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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

March 21, 2003

The Honorable Wallace B. Scarborough
Member, House of Representatives
306C Blatt Building
Columbia, South Carolina 29211

Dear Representative Scarborough:

You have asked for "clarification of the 'Home Rule' law passed by the General Assembly in the mid-1980s – specifically, does it give counties the authority to regulate the use of fireworks."

Law / Analysis

We start with the basic proposition that a county ordinance is entitled to a presumption of validity. Consistent with Article VIII of the South Carolina Constitution which mandates Home Rule, a county possesses police power to enact ordinances to further the health and welfare of its residents. See, S.C. Code Ann. Sec. 4-9-30 and Art. VIII, § 17 of the South Carolina Constitution. As the Supreme Court of South Carolina cautioned in Rothschild v. Richland County Bd. of Adjustment, 309 S.C. 194, 197, 420 S.E.2d 853, 855 (1992), "it is well settled that ordinances, as with other legislative enactments, are presumed constitutional; their unconstitutionality must be proven beyond a reasonable doubt." A court will not declare an ordinance invalid unless it is clearly in conflict with the general law. Hospitality Assn. of S.C. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116 (1995). Keeping in mind the presumption of validity and the high standard which must be met before an ordinance is declared invalid, we note that, while 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. Atty. Gen., April 21, 1998.

In Hospitality Assn. of S.C. v. County of Charleston, supra, the Supreme Court of South Carolina recognized the test for resolving the issue of the validity of a local ordinance vis à vis state law. There, the Court stated that

> [d]etermining 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.

320 S.C. at 223. The Hospitality Association Court referenced § 4-9-25 of the Code, which was enacted in 1989 and which provides that

> [a]ll counties of the State have authority to enact regulations, resolutions, and ordinances ... 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.

This broad grant of power, noted the Court, "is limited only by the requirement that the regulation, resolution, or ordinance be consistent with the Constitution and general law of this State." Id., at 225. Moreover, the Hospitality Association Court stressed that § 4-9-25 states that "[t]he 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." Id.

Thus, the first question which must be addressed in analyzing whether an ordinance is consistent with State law is the authority of counties to regulate in this area. Put another way, is the ordinance preempted by state law? The test for preemption of local government regulation is set forth in Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000) in which the South Carolina Supreme Court stated 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). In Fine Liquors, Ltd., the Court held, although the General Assembly gave the Alcoholic Beverage Control Commission the sole and exclusive authority to sell beer, wine and alcohol, it had not preempted the field so as to preclude the Town of Hilton Head from passing a zoning ordinance which prohibited internally illuminated "red dot" signs.

340 S.C. at 92. Applying the "manifest intention" test, the Court in Bugsy's found that "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." Id., at 93-94.

We now apply these principles to the issue of whether the General Assembly has preempted a county's regulation of fireworks. The landmark case in this area is Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985). In Terpin, the South Carolina Supreme Court concluded that a Darlington County ordinance which "generally prohibit[ed] the sale, possession, or

discharge of fireworks within a one mile radius of Darlington International Raceway during any period extending from 24 hours before an event to 24 hours thereafter" was invalid because "the county lacks authority under the home rule system to enact a fireworks ordinance containing penalty provisions." Darlington County had, pursuant to the ordinance in question, made any violation of the provision a misdemeanor subject to a $500 fine or 30 days imprisonment.

The Court recognized that, pursuant to Article VIII of the South Carolina Constitution, the people had bestowed Home Rule upon the counties of South Carolina. In the Court's view, "Article VIII was intended to return county government to a local level." Id. In accord with the Home Rule amendment, the General Assembly enacted § 4-9-10 et seq., devolving broad authority upon counties to insure self-regulation.

> However, the Terpin Court also noted that § 4-9-30(14) provides that counties may
>
> ... enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violation thereof not to exceed the penalty jurisdiction of magistrates' courts ... 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.

In reviewing state law (§ 23-35-10 et seq.) regarding the regulation of fireworks, the Court concluded that "[t]he General Assembly has created an extensive system for controlling the possession, sale, storage and use of fireworks in South Carolina." 286 S.C. at 114. Terpin analyzed that system of regulation to include legislation which

> 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. § 25-35-70(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 Marshal ... to issue rules and regulations and § 23-35-150 creates penalties for violation of the Act.

Id. In view of this extensive regulatory scheme, as well as the mandate of § 4-9-30(14), the Court concluded that state law preempted further regulations by the County. In the Court's opinion,

> [t]he challenged ordinance has penalty provisions and concerns a matter provided for by the general law. No where does the general law on fireworks provide for enactment of regulatory ordinances by counties. The ordinance is thus invalid. The respondent contends that the county acted within the police power and that the ordinance is valid so long as it does not conflict with provisions of the general law. We disagree; we are bound by the express terms to § 4-9-30(14).

Id.

Thus, the question here is whether the law has changed in the intervening years since Terpin was decided in 1985 to the extent that the Court's holding in Terpin has been undermined or altered. We conclude that it has not.

In Op. S.C. Atty. Gen., Op. No. 90-53 (September 12, 1990), this Office addressed the issue of "the authority of Horry County Council to adopt an ordinance that could either totally ban the sale and use of fireworks in the unincorporated areas of the county or regulate the areas where fireworks could be sold, used and the time of such use." The opinion noted that since Terpin was decided, the General Assembly enacted § 4-9-25, which clarifies that counties possess police power as follows:

> [a]ll counties of this 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 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 the counties.

