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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 18, 1996

The Honorable N. R. "Bob" Salley, Sr.
Mayor, Town of Salley
Post Office Box 484
Salley, South Carolina 29137-0484

Re: Informal Opinion

Dear Mayor Salley:

You have asked whether the Ordinance of the Town of Salley relating to the Town's annual festival, the "Chitlin Strut", is valid. Particularly, you are concerned with that portion of the Ordinance which states:

> No individual, organization, group or anyone other than the Town of Salley shall be allowed to sell chitlins (fried, boiled or raw) on the day of the Chitlin Strut. Any exceptions to this must be approved by a majority of the town council and mayor.

The Ordinance also regulates the "Chitlin Strut" generally, providing for the organization of the festival, the negotiation of contracts for the festival's operation, etc. Such Ordinance further provides for the charging of a fee to anyone who sells food and/or drink in the town during the week of the Festival other than those who operate businesses in the Town, year round. It is obvious that one of the primary purposes of the Ordinance is to secure revenue for the Festival's operation, the preamble to the Ordinance noting that "the Chitlin Strut represents a significant portion of the revenue of the Town of Salley ... ." Thus, the issue here is whether it is a valid exercise of the town's power to prohibit the purchase of chitlins from anyone except the Town on the day of the Festival.

Request Letter

LAW \ ANALYSIS

We start with the proposition that an Ordinance of a municipality will be presumed valid in the same way that a statute of the General Assembly is entitled to a presumption of validity. As this Office stated in an opinion dated May 23, 1995,

> [a]ny municipal ordinance adopted pursuant to Section 5-7-30 [of the Code] is presumed to be valid. Town of Scranton v. Willoughby, ___ S.C. ___, 412 S.E.2d 424 (1991). Within the limits of a municipality, an ordinance has the same local force as does a statute. McCormick v. Cola. Elec. St. Ry. Light and Power Co., 855 S.C. 455, 675 S.E. 562 (1910). Any ordinance must be demonstrated to be unconstitutional beyond all reasonable doubt. Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985). The presumption of validity especially applies to legislation relating to a city or a town's police powers. Town of Hilton Head v. Fine Liquors, Ltd., 302 S.E. 550, 397 S.E. 662 (1990).

Only recently, our Supreme Court, in Williams v. Town of Hilton Head Island, ___ S.C. ___, 429 S.E.2d 802 (1993), reaffirmed the considerable degree of autonomy that municipalities now enjoy. The Court held in Williams, that the so-called "Dillon's Rule", long-recognized by our Court in previous cases to limit substantially the power of municipalities to specific statutory authorization or fair implications therefrom was, in keeping with the Home Rule amendments and their implementing statutory authority, 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. Sec. 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 a such regulations are not inconsistent with the Constitution and general law of the state. (emphasis added).

This same standard was enunciated by the Court recently in Hospitality Assoc. v. Town of Hilton Head, __ S.C. __, 464 S.E.2d 113 (1995). There, the Court said the following:

> [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. For the reasons discussed below, we hold that (1) the local governments had the power to enact the ordinances, and (2) the ordinances are not inconsistent with either the Constitution or general law of this State.

Moreover, "[w]hile this Office advises whenever it may identify a particular constitutional infirmity, it is solely within the province of the courts of this State to actually declare an enactment or ordinance unconstitutional or unenforceable for other reasons."

Although this Office would be required to presume that the Ordinance in question is valid, I must advise you that the portion of the Ordinance with which you are concerned would be subject to attack if it is enforced. One major issue in such a challenge would be whether the Ordinance would violate the antitrust laws. The Ordinance purports to give the Town a monopoly on the sale of chitlins on the day of the Festival, providing that only the Town may sell chitlins on that day unless an exception is provided. When a statute or ordinance authorizes the state or a municipality to engage in anticompetitive conduct, such as this Ordinance does, the issues then becomes whether the state or its political subdivisions are entitled to the so-called "state action" immunity which is afforded to the sovereign. In Op.Atty.Gen., Op.No. 87-6 (January 21, 1987), we summarized the law concerning "state action" immunity as follows:

