2615
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

May 21, 1987

Michael L. Harlan, Director
Richland County Recreation Commission
5819 Shakespeare Road
Columbia, South Carolina 29223

Dear Mr. Harlan:

By your letter of January 14, 1987 on behalf of the Richland County Recreation Commission, you have asked that this Office consider the no-smoking ordinance recently adopted by the Richland County Council and advise the Commission as to the authority of Council to adopt such an ordinance; the constitutionality of such an ordinance; and what effect the ordinance would have on special purpose districts such as the Richland County Recreation Commission.

Richland County's "Clean Indoor Air Ordinance" prohibits the smoking or carrying of lighted cigars, cigarettes, or pipes in the following public places: retail and department stores; elevators; hospitals (except in private patient rooms); schools; public theaters, auditoriums, motion picture theaters; public transportation (except taxis); and buildings owned by Richland County or any of its political subdivisions. Smoking is to be permitted in public restrooms and "any reasonable area of a public place which has been set aside ... for the purpose of smoking." Violation of the ordinance constitutes a misdemeanor; a fine of not more than one hundred dollars ($100.00) may be imposed for such violation.

This Office has previously determined that counties have the police power necessary for the protection of the public health and welfare. See Op. Atty. Gen. No. 84-66 dated June 11, 1984. Adoption of a non-smoking ordinance would come within the police power of a political subdivision such as a county. See 62 C.J.S. Municipal Corporations etc. § 302;

Alford v. City of Newport News, 269 S.E.2d 241 (Va. 1979); Gasper v. Louisiana Stadium and Exposition District, 577 F.2d 897 (5th Cir. 1978), cert. den. 439 U.S. 1073. In response to your first question, Richland County would have the authority to adopt such an ordinance.

You also asked about the constitutionality of the ordinance. At the outset we must note that, in considering the constitutionality of a legislative act such as an ordinance, the enactment is presumed to be constitutional in all respects. Such an enactment will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.E. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Courts have declared that the "right to smoke in public places is not a [constitutionally] protected right, even for adults." Craig, by Craig v. Buncombe County Board of Education, 80 N.C. App. 683, 343 S.E.2d 222, 223, app. dismd. 318 N.C. 281, 348 S.E.2d 138 (1986). See also Gasper v. Louisiana Stadium and Exposition District, supra. Thus, a challenge to the no-smoking ordinance by smokers attempting to assert their constitutional rights as smokers will not be upheld.

Other constitutional considerations have been expressed in 62 C.J.S. Municipal Corporations § 302:

> While municipal corporations may prohibit smoking in certain places in order to preserve pure and fresh air therein, as, for instance, crowded halls or streetcars, an ordinance prohibiting the smoking of cigarettes within the corporate limits is void as an unreasonable invasion of private rights. A municipal ordinance making it an offense to use or carry tobacco on any of the streets or in the parks or the public buildings may not be sustained as a valid police regulation.

In addition to these considerations, the Supreme Court of Virginia has advised:

> No matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the means employed are reasonably suited to the achievement of the goal. "The mere power to enact an ordinance ... does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property." [Citation omitted.]

Alford v. City of Newport News, supra, 269 S.E.2d at 243.

The no-smoking ordinance challenged in the Alford case, supra, was determined to be unconstitutional as applied in that case; too, the decision was limited to consideration of the ordinance as applied only in that case. The ordinance in Alford prohibited smoking in restaurants, except in those areas specifically designated as public smoking areas, among other places. Restaurant owners or managers were required to post signs prohibiting smoking and advising of the ordinance. The city's manner of enforcement consisted, as to restaurants, of having one table in the restaurant designated as a non-smoking table. The court found the practice to be misleading and further that while patrons thought they were within a smoke-free environment, they were actually still being exposed to tobacco smoke. Thus the legislative purpose was defeated by enforcement of the ordinance.

In Craig, by Craig v. Buncombe County Board of Education, supra, high school students challenged the county board of education's policy prohibiting the use or possession of tobacco products by high school students. The policy was upheld by the North Carolina Court of Appeals, which stated:

> The Board of Education has legitimate concerns over students' health, cleanliness of grounds and buildings, fire hazards, the use of "smoking areas" for the smoking of illegal, non-tobacco cigarettes and the effect of smoke inhaled from the air on

> non-smokers. These concerns are all reasonably related to the educational process and thus provide a rational basis for the regulation.

Id., 343 S.E.2d at 224. The ban on the use and possession of tobacco products in the Buncombe County schools was thus held to be valid. The court did not consider meritorious the argument that teachers were permitted to smoke in teachers' lounges and thus the guarantee of equal protection was violated.

