not been abandoned, the Court has recently found it appropriate to employ an analysis akin to that used to determine whether federal law preempts state law, i.e., whether State law preempts local law through express, implied field, or implied conflict preemption. *See* Ports Authority, Foothills Brewing, Beachfront Entertainment, Aakjer v. City of Myrtle Beach, 388 S.C. 129, 694 S.E.2d 213 (2010), *and* Sandlands.

a) Express Preemption

"Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." Ports Authority, 368 S.C. at 397, 629 S.E.2d at 628.

In Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), the Court held local public smoking bans were not preempted by the regulation of indoor smoking pursuant to the Clean Indoor Air Act, §§ 44-95-10 et seq. The Court emphasized that "[t]here is simply no **expressly** stated intent in the statute that the State chose to exclusively regulate the subject of indoor smoking." Id. (emphasis in original).

In Sandlands C & D, LLC v. County of Horry, Op. No. 27042 (2011), the Court held an ordinance regulating the county-wide flow of solid waste was not preempted by State law imposing a statewide, coordinated solid waste management scheme to be overseen at the state level by DHEC. See S.C. Solid Waste Policy and Management Act (SWPMA), §§ 44-96-10 et seq. The Court found no express language in the SWPMA evincing the intent to preclude local regulation over the flow of solid waste. Although, the Court noted, the express language of provisions in the SWPMA granted DHEC exclusive authority to make certain decisions and determinations with regards to permitting,[5] no such language was found in § 44-96-260(2) concerning the flow of solid waste within counties.

In light of Foothills Brewing and Sandlands, it is apparent that express preemption will not be found absent statutory language which clearly and expressly indicates a legislative intent to preclude local regulation in an entire field. In addition, the authority of a state agency to oversee a statewide,

[5] The Court referenced § 44-96-290(E) ("No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department"), and § 44-96-260(2) (DHEC may "issue, revoke, or modify permits, registrations, or orders under such conditions as the department may prescribe . . ."), in support of the conclusion DHEC had exclusive authority in the area of permitting.

coordinated regulatory scheme will not be construed as exclusive except to the extent the language of a statute expressly indicates certain decisions or determinations are solely within the agency's powers.

Like the statutes in Foothills Brewing and Sandlands, no statute expressly indicates the Legislature intended to preclude any local regulation in the area of fireworks. Although the State Fire Marshal once possessed the authority to issue rules and regulations regarding the use of fireworks pursuant to § 23-35-140, that section was repealed by the 2010 Act. The Pyrotechnics Board now has the authority "to promulgate . . . regulations relating to pyrotechnics in this State, including the *manufacture, sale, storage, and fire safety* of these products." § 40-56-70(A). No language in that provision expressly gives the Pyrotechnic Board *any* authority over the discharge of fireworks, much less exclusive authority over the entire field of fireworks. Accordingly, the General Assembly has not given any state agency exclusive authority over the regulation of fireworks or, more specifically, the discharge of fireworks.

b) Implied Field Preemption

Implied field 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.*" Ports Authority, 368 S.C. at 397, 629 S.E.2d at 628 (emphasis added).

In Ports Authority, the Court held Jasper County was not preempted from passing several enactments which allowing it to develop a public marine terminal on the Savannah River, nor was it preempted from acquiring property for such purposes through condemnation proceedings. Pursuant to the S.C. State Ports Authority's (SCSPA) Enabling Act, §§ 54-3-110 et seq., the SCSPA possessed the authority to promote, develop, construct, maintain, and operate harbors in the State, and also had the power to acquire property for such purposes through condemnation.

Although Ports Authority found that the General Assembly had created a "comprehensive statutory scheme regulating many aspects of port and terminal development, ownership, and maintenance in this state," the Court concluded this scheme failed to manifest the intent to preempt local enactments from touching the subject. The General Assembly's intent *not* to occupy the entire field was indicated by: "consistent use of the permissive 'may' in describing the SCSPA's powers"; other statutory provisions allowing certain cities to develop port and terminal utilities; other statutory provisions allowing local governments to construct terminals; the SCSPA's general supervisory authority over terminals and ports, which the Court held "is a manifestation that the General Assembly contemplated the development of terminals by other entities"; and the presence of other non-SCSPA-owned terminals in the state. The Court also rejected the argument that the management of the State's ports requires statewide uniformity, again referencing the SCSPA's supervisory authority in support of its conclusion.