The United States Supreme Court first enunciated the doctrine of "state action" immunity in Parker v. Brown, [317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943)]. In Parker, the Court interpreted the Sherman Antitrust Act as inapplicable to the anticompetitive conduct of a state acting through its legislature. 317 U.S. at 350-351. The Court held that the Sherman Act was instead intended to prohibit private restraints on trade, concluding that Congress did not intend to "nullify a state's control over its officers and agents" in activities directed by a state legislature. Id. Based upon the doctrine of federalism, the court reasoned that in contrast to individual or private agreements, Congress intended that deference must be given to the "legislative command of the state...." Id. Numerous other cases since Parker have reaffirmed the basic doctrine of state action immunity. See, City of Lafayette v. Louisiana Power and Light Company, 435 U.S. 389 (1978); Community Communications Company v. City of Boulder, 455 U.S. 40 (1982); New Motor Vehicle Board v. Orrin W. Fox Company, 439 U.S. 96 (1978); Cantor v. Detroit Edison Company, 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Hoover v. Ronwin, 466 U.S. 558 (1984).

Recently, the Supreme Court clarified certain ambiguities in the application of the "state action" doctrine. In Town of Hallie v. City of Eau Claire, [471 U.S. 34, 85 L.Ed.2d 24 (185)], ... the Court reiterated that in order for a municipality or other governmental entity to qualify for the state action exemption from the antitrust laws, it must demonstrate "that it is engaging in the challenged activity pursuant to a clearly expressed state policy." More specifically, the statute or enactment in question must "evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition. ..." 85 L.Ed.2d at 32. The Court further concluded, however, that while there must be a "clear articulation" of state policy to displace competition, such does not mean that the state must have "compelled" the particular governmental entity to have acted in this way. In eliminating any requirement of state compulsion, the Court noted that

> [n]one of our cases involving the application of the state action exemption to a municipality has required that compulsion be shown... . This is so because where the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action. In short, although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy.

The Court also held that where a municipality is involved, there is no requirement of active state supervision to qualify for the "state action" exemption, such as there is with private parties.

> Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interest at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. 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. 85 L.Ed.2d at 34.

Following the Parker v. Brown and Town of Hallie line of cases, courts have found statutes and ordinances in a wide variety of instances to provide a "state action" immunity from anti-trust liability. See, Coastal Neuro-Psychiatric Assoc. v. Onslow Memorial Hosp., 795 F.2d 340 (4th Cir. 1986) [hospital given exclusive contract to perform CAT scans]; Hybud Equip. Corp. v. Akron, 742 F.2d 949 (6th Cir. 1984) [waste monopoly]; Grason Elec. Co. v. Scramento Munic. Util., 770 F.2d 833 (9th Cir. 1985) [exclusive supplier of electricity]; Cent. Florida Clinic v. Citrus Co. Hosp. Bd., 738 F.Supp. 459, (M.D.Fla. 1989), affd. w/out op. 888 F.2d 1396 (11th Cir. 1989) [hospital sole supplier

of ancillary health care in county]; Gold Cross Amb. and Transfer v. City of K.C., 705 F.2d 1005 (8th Cir. 1983) [ambulance service]; Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989) [requiring all Oregon-based attorneys to purchase malpractice insurance from the Bar]; Limeco v. Div. of Lime of Miss. Dept. of Ag. and Commerce, 778 F.2d 1086 (5th Cir. 1985) [State of Mississippi operating the lime business].

On the other hand, there are cases which have refused to extend state action immunity to a municipal ordinance creating a monopoly or requiring anti-competitive conduct on the basis that no state policy clearly articulated such conduct. For example, in Giddens v. City of Shreveport, 901 F.Supp. 1170 (W.D. La, 1995), the Court held that, because there was no Louisiana State policy providing for monopolistic services for the storage of towed vehicles, the city was not exempt from the applications of Louisiana's antitrust laws. And in Wicker v. Union County General Hospital, 673 F.Supp. 177 (N.D. Miss. 1987), the Court held that a county hospital was not entitled to "state action" immunity in an antitrust action brought against it by a certified nurse anesthetist whose privileges had been restricted by the Hospital. The Court reasoned that the Mississippi statute authorized

> ... no exclusion of competing providers and recites that it should be construed liberally to ensure competitive health care services. VCGH has failed to show that Mississippi articulated a state policy to displace competition with regulation or monopoly as is required to sustain the state action defense under Hallie. VCGH has established, at most, neutrality by the state toward competitive limiting actions. The requirement of state action is not met by showing mere neutrality.

