7209 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

September 18, 2001

The Honorable Thomas G. Keegan
Member, House of Representatives
209 Prestwick Road
Surfside Beach, South Carolina 29588-5389

Dear Representative Keegan:

By your letter of July 26, 2001, you have requested an opinion of this Office concerning the imposition of local accommodations and hospitality taxes, now codified at South Carolina Code of Laws Sections 6-1-500, *et seq*. and 6-1-700, *et seq*. By way of background, you write:

> As both sections of the code specifically state, local governments are restricted as to the amount of these taxes and as to how they may be used. Sections 6-1-540 and 6-1-740 limit the cumulative rate of these taxes, unless they were in excess of that rate as of December 31, 1996.
>
> There is some opinion, although I totally disagree, that if a local government passed an ordinance prior to December 31, 1996, and defined the tax in different terms or definitions that they may now propose and pass an ordinance using the proper language as authorized in Articles 5 and 7 of Title 6 of the South Carolina Code of Laws. For example, if a municipality or county had passed a broad ordinance prior to December 31, 1996 and levied a two and a half (2 1/2) percent "hospitality tax" on hotel accommodations, restaurant meals and admissions to attractions, that this local government could now levy up to an additional three (3) percent "Local Accommodations Tax" as authorized in Article 5 of Title 6.

You ask if a local government's adoption of a new ordinance in the manner described above would constitute a violation of State law.

In Williams v. Town of Hilton Head Island, 311 S.C. 417, 429 S.E.2d 802 (1993), our Supreme Court affirmed the considerable degree of autonomy that municipalities now enjoy. The Court held in Williams that the so- called "Dillon's Rule," long-recognized in previous cases to limit

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE: 803-734-3970 • FACSIMILE: 803-253-6283

Request Letter

substantially the power of municipalities to specific statutory authorization for fair implication therefrom, was no longer valid. Recognizing that Home Rule meant just that, the Court left no doubt as to the intent of the General Assembly:

> This Court concludes that by enacting the Home Rule Act, §S.C. Code Ann. 5-7-10 et seq. (1976), the legislature, intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. 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.

429 S.E.2d at 805.

This same standard was enunciated by the Supreme Court in Hospitality Assoc. v. Town of Hilton Head, 320 S.C. 219, 464 S.E.2d 113 (1995). There the Court articulated the analysis necessary for determining the validity of a municipal ordinance:

> [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. . . .

Id.

Thus, although under Home Rule, municipalities and counties enjoy a great deal of autonomy, the General Assembly can certainly pass legislation specifically limiting the authority of local government. Town of Hilton Head v. Morris, 324 S.C. 30, 484 S.E.2d 104 (1997). Given the broad grant of powers to local governments, the key is recognizing when the General Assembly has taken some of that power away from them. The second step of the analysis is often the more critical step in determining the validity of the ordinance.

Turning this analysis to your question, the very case that established the two pronged approach above addressed the validity of local governments imposing their own accommodations tax. See Hospitality Assoc. v. Town of Hilton Head, 320 S.C. 219, 464 S.E.2d 113 (1995). The Court held that inherent in a municipality's power to promote the general health, safety, and welfare of the Town is the authority to raise funds to enhance those services and facilities used by tourists, who are economically essential. Id. at 118. Thus, under the first step of the analysis, the municipality

has the power to levy local accommodations taxes. The Court in Hospitality also concluded that the accommodations tax passed the second prong as well, finding the ordinance consistent with the general laws of the State. The question remains, then, whether any legislation has passed since the issuance of the Hospitality case that would now prohibit this type of taxing ordinance by a county or municipality.

Act No. 138 of the 1997 Acts and Joint Resolutions enacted what are now known as the Local Accommodations Tax Act, S.C. Code Ann. § 6-1-500 *et seq.*, and the Local Hospitality Tax Act, S.C. Code Ann. § 6-1-700 *et seq.* The Local Accommodations and Hospitality Tax Acts specifically authorize local governments to levy these taxes as a method of generating revenue, primarily for tourism related expenses. Their cumulative rate in any given area of a county is limited, however. The determinative provisions for answering your inquiry are the definitions and cumulative rate portions of the Acts.

Section 6-1-510 contains the following definition:

> "Local accommodations tax" means a tax on the gross proceeds derived from the rental or charges for accommodations furnished to transients as provided in Section 12-36-920(A) and which is imposed on every person engaged or continuing within the jurisdiction of the imposing local governmental body in the business of furnishing accommodations to transients for consideration.

The cumulative rate provision for the local accommodations tax states:

> The cumulative rate of county and municipal local accommodations taxes for any portion of the county area may not exceed three percent, unless the cumulative total of such taxes were in excess of three percent prior to December 31, 1996, in which case the cumulative rate may not exceed the rate that was imposed as of December 31, 1996.

