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ATTORNEY GENERAL

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Dear Mr. Harvey:

In your capacity as City Attorney for the City of Beaufort, you have requested an opinion of this Office regarding "the propriety of awarding an exclusive franchise to one carriage tour operator to conduct business on the [public] streets of the City." In particular, you have expressed concern regarding whether granting an exclusive franchise would violate antitrust laws.[1]

Law/Analysis

Authority pursuant to section 5-7-30

A "franchise" is a "special privilege[] conferred by government upon individuals, and which do[es] not belong to the citizens of the country, generally, of common right." *Bank of Augusta v. Earle*, 38 U.S. 519, 595 (1839). "It is essential to the character of a franchise that it should be a grant from the sovereign authority . . . ." *Id.* "No one has the inherent right to carry on his private business along the public streets. Such rights can be exercised only under such terms and conditions imposed by the [appropriate] authorities." *Huffman v. City of Columbia*, 146 S.C. 436, 450, 144 S.E. 157, 162 (1928). Thus, the privilege to offer passengers transportation for hire upon the public streets may be described as a franchise. *E.g.*, *City of Memphis v. State ex rel. Ryals*, 179 S.W. 631, 635 (Tenn. 1915) ("[J]itney operators . . . as common carriers, have no vested right to use the [streets] without complying with a requirement as to obtaining a permit or license. The right to make such use is a franchise . . . ." (quoted with approval by *Huffman*, 146 S.C. at 446, 144 S.E. at 160)).

It is well-established in the law of this State that the General Assembly has plenary power to regulate, or even prohibit, the conduct of a business offering passengers intrastate transport for hire upon the public streets. *E.g.*, *Huffman*, 146 S.C. 436, 144 S.E. 157 (citing numerous authorities from other jurisdictions). States often have delegated to municipalities the power to set the terms and conditions upon which such businesses may operate. *E.g.*, *City of Charleston v. Roberson*, 275 S.C. 285, 269 S.E.2d 772 (1980) (prohibiting horse drawn sightseeing vehicles from operating on certain streets); *Radio Cab Co. v. Bagby*,

[1] This Office has not reviewed a proposed ordinance in conjunction with this request.

224 S.C. 28, 77 S.E.2d 264 (1953) (requiring taxicabs to park only at their regular stands when not engaged in transporting passengers); *Huffman*, 146 S.C. 436, 144 S.E. 157 (fixing routes and schedules for jitneys). However, the franchising and regulatory powers delegated to municipalities traditionally have not included the power to grant an exclusive franchise, unless otherwise specified:

> Even in the absence of a constitutional prohibition against the granting of exclusive franchises by municipalities, such grants may not be made if the legislature has not delegated the power to do so. A municipality has no power to grant to a public service corporation an exclusive franchise to use the streets, unless the power not only to grant a franchise but also to grant an exclusive franchise has been delegated to it by the legislature either expressly or by necessary implication, and if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them. The general power to regulate streets is insufficient to authorize the granting of an exclusive franchise, as is the statutory authority to grant the use of the streets for such time and on such terms as the municipality may deem proper.

McQuillin, *The Law of Municipal Corporations* § 34:31 (emphasis added); *cf.* Letter to The Honorable John Holt, Op. S.C. Att'y Gen. (June 29, 1963) (opining that the Town of Cherry Grove did not have the power to grant an exclusive license for the renting of floats because "[t]he mere power to license, or to license and regulate, does not confer the power to create a monopoly by granting an exclusive license").[2]

It is against this background that section 5-7-30 of the South Carolina Code (2004 & Supp. 2010) grants to municipalities the following powers:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the authority to . . . grant franchises for the use of public streets and make charges for them; grant franchises and make charges for the use of public beaches; engage in the recreation function . . . .

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[2] Where the extent of the public's need for a certain utility justifies only one franchisee, it often has been said that the failure to grant additional franchises is not tantamount to a grant of exclusive rights, so long as the franchising authority retains the ability to franchise additional, competing entities whenever the public need so requires. *E.g.*, *Capitol Taxicab Co. v. Cermak*, 60 F.2d 608, 612 (N.D. Ill. 1932) ("To the argument that the ordinance tends to create a monopoly, it is sufficient answer that the city has not by its legislation surrendered its right to grant other and further certificates to all other applicants."); *Gill v. City of Dallas*, 209 S.W. 209, 212 (Tex. Civ. App. 1919) ("The convenience, peace, health, and safety of the citizens necessarily determine the number and extent of similar competing utilities which are to be permitted to operate. While none may be given exclusive or monopolistic rights, it does not follow that all are entitled to enter upon the city streets.").