However, in Aakjer, 388 S.C. 129, 694 S.E.2d 213, the Court held the City was precluded from imposing a helmet and eyewear requirement for all motorcycle riders because the need for statewide uniformity in this area is "plainly evident." Pursuant to provisions of the Uniform Traffic Act, State law only required helmets and protective eyewear for riders under the age of 21. §§ 56-5-3660 and -3670. The Court reasoned that allowing local authorities to impose requirements in addition to State law, or in conflict with each other, would create compliance problems which would "unduly limit a citizen's freedom of movement throughout the State."

In Sandlands, the Court held the County's efforts to regulate the flow of solid waste were not impliedly preempted despite the fact the SWPMA required counties "to comply with state law, DHEC regulations, and the state solid waste management plan when submitting their own plans." The Court held that "[w]here the General Assembly specifically recognizes a local government's authority to enact local laws in the same field, the statutory scheme does not evidence legislative intent to occupy the entire field of regulation." Finding the SWPMA "expressly invites county regulation, planning, authority, and responsibility" in solid waste management, the Court concluded the General Assembly did not intend to occupy the entire field. In addition, the Court noted that the compliance concerns with local regulations in Aakjer were not present in this case, instead finding that "in the solid waste field, statewide uniformity is not necessarily beneficial, given the various solid waste needs specific to each county, which differ in size, geography, and population."

Notwithstanding the need for statewide uniformity, the cases of Ports Authority and Sandlands indicate a field will not be preempted by State law if any provision that is part of a statewide, coordinated regulatory scheme can be construed as recognizing the authority of local governments to regulate in the field. Any such recognition is considered a manifestation of the legislative intent *not* to occupy a field. As seen in Aakjer, statewide uniformity is necessary in an area where the need for such is "plainly evident." Such a need may exist when local regulation in the field would create compliance problems which impose undue burdens on those seeking to comply with them. Aakjer. Statewide uniformity is unnecessary, however, where it is "not necessarily beneficial" to the needs of counties and municipalities. Sandlands.

Although the Court in Terpin found the State had created an "extensive system for controlling the possession, sale, storage, and use of fireworks," this system no longer exists in the same form. The State has arguably created a statewide, coordinated regulatory scheme with regards to the manufacture, storage, and sale of fireworks, and the licensing of these activities, to be overseen at the state level by the Pyrotechnic Board. §§ 40-51-1 et seq. However, this scheme in no manner concerns the discharge of fireworks.

Currently, § 23-35-175 is the only statute that does concern the discharge of fireworks. Like the pertinent statutes in Ports Authority and Sandlands, the plain language of § 23-35-175 acknowledges the authority of local governments to regulate the discharge of fireworks. Subsection (E) provides that a "Fireworks Prohibited Zone" may only extend onto public land *if authorized by a decision of the local governing body*. § 23-35-175(E)(1). The only limitations placed on this authority are merely procedural – the local governing body must schedule a hearing, provide public notice of the hearing, and receive testimony. § 23-35-175(E)(4). Nothing in the statute indicates this is the sole and exclusive process by which local governments may prohibit the discharge of fireworks on public property. In addition, subsection (J) provides that no provision in this section applies to "a professional fireworks display show or demonstration that has been *permitted or licensed to operate by the local governing body* or has been authorized to operate as provided by law." § 23-35-175(J). Clearly, if local governments have the authority to permit or license the display of fireworks, they are not preempted from regulating the discharge of fireworks. Therefore, we believe the enactment of § 23-35-175 indicates the Legislature did not intend to preclude local regulation of the discharge of fireworks.

With regards to the need for statewide uniformity, the issue before us is arguably analogous to Sandlands, but distinguishable from Aakjer. Like the SWPMA in Sandlands which explicitly allowed

single-county planning, §23-35-175 explicitly allows local governments to authorize the extension of fireworks prohibited zones onto public land. Thus, we believe the General Assembly recognized the need for local regulation with the 2005 enactment of § 23-35-175. In addition, unlike the motorcycle equipment regulations of the Uniform Traffic Act in Aakjer, there currently is not a clear, uniform statewide regulation concerning the discharge of fireworks. Until recently, § 23-35-20 uniformly prohibited the discharge of fireworks within proximity of certain establishments statewide, and § 23-35-160 prohibited the discharge of fireworks in counties with certain populations. However, the 2010 Act repealed these statutes. Although the 2010 Act also amended the provisions of §§ 40-56-1 et seq. relating to pyrotechnics, none of these statutes concern the discharge of fireworks. Thus, we believe the General Assembly's repeal of the only uniform, statewide regulation prohibiting the discharge of fireworks, and the contemporaneous failure to include any such regulation in the newly enacted fireworks sections, manifest a legislative intent to allow local regulation of the matter.