We thus addressed the question as to whether § 4-9-25 in any way altered the Terpin Court's conclusion. First, we noted that Terpin itself "considered and rejected the argument that a county's police powers would override or supersede Section 4-9-30(14). Secondly, we considered the effect of the Legislature's subsequent enactment of § 4-9-25 upon § 4-9-30(14). We observed that

> [f]irst, the General Assembly must be presumed to have known the existence of Section 4-9-30(14) when it adopted Section 4-9-25. ... The act of which Section 4-9-25 was part, Act No. 139 of 1989, did not expressly repeal, modify, or even refer to Section 4-9-30(14); implied repeal of a statute would be disfavored and would be resorted to only if two statutes were in conflict that both could not stand ... Statutes must be construed harmoniously if at all possible giving effect to both whenever possible .... Finally, if either statute or an ordinance should be viewed as penal, such enactment will be construed strictly ....

Accordingly, in our view, as expressed in the 1990 opinion, § 4-9-30(14) serves "as a limitation ... on the applicability of Section 4-9-25, since the Supreme Court in Terpin v. Darlington County, supra rejected the applicability of a county's police powers and considered the express terms of Section 4-9-30(14) to be binding upon the court." We were thus "constrained by the Supreme Court's interpretation of Section 4-9-30(14) to conclude that a county would have no authority to further regulate the possession, sale, or use of fireworks, notwithstanding Section 4-9-25." We further advised that it would be a matter for the Legislature to enact "a general law ... to permit regulation [of fireworks] by municipalities or counties, if such is deemed desirable."

Since Terpin was decided, the Supreme Court has not spoken with a single voice on the matter of "preemption" of local regulation. Most recently, the Court has applied the so-called "manifest intention" test to determine whether a county or municipality is preempted from further regulation in a particular area. In Bugsy's supra, in ruling upon a county's authority to further regulate video poker, the Court stressed 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." Id. See also, Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990). These cases held that there was no preemption despite the fact that there existed comprehensive regulatory schemes at the state level and in the case of Fine Liquors, strong statutory language supporting preemption.

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). This line of cases is the most rigorous in favor of state preemption.

Most recently, the Court decided Denene, Inc. v. City of Chas., 352 S.C. 208, 574 S.E.2d 196 (2002). In that case, the Court concluded that an ordinance adopted by the City of Charleston prohibiting operation of places of business which provide on-premises consumption of beer and wine during certain hours was not preempted by state law. This conclusion was reached even though state law gave the "sole and exclusive authority" to regulate such establishments to the Department of Revenue. The Court relied upon the Town of Hilton Head v. Fine Liquors, Ltd., supra which had held that a predecessor statute did not indicate a legislative intent to preempt the field.

Since Turpin was decided and our 1990 opinion was written, §§ 4-9-30(14) and 4-9-25 have not changed. The statutes relating to fireworks, § 23-35-10 et seq. have been amended to some extent, but not in such a way as to alter the conclusion reached by the Court in Terpin or by this Office in the above-referenced 1990 opinion. As this Office stated in Op. S.C. Atty. Gen., Op. No. 89-68 (June 28, 1989),

> [w]e recognize the concerns expressed by the Mount Pleasant Town Council as to the perceived threat of public safety due to the risk of personal injury and property damage as well as the concern of loud noises being a nuisance. Indeed, the legislature and the courts have also expressed their concerns about the dangers in the use of fireworks. Elliot v. Sligh [233 S.C. 161, 103 S.E.2d 923 (1958)]; Act No. 113, 1947 Acts and Joint Resolutions. However, our Supreme Court and General Assembly have mandated the need for state-wide uniformity in the various matters relating to

fireworks as made clear in Elliott v. Sligh and Terpin v. Darlington County Council, both supra. Municipal officials may wish to bring their public safety concerns to the attention of their local legislative delegation members, toward having the general law amended to permit regulation by municipalities or counties, if such be deemed desirable.

Conclusion

While it might be argued that the most recent preemption cases decided by the Supreme Court undermine the Terpin decision, it is our opinion that Terpin remains good law, thus preempting counties and cities from regulating fireworks. In our opinion, Terpin can be reconciled with recent Supreme Court decisions such as Bugsy's and Denene which used the "manifest intent" test to determine whether the Legislature intended local authorities be preempted from regulation in a particular area. 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. Moreover, in Terpin, the Court found that the Ordinance in question, which provided for criminal penalties, conflicted with § 4-9-30(14). As referenced above, this Section remains virtually unchanged.

We are aware of no amendment by the General Assembly since Terpin was decided which expressly empowers counties or municipalities to regulate fireworks. Notwithstanding the fact that the general law relating to fireworks has, since that time been amended to a certain extent, the Legislature has enacted no provision which allows counties and municipalities to enter this field of regulation. Terpin, thus remains the controlling law in South Carolina. Only the Supreme Court could alter or modify its conclusion in the Terpin case.

Accordingly, it is our opinion that, under present law, as interpreted by our Supreme Court Terpin v. Darlington County, counties or municipalities are not empowered to further regulate fireworks. Certainly, any fireworks ordinance which provides for criminal penalties for violation thereof is suspect in light of Terpin. Of course, the General Assembly could provide express authority to counties and cities to regulate fireworks if it so desired. Should the General Assembly desire to change the law to give counties and cities the power to regulate fireworks, such authority would need to be specific and clear to override the Court's holding in Terpin.

Sincerely,

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