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June 28, 1989

The Honorable Everett Jones
Member, Mount Pleasant Town Council
P. O. Box 745
Mount Pleasant, South Carolina 29465-0745

Fred Thompson, III, Esquire
Mount Pleasant Town Attorney
Post Office Box 1705
Charleston, South Carolina 29402

Gentlemen:

In letters to this Office you questioned the legality of an ordinance adopted by the Town of Mount Pleasant regulating fireworks. Pursuant to Section 2 of the ordinance:

(i)t shall be unlawful for any person to use, fire, shoot, discharge, sell, offer for sale, store, exchange, give away, or possess any fireworks within the corporate limits of the Town except as provided herein and except for use in public display or exhibit under the provisions of Section 3 herein, except as provided in Section 4.

Section 4 relates to the authorized use of signal fireworks by certain carriers and the transporting of fireworks in interstate commerce or for delivery in the Town where authorized. An exception is made in Section 2 to the authorized use or possession of toy cap pistols, toy pistol caps and sparklers. Also, the possession and use of fireworks within the town limits is authorized for specified individuals on certain specified holidays. Section 3 of the ordinance authorizes the use of fireworks in displays or exhibits where a permit is obtained. A criminal penalty of a fine not to exceed two hundred (\$200.00) dollars or a term of imprisonment not to exceed thirty (30) days is provided for violations of the ordinance.

Pursuant to Sections 23-35-10 et seq. of the Code, the General Assembly enacted comprehensive legislation dealing with fireworks. Section 23-35-10 states in part "(i)t shall be unlawful for persons to possess, sell, offer for sale, store, transport or use within

Mr. Jones
Mr. Thompson
Page 2
June 28, 1989

this State any fireworks other than the permissible fireworks herein enumerated...." Permissible fireworks are generally those classified as ICC Class C, "common fireworks". Other provisions require permits from counties or municipalities for fireworks displays, establish requirements for wholesale and retail distributors of fireworks which include their obtaining specified licenses or permits, establish the manner of storing fireworks, and prohibit sales to minors and the discharge of fireworks in certain circumstances. Section 23-35-140 authorizes the State Fire Marshall to issue rules and regulations regarding the storage, transportation, sale and use of permissible fireworks. Pursuant to Section 23-35-160, the sale, possession, discharge or use of fireworks is prohibited in counties having a population in between two hundred five thousand and two hundred fifteen thousand. Penalties for the violation of such provisions are also set forth.

Pursuant to Sections 40-56-10 et seq. of the Code, the State Board of Pyrotechnic Safety was created. By such legislation, the Board was given the authority to promulgate regulations dealing with the sale, storage and fire safety of pyrotechnics. The Board has promulgated such regulations which are set forth in R 19-405 et seq. of the Code.

In Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985), the State Supreme Court construed the validity of a county ordinance which regulated the sale, possession and discharge of fireworks and which provided a penalty for the violation of such ordinance. The Court noted that pursuant to Section 4-9-30 of the Code counties are granted certain specified powers and are authorized to

... 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. (emphasis added.)

268 S.C. at 113-114. In Terpin, the Court in concluding that the ordinance before the Court was invalid stated that the 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.

Mr. Jones
Mr. Thompson
Page 3
June 28, 1989

268 S.C. at 114. 1/

Pursuant to Section 5-7-30 of the Code, municipalities are authorized to

... enact regulations, resolutions and ordinances not inconsistent with the Constitution and general law of this State (emphasis added.)

Therefore, generally a municipality is not free to adopt an ordinance which is inconsistent with or repugnant to the general laws of the State. See also: Law v. Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928); McQuillin Municipal Corporations (3rd Ed.) Vol. 6A § 24.54; 56 Am. Jur.2d, Municipal Corporations, Section 374. As stated in a prior opinion of this Office dated October 9, 1986 which referenced Section 5-7-30

(w)hen it is clear that the general law is intended to predominate in a particular matter, a political subdivision is not free to vary the terms of the general law by ordinance ... In such a case, the general law must prevail over the ordinance.

Mr. Thompson notes in his letter that there is a problem when a subordinate political subdivision attempts to adopt a law (i.e., ordinance) which is more restrictive than the broad statutory provisions; such an ordinance will thus be invalid. He specifically notes that he is concerned "that the ability of a subordinate political entity to pass laws which are more restrictive than the broad statutory provisions contained in South Carolina Code Section 23-35-10 et seq is nil" and that the proposed ordinance "may be invalid." Mr. Thompson further seeks to distinguish the Terpin case by distinguishing the powers of counties from those of municipalities; moreover, he argues that the ordinance merely further regulates fireworks. We share Mr. Thompson's legal concerns, but we believe the Supreme Court's ruling in Terpin is controlling here

1/ In Elliott v. Sligh, 233 S.C. 161, 103 S.E.2d 923 (1958) the State Supreme Court determined that the regulation of the use, possession, and sale of fireworks is a matter of statewide concern and therefore, special legislation in this area affecting only two counties was unconstitutional.

Further, Act No. 113 of 1947, the general law regulating the use, possession, and sale of fireworks, contains no provision permitting municipalities to enact regulatory ordinances relating thereto.

Mr. Jones
Mr. Thompson
Page 4
June 28, 1989

also. In addition, several prior opinions of this Office have determined that municipal ordinances which seek to prohibit the sale of fireworks expressly authorized by State law are invalid. See: Ops. Atty. Gen. dated June 19, 1981; July 17, 1978; June 28, 1978; January 1, 1978.

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, supra; 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.

It should be noted that a county ordinance is entitled, as is any legislative enactment, to presumptions of legality and constitutionality. See Op. Atty. Gen. dated May 23, 1988; Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987). While this Office may identify or comment on problems of legality (as to an ordinance potentially conflicting with general law) or constitutionality, only a court can actually declare an ordinance invalid or unconstitutional.

In conclusion, our Supreme Court has made it apparent that an ordinance such as that adopted by the Town of Mount Pleasant will be found invalid to the extent it attempts to regulate the sale, possession or discharge of fireworks in a manner inconsistent with State law. As stated, pursuant to Section 23-35-10, the sale, use and possession of those fireworks enumerated in such provision, which typically includes those of ICC Class C, "common fireworks", distinction, is authorized in this State.

If there is anything further, please advise.

Sincerely,

Patricia D. Petway
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Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

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