In addition, the compliance problems identified with local motorcycle equipment regulations in Aakjer are not present here. Clearly, the enactment of different county and municipal ordinances concerning the discharge of fireworks would not unduly prohibit a citizen's movement throughout the State. It is not, therefore, "plainly evident" that the regulation of the discharge of fireworks requires statewide uniformity. Moreover, like the management of solid waste flow in Sandlands, the statewide regulation of the discharge of fireworks is not necessarily beneficial. Obviously, the many counties and cities in this State vary in size, population densities, demographics, ecological environments, and in other aspects which affect their individual needs to prohibit or allow the discharge of fireworks in certain areas or at certain times.

c) Implied Conflict Preemption

Implied conflict preemption "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." Ports Authority, 368 S.C. at 400, 629 S.E.2d at 630.

In Ports Authority, the Court held that the County's efforts to develop the terminal marine port and acquire property through condemnation did not hinder the purposes of the SCSPA, nor conflict with the provisions of its Enabling Act. The Court found that the provisions of the Enabling Act "do not manifest an intent that other public entities are prohibited from developing ports and terminals or from exercising their eminent domain powers for such development." In light of the SCSPA's supervisory powers over owners of terminals pursuant to the Enabling Act, the Court noted that a county owned terminal would be subject to the general supervision of the SCSPA. Therefore, compliance with both was possible.

In Sandlands, the Court found the County ordinance regulating the flow of solid waste neither frustrated nor interfered with the purpose of the SWPMA or its regulations. The Court observed that "[w]hile the SWPMA provides for a statewide management system, it also places the onus on the counties to plan and provide for waste collection and disposal at the local level." Finding compliance with the ordinance and the SWPMA "undoubtedly possible," the Court concluded the ordinance was not preempted.

As to the matter at hand, there is no indication an ordinance prohibiting the discharge of fireworks would hinder the purpose of any statute concerning fireworks, and compliance with such an ordinance and State law is clearly possible. The title of Act No. 6 of 2005 indicates § 23-35-175 was enacted "so as to provide a process for establishing fireworks prohibited zones within counties and municipalities." See Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999) ("it is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature"). Nothing in the title of the act or its provisions indicates the General Assembly intended to limit the authority of local governments to regulate the discharge fireworks to the procedures set forth in § 23-35-175 for the establishment of "fireworks prohibited zones." In addition, an ordinance prohibiting the discharge of fireworks in certain areas or at certain times would merely impose regulation into areas in addition to those regulated by State law pursuant to § 23-35-175.

The same conclusion is reached with regards to the purpose and provisions of the pyrotechnics regulations of Chapter 56 of Title 40. § 40-46-1 indicates the purpose of the chapter is to promote safety through the regulation of pyrotechnics. The language of that section, however, indicates that the subject matter of such regulations is limited to the persons and facilities responsible for the manufacture, storage, and sale of pyrotechnics. Nothing in the provision can be construed as indicating an intent to regulate the discharge of fireworks. Likewise, § 40-56-70 gives the Pyrotechnic Board the authority to regulate the manufacture, sale, storage, and fire safety of pyrotechnics, and to address violations of this chapter by "licensees." A "licensee" is a person, firm, or entity licensed under this chapter by the Pyrotechnic Board to manufacture, sell, or store fireworks. § 40-56-20(9). Clearly, the regulatory authority of the Pyrotechnic Board does not extend to the discharge of fireworks or persons discharging fireworks. These provisions indicate the General Assembly did not intend to regulate the discharge of fireworks, much less local enactments regulating such. Thus, local ordinances regulating the discharge of fireworks do not hinder the purposes of §1 of the 2010 Act or conflict with any of its provisions, and compliance with both is possible.

