3881 Library

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

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

November 16, 1989

Louis M. Cook, City Attorney
City of North Myrtle Beach
1015 Second Avenue South
North Myrtle Beach, South Carolina 29582

Dear Mr. Cook:

In a recent letter to our office you stated that the City of North Myrtle Beach would like to enact an ordinance which would make it an offense for an individual to enter a dwelling without intent to commit a crime and without having received notice that the entry or presence is not authorized. You state that it is the intent of the proposed ordinance to make it a criminal offense for an individual to enter the property of another without the consent or invitation of a property owner. You also state that the proposed ordinance would address the difficulty the city of North Myrtle Beach is experiencing with individuals who enter vacation cottages strictly for the purpose of seeking shelter for a night or a few days and in an attempt to avoid the posting of no trespassing signs on all residences in the city. You also asked whether we interpret S.C. Code Ann. §16-11-620, that a person entering a dwelling without requisite intent to do evil is not in violation of the statute if the individual has not been warned not to enter.

S. C. Code Ann. §5-7-30 grants to North Myrtle Beach the power to

> ...enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to law ...law enforcement... 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... (emphasis added)

As recognized in the memorandum which accompanied your request, an ordinance must not conflict with general law of the state on a matter of statewide concern or application. 56 Am.Jur.2d, Municipal Corporations §§361, 374; McQuillin, Municipal Corporations, (3rd Ed.) Vol. 6, §24.54. An ordinance which is repugnant to a statute is void. Law et. al., Spartanburg County Board v. City of Spartanburg, 148 S.C. 229, 146 S.E.12 (1928); Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951). Whether or not a conflict exists is dependant upon the "whole field of prohibitory legislation with respect to the subject", McAbee v. Southern Rwy. Co., 166 S.C. 166, 164 S.E. 444 (1932), and whether the ordinance contains express or implied conditions which are inconsistent and irreconcilable with applicable state statutes. Id.; City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963). The fact that a statute may "enlarge upon the provisions of a statute by requiring more creates no conflict unless the statute limits the requirement for all cases to its own prescription". Am. Vets Post 100 v. Richland County Council, 280 S.C. 317, 313 S.E.2d 293 at 294 (1984). See Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985). Neither the difference in detail nor the fact one is silent where the other speaks constitutes a conflict. Law v. City of Spartanburg, supra; City of Charleston v. Jenkinssupra. However, the city may not declare something which is lawful by statute or common law to be a nuisance, Greenville v. Kemmis, 58 S.C. 427, 36 S.E. 727 (1900); Law v. City of Spartanburg, supra, or make legal that which a statute proscribes. State v. Solomon, 245 S.C. 550, 141 S.E.2d 818 (1965). See also McQuillin, Municipal Corporations, (3rd Ed.) Vol. 6, §21.36.

As has been recognized in a prior opinion of this Office (1/26/88), it is necessary to conduct a three prong analysis in reviewing local ordinances for validity. First, it must be determined whether the state has pre-empted local regulation by limiting "the requirements for all cases to its own prescription". City of Charleston v. Jenkins, supra at 313 S.E.2d 294. If the issue in question has not been pre-empted by statutory regulation then it must next be determined whether the provisions of the ordinance conflict with general law. Lastly, it must be ascertained whether the provisions of the ordinance are unconstitutional.

The initial inquiry, therefore, focuses on state preemption. This Office is not aware of a field of prohibitory legislation with respect to the subject about which you inquire.

Next, it must be determined whether the proposed ordinance is consistent and reconcilable with applicable statutes. You specifically direct our attention to the burglary and trespassing statutes.

In order to violate S.C. Code Ann. §§16-11-311 or 16-11-312 regarding burglary, a person must enter a dwelling without consent and with intent to commit a crime therein. The purpose of the burglary statute is to protect a person in his living quarters rather than protect property. State v. Fereby, 109 S.C. 117, 257 S.E.2d 154 (1979).

An individual has violated the similar statutes regulating criminal trespass when he,

> without legal cause or good excuse, enters into a dwelling house, place of business or on the premises of another person after having been warned within 6 months preceding not to do so

S.C. Code Ann. §16-11-620, or if he remains therein, if not having been properly warned, after being ordered or requested to leave. Id. An individual has violated S.C. Code Ann. §16-11-640 if the person enters any private property between the hours of 6 p.m. and 6 a.m where the property is enclosed by walls or fences and a closed gate and has posted signs prohibiting trespassing unless the person is an owner, occupant, invitee or one experiencing a justifiable emergency. It appears that the purpose of these trespass statutes is to give notice that the property is not free shelter.

A review of these statutes and criminals offenses in S.C. generally reveals that the state has not sought to provide criminal liability for the particular act about which you inquire. The ordinance, therefore, is not in conflict with any state legislation. See Greenville v. Kemmis, supra. (Ordinance which prohibits gaming in private room does not conflict with statute which proscribes gaming in public place). Although the burglary statute requires entry with intent to commit a crime and trespassing requires notice of unauthorized presence, these are matters to which the statutes speak and to which the ordinance is silent. See McAbee v. Southern Rwy. Co., supra. It appears there is no conflict.

Lastly, it must be determined whether the statute is constitutional. This Office has previously recognized that an ordinance is entitled, as is a statute, to presumptions of legality and constitutionality. See S.C. Atty. Gen. Op. 5/23/88 and 6/28/89. See also Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985); S.C. Digest, Municipal Corporations, key 122(2). It is axiomatic that

> substantive due process requires that an ordinance be definite and certain as to proscribe conduct so persons of ordinary intelligence do not have to guess at its meaning.

McQuillin, Municipal Corporations, (3rd Ed.) Vol 5 §19.11.30 An Ordinance must be

> clear, precise, definite, certain in its terms, and an ordinance vague to the extent that its precise meaning cannot be ascertained is invalid. Id. §15.24.

While only a court can declare a statute invalid, the city may encounter potential difficulty should the proposed ordinance be enacted and later challenged because the broad terms of the proposed ordinance may be overly vague where it may make criminal an innocent act, 1/ Town of Honea Path v. Flynn, 255 S.C. 32, 176 S.E.2d 564 (1970), and where it assesses criminal liability without requiring criminal intent. Criminal intent is a prerequisite for criminal liability. See McAninch and Fairey, Criminal Law of S.C. (2nd Ed.) p.1-30 (1989). Of course, it is possible for the city attorney to draft an ordinance which takes into account and avoids the difficulty we have identified. Also, other remedies are available through the statutes regarding malicious injury to property (§16-11-510) and defrauding an innkeeper (41-1-50). The two trespassing statutes discussed earlier, are also available but will require that homeowners post the property if it is their desire to do so. Further, as the issue of whether an individual enters a dwelling with intent to commit a crime is an issue of fact for a jury, the burglary statutes may be equally applicable. See State v. Haney, 257 S.C. 89, 184 S.E.2d 344 (1971).

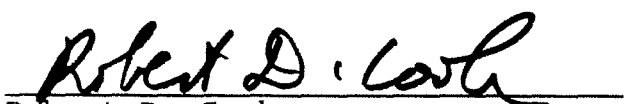
I also enclose an opinion of this Office to the Recorder for the City of North Myrtle Beach which is dated April 29, 1980 and which appears to address your second question.

Sincerely,

Salley W. Elliott
Assistant Attorney General

SWE/nnw
Enclosure

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

1/ In certain situations entry may be accomplished by mistake or for purposes of solicitation.