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# The State of South Carolina

Opinion No. 88-19
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## Office of the Attorney General

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William F. Able, Esquire
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Dear Mr. Able:

Your letter of December 9, 1987 to Attorney General Medlock has been referred to me for response. In your letter, you ask the Attorney General to render an opinion on the applicability of a Richland County ordinance governing bingo games to the operation of such games within incorporated areas of the county. For purposes of this discussion, the pertinent portion of the county ordinance states that:

"The game of bingo shall not be conducted within the boundaries of the county, including areas of incorporation, unless...." (whereafter, several conditions precedent are enumerated).

You correctly cite the S. C. Supreme Court's opinion in Amvets Post 100 v. The Richland County Council, et al., 280 S.C. 317, 313 S.E.2d 292, (1984), for the proposition that counties and municipalities are not pre-empted by the State from regulating the operation of bingo games, so long as the regulatory provisions adopted do not conflict with the general bingo law (S. C. CODE, 52-17-10, et seq.). With the Richland County ordinance having withstood the constitutional challenge posed in Amvets, supra, the dispositive issue in the matter at hand is whether the county may regulate the operation of bingo games within the boundaries of incorporated areas of the county.

Another, perhaps more salient way of framing this question is whether the legislature has granted to the county the authority to extend an exercise of its police power, in the form of the bingo ordinance, to reach bingo games conducted within the boundaries of incorporated areas of the county. For, it is settled law that counties and municipal corporations have only such powers as are granted to them by legislative enactment. Williams, et al. v. Wylie, et al., 217 S.C. 247, 60 S.E.2d 586 (1950); 56 Am.Jur.2d, Municipal Corporations, etc., Section 193.

Section 7 of Article VIII of the S. C. Constitution provides that the General Assembly "shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties....". Pursuant to this mandate, the legislature, through the provisions of Act 283 of 1975, granted certain governmental powers to counties. Codified at 4-9-10, et seq., Act 283, or as it is commonly known, the Home Rule Act, authorizes counties, among other things:

"to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works; water treatment and distribution; sewage collections and treatment; courts and criminal justice administration; correctional institutions; public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; hospital and medical care; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above...."

In previous opinions, this Office, while recognizing that the issue is not entirely free of doubt, has construed the above-mentioned provisions of the Home Rule Act to be a general grant of police power to counties. See Opinion No. 84-66, June 11, 1984; Opinion Attorney General, December 18, 1978. Accepting the notion that the legislature has provided counties with a general police

power, it seems clear that that power would include the ability to regulate matters such as the operation of bingo games.

It is not so clear and, in fact, it is doubtful, that counties have the power to extend their regulatory authority to areas that are within the confines of incorporated municipalities. The provisions of Articles VII and VIII of the S. C. Constitution do not expressly invest counties with this power, nor do these provisions expressly authorize the legislature to confer such power on counties. Consistent with this lack of authorization, the legislature did not, in the Home Rule Act, expressly grant this power to counties. Further, in accordance with ample precedent, the powers of counties are delimited by the express terms of the legislative grant of authority. Williams v. Wylie, supra; Beazley v. DeKalb County, 210 Ga. 41, 77 S.E.2d 740, (1953); Moody v. Transylvania County, 271 N.C. 384, 156 S.E.2d 716, (1967).

In Sections 4-9-30 and 4-9-40 of the Home Rule Act, the legislature, itself, seems to have, at least, implicitly recognized a limitation on the authority of counties to act within the boundaries of municipal corporations. For example, Section 4-9-40 allows a county to:

"perform any of its functions, furnish any of its services within the corporate limits of any municipality, situated within the county, by contract with any individual, corporation or municipal governing body, subject always to the general law and the Constitution of this State regarding such matters. Provided, however, that where such service is being provided by the municipality or has been budgeted or funds have been applied for that such service may not be rendered without the permission of the municipal governing body." (emphasis supplied).

By its clear terms, 4-9-40 permits a county to perform a function or provide a service within the corporate limits of a municipality situated within the county only where the county has contracted to do so with the governing body of the municipality. Moreover, a county must obtain the permission of a municipality to provide a service which is already provided by the municipality or for which the municipality has already budgeted or applied for funds.

The pertinent part of Section 4-9-30(17) provides that:

"The governing body of any county shall not create a special tax district, other than watershed district, any portion of which falls within the corporate boundaries of a municipality, except upon the concurrence of the governing body of the municipality."

The language of this section appears to provide still more evidence of the legislature's recognition of and desire to maintain the mutual sovereignty of counties and municipalities.

This Office has, on several occasions, expressed its belief that a county's exercise of police power is restricted to the unincorporated areas of the county. In an opinion dated October 2, 1984, the "intent of the General Assembly to recognize the autonomy of a municipality within its borders and likewise recognizes the autonomy of the county within the unincorporated areas of the county" was discussed. Likewise, in an opinion dated May 21, 1987, we concluded that a Richland County anti-smoking ordinance would be of no effect for facilities of the Richland County Recreation Commission located within a municipality of the county.