(Emphasis added). On its face, section 5-7-30 does not delegate to municipalities the additional power to grant exclusive franchises.[3] Thus, it would be reasonable to read section 5-7-30 to confer only those powers respecting the conduct of business upon the public streets that traditionally have been delegated to municipalities by similar language.

With the adoption of "home rule," however, it might be contended that the city does not need specific statutory authorization to grant an exclusive franchise. *See generally Williams v. Town of Hilton Head Island*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) ("We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state."). If on this basis a court found that section 5-7-30 conferred the authority to grant an exclusive franchise, it would proceed to determine whether such grant conflicted with other law. *Hospitality Ass'n of S.C., Inc. v. County of Charleston*, 320 S.C. 219, 224, 464 S.E.2d 113, 116-17 (1995) ("Determining if a local ordinance is valid is essentially a two-step process. . . . [I]f 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."). Accordingly, we turn now to a consideration of whether the city's grant of an exclusive franchise would be subject to challenge on the ground that it violated antitrust law.

Municipal exemptions from antitrust law

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States" and prohibits "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. §§ 1-2. Pursuant to *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny, municipal corporations are exempt from the operation of the Sherman Act only under certain circumstances. Thus, our analysis of your antitrust question centers on a discussion of the *Parker* exemption.[4]

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[3] Other South Carolina law might delegate to municipalities the power to grant certain kinds of exclusive franchises or authorize municipalities to enter into other types of exclusive agreements with private entities. *E.g.*, S.C. Code Ann. § 5-31-50 (2004) ("All cities and towns of this State may grant to persons the exclusive franchise of furnishing water or waste disposal service to such cities and towns and the inhabitants thereof . . . ."); Letter to The Honorable Glenn F. McConnell, Op. S.C. Att'y Gen. (Oct. 22, 2004) (discussing cases in which the South Carolina Supreme Court has upheld exclusive franchises granted to non-profit corporations for the purpose of administering some portion of the duties delegated to a state agency or political subdivision). We are unaware of any authority more specific than section 5-7-30 that might apply to the tours that are the subject of your opinion request.

[4] *Parker* exemption is a threshold inquiry; a municipal act that fails to qualify for the exemption does not necessarily violate the law. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56

In *City of Lafayette v. Louisiana Power & Light Co.*, a plurality of the United States Supreme Court stated that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. 389, 413 (1978). If the State did not either "direct[] or authorize[]" anticompetitive conduct in this way, a city "exercising [its] delegated power must obey the antitrust laws." *Id.* at 416. The plurality explained that where state law allows cities "to approach a policy decision their own way, the anticompetitive restraints adopted . . . may express [the cities'] own preference, rather than that of the State." *Id.* at 414. The plurality saw this as a problem because cities might "make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects." *Id.* at 408, 415-16. Accordingly, the plurality considered whether "the [state] legislature contemplated the kind of action complained of." *Id.* at 415.

A majority of the Court echoed many of these statements in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (5-3 decision; White, J., not participating). In that case, the Court stated a municipal ordinance could not enjoy *Parker* exemption unless "it constitute[d] municipal action in furtherance or implementation of [a] clearly articulated and affirmatively expressed state policy." *Id.* at 52. The Court held that a broad delegation of "home rule" power to the City of Boulder expressed "mere neutrality regarding the municipal actions challenged." *Id.* at 55. Consequently, the ordinance at issue reflected municipal policy, not state policy, and was not exempt. *Id.*

In *Town of Hallie v. City of Eau Claire*, four towns challenged a city's conduct in refusing to supply sewerage treatment services to the towns and providing such services to areas within the towns only if those areas agreed to be annexed into the city. 471 U.S. 34, 36-37 (1985). The relevant state statutes allowed cities to define the areas that would be served by their sewerage systems and provided that, while the Department of Natural Resources could order cities to construct their systems in a manner that would allow other areas to add connections thereto, such an order would be void if the areas wishing to connect refused to be annexed to the city. *Id.* at 41. The Court found that these provisions—especially the

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n.20 (1982); *id.* at 58 (Stevens, J., concurring) ("The Court's opinion . . . explains why the city of Boulder is not entitled to an exemption . . . . The dissenting opinion seems to assume that the Court's analysis of the exemption issue is tantamount to a holding that the antitrust laws have been violated. The assumption is not valid."). Moreover, local governments and their officials and employees might be protected against an award of monetary damages even if their acts do violate the Sherman Act. *See* 15 U.S.C. §§ 34-36.