3) Inconsistency with the Constitution or General Law

As the Supreme Court has explained:

> Where an ordinance is not preempted by state law, the ordinance is valid if there is no conflict with State law. A conflict between a state statute and a county ordinance exists when "both contain either express or implied conditions which are inconsistent 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."

Ports Authority, 368 S.C. at 403, 629 S.E.2d at 631 (citations omitted); see also Fine Liquors, 302 S.C. at 553, 397 S.E.2d at 664 ("An ordinance which imposes a regulation in addition to that of State law does not constitute a conflict"); and Denene, 352 S.C. at 215, 574 S.E.2d at 199 (unreasonable local regulation which has effect of "banning a business which the State has deemed legal" is unenforceable as exceeding the local government's police power).

The power of local governments to enact ordinances is further limited by Article VIII, § 14, which provides that "general law provisions applicable to the following matters shall not be set aside: . . . (5) criminal laws and the penalties and sanctions for the transgressions thereof; and (6) the structure and

administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity." The Court has determined that certain matters are solely state functions, and thus local regulation of such a matter is unconstitutional. See, e.g., Brashier v. S.C. Dept. of Transp., 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997) (holding, pursuant to Art. VIII, § 14, "planning, construction, and financing of state roads is a governmental service which requires statewide uniformity"); and Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975) (holding, pursuant to Art. XI, public education is the duty of the General Assembly, not of the counties).

The issue of whether a local ordinance "sets aside" state criminal law was previously addressed in Diamonds, Connor, and, arguably, Terpin. The Court recently expounded on this issue in two cases concerning local public smoking bans. See Foothills Brewing, 377 S.C. 355, 660 S.E.2d 264; Beachfront, 379 S.C. 602, 666 S.E.2d 912. The Clean Indoor Air Act, §§ 44-95-10 et seq., prohibited smoking inside certain public facilities and classified violations as misdemeanors punishable by a fine of $10 to $25. The ordinance in each case prohibited smoking in additional areas where State law did not. Although the Court found neither ordinance was preempted, one was upheld while the other was invalidated.

The Court distinguished the two ordinances based on the manner in which one ordinance characterized violations, and based on the severity of the penalties each ordinance imposed for violations compared to that imposed by state law. In Foothills Brewing, the ordinance characterized a violation as an "infraction,"[6] punished them with a fine, and declared them to be a "public nuisance." The Court found the plain language of the ordinance was non-criminal in nature and thus did not criminalize any conduct, whereas the "misdemeanor" language used in the Clean Indoor Air Act indicated a violation was a criminal offense. The Court concluded that the ordinance was consistent with State law: "While the State has legislated restrictions on smoking in certain areas, a civil ordinance which adds areas does not in any way conflict with State law."

In Beachfront, however, a violation of the ordinance was punishable by a fine of $500 and/or thirty days in jail. Unlike the civil penalty imposed by the ordinance in Foothills Brewing, the Court determined that the ordinance in this case imposed a criminal penalty. The Town argued that, pursuant to the ordinance's severance clause, the thirty-day jail provision should be severed and the $500 fine construed as a civil penalty. The Court disagreed, finding the $500 fine could not be construed as a civil penalty because it was substantially greater than the $10 to $25 fine imposed by the Clean Indoor Air Act. Thus, the ordinance conflicted with State criminal law by imposing a criminal penalty for smoking in places where it was not illegal under State law.

We believe regulation of the discharge of fireworks is not inherently a state function, nor is it a matter which requires statewide uniformity. Unlike public education, no constitutional provision requires the State to provide for matters pertaining to the regulation of fireworks. As previously discussed, we also believe regulation of the discharge of fireworks is a matter which, unlike the state highway system, does not require statewide uniformity. Local regulation of the discharge of fireworks is arguably more beneficial to the particular needs and desires of different localities which vary in size, population, demographics, and other aspects. One locality's need for peace and quiet is another locality's desire for amusement.

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[6] The Court noted that an "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 is a fine and which violation is expressly designated as an infraction." Black's Law Dictionary 537 (6th ed. 1992).

Although local governments may not criminalize conduct that is otherwise legal under a statewide criminal law, it is clear under Foothills Brewing and Beachfront that local governments may prohibit such conduct through the enforcement of a *civil* penalty. Under this rule, the ordinance in Terpin would still be invalid because it imposed a criminal penalty for violations. However, a different conclusion would likely result if the penalty provision was carefully tailored to correspond with the civil penalty upheld in Foothills Brewing.