S.C. Code Ann. § 6-1-540. Similarly, Section 6-1-710 defines local hospitality tax as the following:

> "Local hospitality tax" is a tax on the sales of prepared meals and beverages sold in establishments or sales of prepared meals and beverages sold in establishments licensed for on-premises consumption of alcoholic beverages, beer, or wine.

Its cumulative rate provision reads:

> The cumulative rate of county and municipal hospitality taxes for any portion of the county area may not exceed two percent, unless the cumulative total of such taxes was in excess of two percent or were authorized to be in excess of two percent prior to December 31, 1996, in which case the cumulative rate may not exceed the rate that

was imposed or adopted as of December 31, 1996.

S.C. Code Ann. § 6-1-740.

In applying the above statutes to your question, a number of principles of statutory construction are relevant. First and foremost, in interpreting a statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). An enactment should be given a reasonable and practical construction, consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). Words used therein should be given their plain and ordinary meaning. First South Sav. Bank, Inc. v. Gold Coast Associates, 301 S.C. 158, 390 S.E.2d 486 (Ct. App. 1990).

The purpose of the cumulative rate provisions is to cap all taxes conforming to the definitions of accommodations and hospitality taxes to their respective limits. Under the plain wording of the statute, the cumulative rate provisions would apply to any local taxes of a municipality or county that fit the definitions above, regardless of the terminology actually used. The fact that these taxes were in effect before the enactment of Act No. 138 of the 1997 Acts and Joint Resolutions does not mean that the cumulative rate provisions do not apply. In fact, the cumulative rate provisions clearly intend to apply to taxes in existence before the passage of the Accommodations and Hospitality Tax Acts because the statute first refers to "county and municipal hospitality (or accommodations) taxes," then "*such* taxes... in excess of two percent *prior to* December 31, 1996" (emphasis added). The statutes use the terms "hospitality" and "accommodations" specifically to refer to taxes in existence before the Acts. Thus, the limiting provision would apply to take into account a municipality's existing tax ordinances.

In the example you provide, a municipality, having already levied a broad hospitality tax of two and one-half percent on hotel accommodations, restaurant meals, and admissions to attractions, now seeks to levy an additional three percent "Local Accommodations Tax" pursuant to S.C. Code Section 6-1-500. The existing tax contains characteristics of both the accommodations tax and the hospitality tax. If the municipality now levies the Local Accommodations Tax, the hotel accommodations, for example, would be taxed at five and one-half percent, which is beyond the permissible maximum rate of taxation for this accommodation.

Furthermore, the cumulative rate provisions do contain an exception to the two and three percent limitations, but these exceptions would not authorize the additional tax levied in your example. The exception applies when an accommodations or hospitality tax levied before December 31, 1996 exceeded three or two percent, respectively. For example, if a municipality levied a hospitality tax of four percent before December 31, 1996, the municipality could continue to levy the four percent after the passage of the Hospitality Tax Act. In other words, although the four percent exceeds the cumulative rate allowed by Section 6-1-740, the four percent is "grandfathered in" and capped at that rate. The exception does not allow the municipality to add the pre-existing rate to a newly labeled accommodations or hospitality tax rate to extend the maximum beyond that

limited in Sections 6-1-540 and 6-1-740. Thus, the exception contained in the cumulative rate provisions would not prevent the ordinance in your example from inconsistency with the general laws of South Carolina.

In brief, the General Assembly has limited the authority of local governments to levy accommodations and hospitality taxes to certain maximum cumulative rates. Although the cumulative rate provisions make allowances for local accommodations and hospitality tax rates levied before the passage of the Acts, they do not allow a municipality or county to increase the tax rate beyond the maximum by adding the pre-Act and post-Act rates togther. In our opinion, an ordinance that increases the tax on the already taxed accommodations or hospitality items to an amount beyond the maximum allowed by Sections 6-1-540 and 6-1-740 would conflict with State law.

CONCLUSION

The Legislature has placed clear restrictions upon the authority of local governments to levy accommodations and hospitality taxes. Cities and counties are now cumulatively capped in the imposition of their accommodations and hospitality taxes by the General Assembly. While cities, as well as counties are allowed certain flexibility to maintain their own previous accommodations and hospitality rates existing before the state laws went into effect, it is clear that the legislature has not allowed a local government to piggy back its pre-existing tax rate on top of the maximum cumulative tax rate which state law now allows. A tax cap is a tax cap and that cap may not be circumvented. In our opinion, an ordinance which increases the tax on the already taxed accommodations or hospitality items to an amount beyond the maximum that the Legislature has allowed would violate state law.

With kind regards, I remain

Very truly yours,

Charlie Condon
Attorney General