Here, there might be room for question as to whether the tours at issue affect interstate commerce such that they would be subject to the Sherman Act. However, there is at least some authority that sightseeing tours marketed to out-of-state visitors may be subject to the Act. *E.g., A.B.T. Sightseeing Tours, Inc. v. Gray Line New York Tours Corp.*, 242 F. Supp. 365, 368-69 (S.D.N.Y. 1965); *cf. Duck Tours Seafari, Inc. v. City of Key West*, 875 So. 2d 650, 657-58 (Fla. Dist. Ct. App. 2004) (finding the potential burden on interstate commerce sufficient to survive summary judgment where a would-be competitor brought a Commerce Clause challenge to ordinances restricting local sightseeing tours). This Office has not examined any facts concerning the potential interstate effects of the tour franchise here at issue, and therefore, is unable to comment further on this aspect of the antitrust inquiry.

authorization to "determine the areas to be served"—"clearly contemplate[d]" conduct of the kind alleged. *Id.* at 42, 44. Thus, the city's actions were exempt.[5]

Finally, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court considered whether a municipal zoning ordinance that imposed restrictions on the size, location, and spacing of new billboards should enjoy *Parker* exemption. This ordinance worked to the great benefit of the existing owner of ninety-five percent of the local billboard market and to the detriment of a new competitor seeking to construct billboards in the area. 499 U.S. 365, 367-69 (1991) (6-3 decision). The Court reaffirmed the principle that "[b]esides the authority to regulate . . . the *Parker* defense also requires authority to suppress competition . . . in connection with its regulation." *Id.* at 372. However, the Court found this test was satisfied because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Id.* at 372-73.

As these authorities make clear, the touchstone of a *Parker* analysis is whether the municipal action at issue was taken pursuant to a clearly expressed state policy to displace competition or whether it was taken pursuant to a municipal policy about which the State expressed no view. Section 5-7-30 clearly contemplates that cities might take regulatory action concerning the operation of business upon their public streets. However, these regulatory powers historically have not carried with them the additional power to grant exclusive franchises. Thus, it is at least questionable whether a court would find that section 5-7-30 expresses a state policy in favor of allowing municipalities to grant exclusive rights.[6] For this reason, even if the city has the power to grant an exclusive franchise, the franchise might be subject to challenge under federal antitrust law.

Conclusion

In sum, it is uncertain whether an exclusive franchise granted by the City of Beaufort would enjoy *Parker* exemption from the Sherman Act. At common law, the delegated authority to grant franchises normally did not carry with it the ability to grant an exclusive franchise. While home rule now allows cities to act beyond their enumerated powers, this general authority to act is not synonymous with the clear articulation required for *Parker* exemption. Rather, where a city acts within the powers delegated to it by state law but outside the scope of a clearly articulated state policy, the city "must obey the antitrust laws." Accordingly, it is the opinion of this Office that the exclusive franchise described in your request would

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[5] The Court clarified that, unlike conduct by a private party, anticompetitive conduct carried out by a city need not be supervised by the State in order to enjoy *Parker* exemption. *Id.* at 46-47 ("Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.").

[6] As noted above, our opinion is limited to an analysis of section 5-7-30. Other law might be sufficient to confer *Parker* exemption for certain kinds of exclusive privileges or agreements. *See, e.g., Savage v. Waste Management, Inc.*, 623 F. Supp. 1505, 1508-10 (D.S.C. 1985) (the words "one or more" in a statute authorizing counties to "issue to one or more persons . . . the right or franchise to collect and dispose of garbage" reflected clear legislative permission to award an exclusive contract).

be of questionable validity. Of course, only a court can make a final determination regarding the validity of such action. Letter to The Honorable N.R. "Bob" Salley, Sr., Op. S.C. Att'y Gen. (Nov. 18, 1996) ("[T]his Office possesses no authority to declare an ordinance invalid. Only a court may do so.").

Very truly yours,

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