673 F.Supp. at 185 (N.D. Miss. 1987).

Of course, the fact that a state or a municipality is engaging in economic enterprise rather than police power regulations has been held not to be controlling for purposes of the applicability of the "state action" exemption. In Limeco, supra, the argument was made that the fact the State of Mississippi was in the lime business should be treated differently from those ordinances or statutes which were designed to promote health and safety. The Court rejected such argument, concluding as follows:

> Limeco urges this court to create a "commercial exception" to the doctrine of Parker v. Brown - arguing that when a state acts as a competitor in a commercial activity, the state action exemption does not apply.

> ... Limeco finds a distinction between governmental activities and marketplace participation by governmental entities. We are unpersuaded ... . Parker v. Brown held that Congress did not intend the Sherman Act to apply to the States. The Lime Division of the Department of Agriculture is, indisputably, an enterprise undertaken by the State of Mississippi. As such, it is not subject to the Sherman Act.

778 F.2d at 1087. Thus, the question here is whether State law evidences a "'clearly articulated and affirmatively expressed'" state policy to displace competition, sufficient to entitle the Town of Salley to "state action" immunity.

Section 5-7-30 of the Code provides as follows:

> [e]ach 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 levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them; the authority to abate nuisances; the authority to provide police protection in contiguous municipalities and in unincorporated areas located not more than three miles from the municipal limits upon the request and agreement of the governing body of such contiguous municipality or the county, including agreement as to the boundaries of such police jurisdictional areas, in which case the municipal law enforcement officers shall have the full jurisdiction, authority, rights, privileges, and immunities, including coverage under the workers' compensation law, which they have in the municipality, including the authority to make arrests, and to execute criminal process within the extended jurisdictional area; provided, however, that this shall not extend the effect of the laws of the municipality beyond

> its corporate boundaries; grant franchises for the use of public streets and make charges for them; engage in the recreation function; levy a business license tax on gross income, but a wholesaler delivering goods to retailers in a municipality is not subject to the business license tax unless he maintains within the corporate limits of the municipality a warehouse or mercantile establishment for the distribution of wholesale goods; and a business engaged in making loans secured by real estate is not subject to the business license tax unless it has premises located within the corporate limits of the municipality and no entity which is exempt from the license tax under another law nor a subsidiary or affiliate of an exempt entity is subject to the business license tax; borrow in anticipation of taxes; and pledge revenues to be collected and the full faith and credit of the municipality against its note and conduct advisory referenda. The municipal governing body may fix fines and penalties for the violation of municipal ordinances and regulations not exceeding five hundred dollars or imprisonment not exceeding thirty days, or both. (emphasis added).

Clearly, pursuant to this statute, a municipality possesses the authority to "engage in the recreation function". Presumably, included as part of such power, would be the authority to regulate festivals to promote cultural heritage and history. But see, Historical Pageant Assn. v. Phil., 260 Pa. 447, 103 A.824 (1918). Section 6-4-10 (accommodations tax) anticipates that a municipality will engage in the promotion of such festivals for tourism purposes, defining "tourism-related expenditures" to include "promotion of the arts and cultural events" and including festivals within the term "cultural events". Moreover, it has been held that the recreation authority includes the power to hold cultural events. Adams v. Zeigler, 22 Cal.App. 2d 135, 70 P.2d 537 (1937). See also Section 12-36-2120 (39) [exemption from sales tax under certain circumstances for "concessions sales at a festival by an organization devoted exclusively to public or charitable purposes ... ."]

While State law recognizes that municipalities will engage in the promotion of festivals such as the Chitlin Strut, I am not convinced, however, that the general law anticipates anticompetitive conducts as part of such promotion. Nothing in the Code suggests that a municipality may itself establish an economic monopoly over sales at these events. Merely Home Rule power alone is not deemed an expression of state policy to permit a municipality to engage in anticompetitive conduct. Community Communications v. City of Boulder, supra, ["A State that allows its municipalities to do as they please can

hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought."