Another no-smoking ordinance was challenged as impermissibly vague in Swanson v. City of Tulsa, 633 P.2d 1256 (Okla. 1981). An individual was convicted of possessing a lighted cigarette in an elevator in the county courthouse. The entire ordinance is not reprinted within the opinion and so the comparison to Richland County's ordinance is not meaningful. The ordinance made possession of a lighted tobacco cigarette a misdemeanor when such possession was in any of the following places open to or used by the public; elevators were listed. The court stated:

> Finally, it is argued that Tulsa Revised Ordinances, Title 27, § 658, is impermissibly vague and uncertain thereby denying notice to persons subject to its punishment. The ordinance, by declaring smoking in enumerated public places to be a public nuisance and dangerous to the public health, requiring that "no smoking" and "smoking permitted" signs be posted so assuring notice of the ban, and penalizing knowing violations, affords the reasonably prudent person notice that smoking in public "no smoking" areas is a crime.

Id., 633 P.2d at 1258.

We located several other court decisions in which non-smokers sought to impose bans on smoking in public places but were unsuccessful. See Gasper v. Louisiana Stadium and Exposition District, supra, and GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979). However, in those cases, no ordinance or law had as yet been adopted, and thus those cases are not particularly instructive as to your constitutional question.

It must be presumed, unless or until a court declares otherwise, that the Richland County ordinance is constitutional. Similar ordinances have been upheld against challenges such as void for vagueness, equal protection, and improper exercise of the police power, though one ordinance was determined to be unconstitutional as applied. There is not sufficient case law to predict how the courts of this State might consider the Richland County ordinance; only if this or a similar ordinance should be challenged would we be able to predict with certainty how the courts would view Richland County's ordinance.

Your final question dealt with the effect of the ordinance upon special purpose districts such as the Richland County Recreation Commission. A starting point for discussion as to application or enforcement of the ordinance may be seen in a memorandum dated June 24, 1985 to the Richland County Administrator from the Richland County Attorney discussing the then-proposed ordinance and its enforcement: "Insofar as whether or not it would include the municipalities within Richland County, the answer is 'no.' The Council has no authority to enact ordinances which are enforceable within the confines of municipalities. However, by agreement, the Council could agree to enforce ordinances within the municipalities of Richland County." Thus, for any facilities of the Recreation Commission located within a municipality of Richland County, the ordinance would be of no effect.

The most likely provisions, if any, which would apply to facilities of the Recreation Commission located outside municipal corporations would be those enumerated as follows:

> (2) Elevators;
>
> * * *
>
> (5) Public theaters, motion picture theaters, or other auditoriums used for such purposes;
>
> * * *
>
> (7) Buildings owned by Richland County or any of its political subdivisions ... .

Elevators or public theaters or auditoriums used by the public in Recreation Commission facilities would most likely be covered by the ordinance insofar as the facilities are located in

unincorporated areas of Richland County. However, it is doubtful that entire facilities owned by the Recreation Commission located in unincorporated areas of the county would be covered by the ordinance.

Section (a)(7) of the ordinance prohibits the smoking or carrying of lighted tobacco objects in "Buildings owned by Richland County or any of its political subdivisions" (emphasis added). The Richland County Recreation Commission is a special purpose district created, not by the governing body of Richland County, but the General Assembly by Act No. 873 of 1960. Section 3 of that act provides that the Rural Recreational District of Richland County, as the Commission was formerly known, was to be a political subdivision; we believe that such a special purpose district would be a political subdivision of the State which created it, rather than of the county. As was stated by the Honorable George F. Coleman in Chester County Hospital and Nursing Center v. Martin et al., in the Court of Common Pleas, Chester County, "the essence of a special purpose district is its independence from local government." See also Sections 4-9-80 and 4-9-170 of the Code; Op. Atty. Gen. 84-132; Op. Atty. Gen. No. 85-35 (Richland County Historic Preservation Commission is a special purpose district and political subdivision of the State); Ops. Atty. Gen. dated September 3, 1985 and March 10, 1986 (both related to Chester Metropolitan District and Chester Sewer District, both special purpose districts and political subdivisions of the State). Thus, assuming the facilities of the Recreation Commission to be open to the public and located outside incorporated municipalities, the Clean Indoor Air Ordinance would be enforceable only in elevators and public theaters or auditoriums of such facilities.

To summarize the foregoing, it is the opinion of this Office that:

1. Richland County Council may adopt a non-smoking ordinance pursuant to its exercise of police power.

2. Non-smoking ordinances have been upheld against constitutional challenges in other jurisdictions, but only a court could determine with finality whether the Richland County ordinance would be constitutional. Unless or until a court so determines, the ordinance will be presumed to be constitutional.

3. The ordinance would be enforceable only in elevators and public theaters or auditoriums in facilities owned by the Richland County Recreation Commission and located in the unincorporated areas of Richland County.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

cc: William F. Able, Esquire
Richland County Attorney