Our beliefs are in accordance with the general law on this issue. Counties and cities are viewed as co-equal political subdivisions which are independent of each other politically, geographically, and governmentally. City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 101 S.E.2d 641 (1958); Murray v. City of Roanoke, 194 Va. 321, 64 S.E.2d 804 (1951). As stated in 62 C.J.S. Municipal Corporations § 114:

> Constitutions and statutes providing for different types of government for the counties and cities of the state establish the policy of placing urban areas under city government and keeping rural areas under county government. A county has no legal right to legislate for a municipal corporation located within its limits on any subject which is within the scope of the powers granted the corporation, and

> particularly on any matters involving the police power of the state. When a municipal corporation is organized within the limits of a county, then as much of the territory of such county as is comprehended within the municipal limits of such corporation is, so far as local government is concerned, withdrawn from the county, and any ordinance or regulation passed by the county has no binding force on the municipality as to any matters or subjects as to which the municipality is vested with the power to enact. Constitutional provisions authorizing municipalities to transfer powers to a consenting county do not relate to or affect state powers. [Footnotes omitted.]

See also Hobb v. Abrams, 104 Idaho 205, 657 P.2d 1073 (1983).

In addition, Article VIII, Section 13 of the S. C. Constitution provides that:

"Any county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof." (emphasis supplied).

"Nothing in this Constitution shall be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State."

Clearly, by these provisions, counties and municipal corporations may agree to jointly administer services or exercise powers. By reasonable implication, a county could not exercise power within an incorporated municipality unless such an agreement existed or, in effect, the municipality has assented to the county's exercise of power.

The argument against the extension of the police power of counties is further supported by the fact that the

General Assembly, pursuant to constitutional authority, has expressly granted police power to municipal corporations; albeit, that such power may be exercised only within the territorial confines of the municipality. Lomax v. Greenville, 225 S.C. 289, 82 S.E.2d 191, (1954). Article VIII, Section 9 of the S. C. Constitution provides that the legislature, by general law, shall establish "the structure and organization, powers, duties, functions and responsibilities of the municipalities". In accordance therewith, the legislature enacted S. C. CODE Section 5-7-30. This section, in relevant part, provides that:

"All municipalities of the State shall, 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 such powers in relation to roads, streets, markets, law enforcement, health and order in such municipalities or respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities or for preserving health, peace, order and good government therein...."

Courts have held that Section 5-7-30 constitutes an express grant of the sovereign police power of the State to municipalities. Lomax, supra; Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242, (1963). This express grant of police power to municipalities, coupled with the apparent lack of any express grant of power to counties to regulate matters within municipalities, militates against any notion that a county, without first obtaining the agreement or permission of a municipality situated within geographic boundaries of the county, may extend its police power to reach matters occurring within the territorial limits of the municipality. To construe the Home Rule Act to permit such an act would be inconsistent with the legislative intent expressed in Sections 4-9-30 and 4-9-40. Such a construction would be inconsonant with the principle of statutory construction which holds that the various provisions of an act should be read so that each provision may, if possible, be given full effect without repugnancy or inconsistency. Creech v. S. C. Public Service Authority, 200 S.C. 127, 20 S.E.2d 645, (1942); Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228, (1952).

One may argue that if a municipality has not exercised its regulatory power on a particular matter, and if the municipality lies within the territorial boundaries of a county, then the county should have the "inherent" power to regulate the matter within the municipality, at least until such time as the municipality chooses to act on the matter. This argument, however, would run afoul of the doctrine that neither counties nor municipalities have any "inherent" legislative powers. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697, (1965). As a governmental entity of the state, a county possesses only such powers as are expressly or impliedly conferred upon it by constitutional provisions or legislative enactments; and powers not conferred are just as plainly prohibited as though expressly forbidden. 20 C.J.S. Counties, Section 49, pp. 802-803.

Likewise, it could be argued that because county sheriffs and magistrates exercise county-wide jurisdiction, see Sections 22-1-10 and 23-13-70 of the Code for examples, a county may generally exercise its policy powers on a county-wide basis. It must be observed that the General Assembly has expressly conferred such county-wide jurisdiction over sheriffs and magistrates so that their actions within an incorporated municipality are appropriate. As noted above, the lack of similar express authorization to a county council to exercise its police power or regulatory power within a municipality causes some concern to this Office.

Finally, in Section 12-21-2590 of the Code, it is provided that "[n]o [bingo] license may be issued unless the person or organization is in compliance with all county or municipal ordinances in regard to bingo." (Emphasis supplied.) The term "or" is considered to be disjunctive. 73 Am.Jur.2d Statutes § 241; 82 C.J.S. Statutes § 335. There is no way to interpret a legislative intent that a person or organization comply with both a county and a municipal ordinance if "or" is used disjunctively. Thus, a person or organization holding bingo games within a municipality would be required to comply with municipal, as opposed to county, ordinances.

In light of the foregoing reasoning, this Office concludes that, in accordance with Amvets, supra, Richland County is authorized to regulate the game of bingo within

its boundaries, so long as the regulations promulgated do not conflict with the general bingo law. However, an attempt on the part of the county to extend its regulatory power to bingo operations occurring within incorporated municipalities situated within the boundaries of the county is, probably, ultra vires. Thus, that portion of Richland County's bingo ordinance which purports to include "areas of incorporation", is of doubtful validity.

It should be noted that, even though this Office has reached the conclusion set forth above, the issue of a county's regulatory power within the boundaries of an incorporated municipality is not specifically addressed in the S. C. Constitution, the Home Rule Act or the common law of this state. Therefore, given the apparent lack of South Carolina authority on this point, this issue may well need to be decided through the means of an appropriate court action or legislative enactment.

Please contact me if I may be of any further assistance.

Very truly yours,

Wilbur E. Johnson

Wilbur E. Johnson
Assistant Attorney General

WEJ/fc
REVIEWED AND APPROVED BY:

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