Even if the "state action" exemption applies, the Ordinance is still questionable in requiring only purchases from the City on the day of the Chitlin Strut. It is well recognized that in reviewing the validity of an ordinance which prohibits the sale by an individual of a particular product, the test to be applied "is whether the prohibition ... is necessary to prevent infliction of a public injury." McQuillin, Municipal Corporations, § 24.324. It is likewise said that

> ... where the purported purpose of municipal legislation is to regulate lawful activity, but its real purpose is to prohibit by onerous and exasperating restrictions, under the guise of regulation, the ordinance will be deemed unconstitutional and invalid.

Id. In Gillette Dairy Inc. v. Neb. Products Bd., 219 N.W. 214 (Neb. 1974), it was stated that "[i]f it becomes apparent that a statute under the guise of a police regulation does not tend to preserve the public health safety or welfare, but tends to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual." Another case has recognized that "... ordinances which in their operation necessarily restrain competition and tend to create monopolies or confer exclusive privileges are generally condemned." Nat. Linen Serv. Corp. v. City of Norfolk, 196 Va. 277, 83 S.E.2d 401 (1954).

I point your attention to one case in particular, American Consumer Industries v. City of New York, 281 N.Y.S. 467 (1967). There the City of New York entered into an exclusive franchise agreement for the sale and delivery of ice to tenants in the Hunts Point Market. The City contended the monopoly given was a valid exercise of the police power, but the Court disagreed. Concluded the Court,

> [l]and was condemned or purchased with public funds and a public market established occupied entirely, or in the main, by private tenants engaged in the operation of private businesses for profit. Each tenant had a right to make such contracts with its suppliers as it deemed most profitable and in its best interests. Of course, the City has a right to regulate the operations, but the right of regulation does not give the right to create a monopoly so as to force the tenant to deal only with one supplier of ice ... . If disorder, confusion and

> conditions hazardous to the health and welfare of the public resulted from multiple suppliers of ice a vastly different question would be posed. But nothing in the record leads to that conclusion ... .
>
> The franchise for an ice monopoly cannot be held designed to promote public health for no hazard has been shown to exist, or the reasonable likelihood that such hazard will develop. Public convenience and the general prosperity cannot be said to be affected by reason of the nature of the franchise and the return therefrom. Nor has a public necessity for this exclusive franchise been shown and no aspect of the public morals is involved.

281 N.Y.S.2d at 473-474.

Moreover, in an Opinion dated June 29, 1963, we concluded that the Town of Cherry Grove could not validly given an exclusive license to a person to rent floats, engage in 'vendor-selling" etc. There we stated:

> [t]his office is of the opinion that, under the facts and circumstances which you presented, the Town of Cherry Grove does not possess the power to grant an exclusive license for the operation of this type of business. The mere power to license, or to license and regulate, does not confer the power to create a monopoly by granting an exclusive license. 53 C.J.S. Licenses, Sec. 10(e), p. 487 (1948). Cf. Ex Parte Dickey, 76 W. Va. 576, 85 S.E. 781, L.R.A. 1915F 840 (1915). As a general rule, license laws which create monopolies in ordinary businesses which every citizen has a right to engage on terms of equality, are invalid. 33 Am.Jur. Licenses, Sec. 23, p. 344 (1941); Cf. Code of Laws of South Carolina, Secs. 47-62, 66-51, 66-62 (1962).

Based upon the foregoing, I must advise that the herein discussed portion of the Salley Ordinance - giving the Town of Salley the exclusive right to sell chitlins on the day the Chitlin Strut - is of questionable validity. As mentioned above, this Ordinance, like any validly adopted ordinance, will be presumed valid and this Office possesses no authority to declare an ordinance invalid. Only a court may do so. However, I cannot absolutely assure you that if the Ordinance were challenged in court, it would be upheld.

I question whether the Ordinance would be entitled to the "state action" immunity from antitrust liability and, as I have discussed herein, the Ordinance could be subject to a serious constitutional challenge as well. It would appear to me that the purpose of the Ordinance is primarily economic rather than an exercise of the police power. If health and safety are involved, such purpose is not apparent because the sale of chitlins is regulated only one day in the year. I would thus urge non-enforcement by the Town with respect to the portion of the Ordinance relating to the Town's exclusive right to sell.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph