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The State of South Carolina

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February 8, 1990

The Honorable Richard M. Quinn, Jr.
Member, House of Representatives
323-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Quinn:

By your recent letter, you have advised that you are working with various groups on a bill which has been entitled "The Clean Indoor Air Act." The bill deals with smoking in public areas such as government buildings, stores, and restaurants. You have asked for the opinion of this Office as to possible preemption of county or municipal ordinances which already deal with smoking in public places:

1. If the General Assembly passes a bill which regulates smoking in public areas, without specifically preempting any local legislation, would the counties, towns, and cities be able to enact ordinances (under the Home Rule laws) that could conflict with the State laws?

2. If the General Assembly passes a bill which regulates smoking in public areas and specifically preempts any local legislation, would the bill violate the Home Rule Act or any other state law?

You have not provided a copy of any proposed legislation to be examined.

Constitutional Concerns

Within Article VIII of the State Constitution, the article on local governments usually thought of as "home rule," is the following in Section 14:

> In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside:

> (1) The freedoms guaranteed every person; (2) election and suffrage qualifications; (3) bonded indebtedness of governmental units; (4) the structure for and the administration of the State's judicial system; (5) criminal laws and the penalties and sanctions for the transgression thereof; and (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.

The foregoing list contains those matters of state law which are not to be set aside by county or municipal ordinance, by virtue of the State Constitution.

It is noted that in portions of the Code of Laws relative to elections (Title 7), criminal laws (Title 16), and the judicial system (Title 14), among many other areas of law, there is no statute specifically precluding counties or municipalities from adopting ordinances on such subjects; instead, such preclusion is determining by looking for evidence of legislative intent that the General Assembly's enactment occupy the field.

Statutory Considerations

Counties and municipalities are political subdivisions of the State and have only such powers as have been given to them by the State, such as by legislative enactment. Williams v. Wylie, 217 S.C. 247, 60 S.E.2d 586 (1950). Such political subdivisions may exercise only those powers expressly given by the State Constitution or statutes, or such powers necessarily implied therefrom, or those powers essential to the declared purposes and objects of the political subdivision. McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959). In so doing, however, political subdivisions cannot adopt an ordinance repugnant to the State Constitution or laws, which ordinance would be void. Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928).

With that general law in mind, it may be noted that the Home Rule Act (Act No. 283 of 1975) granted certain powers, duties, and responsibilities to counties and municipalities, with certain limitations. By Section 4-9-30 of the South Carolina Code of Laws (1976, as revised) each county government "within the authority granted by the Constitution and subject to the general laws of this State" was given a list of enumerated powers. Similarly, Section 5-7-30 of the Code authorizes municipal government to adopt ordinances, regulations, and resolutions "not inconsistent with the Constitution and

general law of this State" with respect to a list of functions specified therein. Considering Article VIII, Section 14 of the Constitution and these two enabling statutes, it is clear that a county or municipality cannot adopt an ordinance which would conflict with the State Constitution or general law.

With this background in mind, each of your questions will be examined.

Question 1

It is most difficult to answer this question in abstract form without reviewing a bill for reference. As noted above, no county or municipality is authorized to enact an ordinance which would conflict with the general law of this State. Thus, it must first be determined that the bill (or law, if adopted) is intended to be general and thus of state-wide applicability. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980) (cardinal rule of statutory construction is to determine and effectuate legislative intent if at all possible). Such may be done without so stating that an enactment is general or intended to be preemptive, as in Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985), by examining the language used, applying various rules of statutory construction, considering the constitutional limitations of Article VIII, Section 14, and the like. No one set of criteria could be enumerated which would apply to every legislative enactment to determine such intent.

We are aware of no requirement that such preemption of local ordinances by a general law be specified in the general law; likewise, there is no prohibition against such inclusion. It would be within the discretion of the General Assembly to include whatever matters it felt were necessary in a particular legislative enactment.

We cannot determine whether the bill contemplated by your first question would preempt the adoption of ordinances by counties and municipalities on the same subject, without examining the bill. We can advise that neither counties nor municipalities would be authorized to adopt ordinances in conflict with the general laws of this State.

Question 2

Again, with respect to your second question, we have not examined any proposed legislation. If the General Assembly wished to pass a bill which regulates smoking in public places and specifically preempts the adoption of local ordinances, such ordinances subsequently adopted could be void. Central Realty Corp. v. Allison

and Law v. City of Spartanburg, both supra. The ordinance would require examination on a case-by-case basis, and comparison to the legislative enactment would be crucial, to make certain that a county or municipality was not regulating some activity which was not contemplated by the general law.

If the General Assembly adopted a bill such as that contemplated by your letter, such would not violate the Home Rule Act. The General Assembly, by statutory enactment, authorizes the powers to be exercised by a political subdivision such as a county or municipality; the General Assembly is always free, within constitutional limits, to modify those powers.

Should an enactment such as the one you propose be adopted and then subsequently be found to be in possible conflict with one or more statutes previously or subsequently adopted, resort would be had to the language of the enactments, intent of the legislature, and any other relevant rules of statutory construction to aid in interpreting the statutes in question.

We hope that the foregoing will provide as much guidance as is possible without having a particular bill to be examined. Please advise if you have additional questions or need additional assistance.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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REVIEWED AND APPROVED BY:

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