Notwithstanding consideration of a penalty provision, we believe a local ordinance which prohibits the discharge of fireworks in certain locations or at certain times would generally not conflict with State law. Such restrictions would merely add areas where such conduct is prohibited to the "Fireworks Prohibited Zones" established in accordance with § 23-35-175. We caution, however, that we believe county ordinances generally are not enforceable within municipalities unless the county and the municipality enter into an agreement. Op. S.C. Atty. Gen., August 10, 2011.

Conclusion

Although we concluded in 2003 that the Terpin decision still effectively preempted the local regulation of fireworks, we believe the recent Supreme Court decisions and statutory changes discussed herein support the conclusion that counties and municipalities now possess the authority to regulate the discharge of fireworks. The recent Supreme Court cases of Ports Authority, Foothills Brewing, and Sandlands support the conclusion that local governments have police power to enact ordinances prohibiting the discharge of fireworks in certain locations or at certain times.

In 2005, the General Assembly enacted § 23-35-175 creating a process by which property owners, lessees, or managing authorities may establish their respective properties as "Fireworks Prohibited Zones." § 23-35-175(E) also provides that counties and municipalities have the authority to extend these "Fireworks Prohibited Zones" certain distances beyond such properties onto public property. In accordance with Ports Authority and Sandlands, we believe § 23-35-175 constitutes an acknowledgment that local governments have the authority to regulate the discharge of fireworks, and thus manifests a legislative intent not to preempt local ordinances in the field.

Likewise, the 2010 Act repealed most of the other provisions of §§ 23-35-10 et seq. relating to fireworks, including two provisions which specifically regulated the discharge of fireworks. Notably, this repealed § 23-35-120 which uniformly prohibited the discharge of fireworks in certain locations statewide. Although the 2010 Act also amended the provisions of Chapter 56 of Title 40 relating to pyrotechnics, none of these provisions concern the discharge of fireworks. Thus, we believe the repeal of these statutes banning the discharge of fireworks, and the contemporaneous failure to include any comparable provisions in the newly enacted sections, manifests a legislative intent that the discharge of fireworks be regulated by local authorities and not in a statewide, uniform manner. Nor do we believe the discharge of fireworks is a matter which requires statewide uniformity, thus distinguishing the matter at hand from that in Aakjer. Accordingly, we are of the opinion that State law does not preempt local ordinances concerning the discharge of fireworks, and such ordinances are thus valid to the extent consistent with State law.

We note, however, that the provisions of Chapter 56 of Title 40 arguably create a statewide, coordinated regulatory scheme concerning the manufacture, storage, and sale of pyrotechnics. Thus, any local ordinances concerning these matters are suspect and may be preempted under State law.

Nevertheless, the General Assembly certainly could enact legislation which clearly manifests its intent to preclude local regulation concerning the discharge of fireworks.

While we believe local ordinances regulating the discharge of fireworks are generally valid, we caution that such ordinances must nevertheless be consistent with State law. As the Court made clear in Foothills Brewing and Beachfront, local governments may not criminalize conduct which is otherwise lawful under State law. At this time, State law generally only prohibits the discharge of fireworks in "Fireworks Prohibited Zones" pursuant to § 23-35-175. An ordinance prohibiting the discharge of fireworks in additional areas or at certain times should be carefully drafted so as to impose nothing more than a civil penalty for violations. Consistent with Foothills Brewing and Beachfront, a civil penalty can be achieved by language indicating a violation is an "infraction" and/or a "public nuisance." However, an ordinance will be construed as imposing a criminal penalty if it characterizes a violation as a "misdemeanor," is punishable by jail time, or imposes a fine which is too severe in comparison to that imposed for a similar State law violation. Finally, as the Court cautioned in Denene, local governments should be careful not to unreasonably prohibit the discharge of fireworks so as to have the effect of prohibiting another activity or a business which the State has deemed legal. Such unreasonable regulation would exceed a local government's police power and render the ordinance invalid under State law.

Very truly yours,

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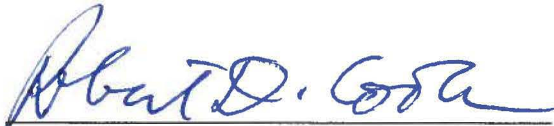
REVIEWED AND APPROVED BY:



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