The State of South Carolina

Office of the Attorney General

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September 12, 1990

Thomas A. Boland, Sr., Esquire
Horry County Attorney
Post Office Box 1236
Conway, South Carolina 29526

Dear Mr. Boland:

You recently requested the opinion of this Office as to 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. To resolve your inquiry, it is necessary to examine home rule statutes and the decision in Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985), in particular.

In 1989, the General Assembly added to the South Carolina Code of Laws, Section 4-9-25, which provides the following as to police powers of counties:

> All 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 counties or 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. 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.

Additionally, Section 4-9-30 provides in subsection 14:

> Under each of the alternate forms of government listed in § 4-9-20, except the board of commissioners form provided for in Article 11, each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof:
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> ....
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> (14) to enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violations 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[.] ...

As a practical matter we note that no county government operates under the board of commissioners form of government, such form having been declared constitutionally invalid in Duncan v. County of York, 267 S.C. 327, 228 S.E.2d 92 (1976). Thus, each county governing body within the State is operating under the identical grant of authority.

The decision in Terpin v. Darlington County Council, supra, must also be considered; we note that this decision was rendered prior to the enactment of Section 4-9-25. Therein, the plaintiff challenged a county ordinance purporting to prohibit "the sale, possession, or discharge of fireworks within a one mile radius of the Darlington International Raceway during any period extending from 24 hours before an event to 24 hours thereafter." 286 S.C. at 113. Violation of the ordinance would be a misdemeanor, the penalty for which would be a $500 fine or 30 days imprisonment.

The court reviewed Article VIII, Sections 7 and 17 of the State Constitution; Section 4-9-30, focusing particularly on subsection 14, supra; and the general statutes regulating the possession, sale, storage, and use of fireworks in this State. The court concluded:

> The challenged ordinance has penalty provisions and concerns a matter provided for by the general law. Nowhere 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 its 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 of § 4-9-30(14).

286 S.C. at 114. While the statute expressly conferring police powers was not in existence at the time of this decision, the court considered and rejected the argument that a county's police powers would override or supersede Section 4-9-30(14). 1/

The effect of the subsequent adoption of Section 4-9-25 upon Section 4-9-30(14) must thus be considered. First, the General Assembly must be presumed to have known the existence of Section 4-9-30(14) when it adopted Section 4-9-25. Ingram v. Bearden, 212 S.C. 399, 47 S.E.2d 833 (1948). The act of which Section 4-9-25 was a 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 such conflict that both could not stand. In Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980). Statutes must be construed harmoniously if at all possible, giving effect to both whenever possible. Stone & Clamp, General Contractors v. Holmes, 217 S.C. 203, 60 S.E.2d 231 (1950). Finally, if either statute or an ordinance should be viewed as penal, such enactment will be construed strictly. Francis v. Mauldin, 215 S.C. 374, 55 S.E.2d 337 (1949).

Here, it is possible to construe both statutes harmoniously and to effectuate each one. Section 4-9-30(14) would be viewed as a limitation, in this instance, 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

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1/ This Office concluded in Op. Atty. Gen. No. 84-66, dated June 11, 1984, that counties most probably possessed general police powers sufficient to regulate massage parlors, though the question was not free from doubt. See also Op. Atty. Gen. No. 85-105, dated September 24, 1985, reaffirming the conclusion that counties could most probably exercise police powers (considering a noise ordinance adopted by Horry County Council).

While the Supreme Court did not identify the source or authorization of a county's police power, neither did the Court deny the existence of police powers of a county.

considered the express terms of Section 4-9-30(14) to be binding upon the court. For this reason, this Office is 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.

In so concluding, this Office is mindful of considerations of safety and peace and quiet which confront those around whom fireworks are discharged. As stated in an opinion of this Office dated June 28, 1989 concerning municipal regulation of fireworks,

> We 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. Elliott 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 is deemed desirable.

We are not aware of any legislation adopted since this opinion was rendered which would provide the needed authorization for counties or municipalities to regulate fireworks in various ways.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

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