9241/9791

ALAN WILSON
ATTORNEY GENERAL

September 22, 2014

The Honorable Daniel B. Verdin
S.C. Senate, District 9
404 Gressette Building
Columbia, SC 29201

Dear Senator Verdin:

We are in receipt of your May 22, 2014 letter requesting an opinion from this Office concerning a county's authority to establish additional requirements for landowners seeking to have timberland classified and assessed as agricultural real property. Specifically, you explain "a few counties are requiring that all timberland owners have a forest management plan before granting the agricultural use assessment." You add that the majority of counties do not require landowners to present such a plan and express your concern that "[t]his creates an inconsistent standard for obtaining the assessment and may require a landowner to incur the additional cost of obtaining a forest management plan in one county while a landowner in another county does not have to pay for a forest management plan." Continuing, you note that because "many private landowners own timberland in several counties" there is a need for "a consistent statewide policy regarding this issue." As a result, you ask whether "counties are authorized by state law to require all timberland owners to have a forest management plan before qualifying and being approved for an agricultural use assessment." Because South Carolina constitutional, statutory and regulatory laws do not authorize counties to regulate the assessment and classification of property for purposes of the property tax, we believe they are not.

I. Law/Analysis

The substance of your question, whether state law authorizes counties to place additional requirements on landowners seeking to have their timberland classified and assessed as agricultural real property, is step one in what is typically a two-step analysis regarding the validity of a local ordinance. See Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000) ("Determining whether a local ordinance is valid is a two-step process."). Here, however, we were not provided with a specific ordinance, but instead received only a flyer, stamped by the Anderson County Assessor's Office, which states, "[y]ou must have a timber management plan in place in order to qualify for agricultural use." Moreover, since you explain "a few counties" appear to have policies similar to that of Anderson County, the focus of this opinion will be limited to the question of whether state law authorizes counties to "require timberland owners to have a forest management plan before qualifying and being approved for

agricultural use." For purposes of this discussion we will assume the policies requiring a forest management plan amount to an exercise of authority tantamount to that of an ordinance.[1]

As stated most recently in Sandlands C&D, LLC v. Horry County, 394 S.C. 451, 716 S.E.2d 280 (2011), our Supreme Court now evaluates the question of whether a local governmental body has the power to adopt an ordinance on two fronts: (1) whether local government possesses the authority to enact the ordinance; and (2) whether state law preempts the area of legislation. 394 S.C. at 460, 716 S.E.2d at 284. "If no such power existed, the ordinance is invalid and the inquiry ends." Bugsy's Inc. v. City of Myrtle Beach, 340 S.C. at 93, 530 S.E.2d at 893.

A. Authority to Pass Legislation and Preemption

"Article VIII of the South Carolina Constitution mandates 'home rule' for local governments and requires all laws concerning local government to be liberally construed in their favor." South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 402, 629 S.E.2d 624, 631 (2006) (citing S.C. Const. Art. VIII, § 17); see also Quality Towing Inc. v. City of Myrtle Beach, 340 S.C. 29, 37, 530 S.E.2d 369, 373 (2000). The rationale underlying "home rule" is that "different local governments have different problems that require different solutions." Quality Towing, 340 S.C. at 37, 530 S.E.2d at 373. "Pursuant to the constitutional mandate of 'home rule' the General Assembly has delegated general authority to its counties to enact ordinances '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.'" Op. S.C. Att'y Gen., 2014 WL 2591471 (May 20, 2014) (quoting S.C. Code Ann. § 4-9-25 (2006)). That said, because the rationale underlying home rule only applies in instances where the State has either expressly or impliedly delegated its legislative authority to local government, counties cannot set aside general law on subjects requiring statewide uniformity. See S.C. Const. Art. VIII, § 14 (1895) (explaining local government cannot set aside general law provisions regarding "the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity."). In the present situation, we believe that while local government possesses general police power to regulate local issues, these powers do not extend to the area of classification of real property for purposes of the property tax as this is an area of the law that is reserved for the General Assembly and is one requiring statewide uniformity. See City of Charleston v. County of Charleston, 363 S.C. 527, 530, 611

[1] As an initial matter, we note that while arguably collateral to the question in your opinion request, state law does not require timberland owners seeking classification and assessment of their property as agricultural real property to have a forest management plan in place. See Hampton County Assessor v. Johnson, 2008 WL 445783 (S.C. Admin. Law Judge Div. filed January 16, 2008) ("[A] [timber] Management Plan is not required by South Carolina law for a property to qualify as timberland, and therefore agricultural property."). Instead, as explained below, South Carolina constitutional, statutory and regulatory law collectively provide an extensive framework to determine whether timberland qualifies for classification and assessment as agricultural real property.

S.E.2d 920, 922 (2005) (concluding the state constitution requires uniformity of property tax laws); Martin v. Condon, 324 S.C. 183, -- , 478 S.E.2d 272, 274 (1996) (noting the State Constitution requires uniformity of property tax laws); S.C. Const. Art. VIII, § 14 (explaining local government cannot set aside general law provisions regarding "the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.").

1. County Authority to Legislate

In determining whether local government, in this case the county, has authority to legislate, we first look to South Carolina constitutional and statutory law, specifically, Article VIII, Section 17's "home rule" provision embodied in Section 4-9-25 of the Code. See South Carolina State Ports Auth. v. Jasper County, 368 S.C. at 401-03, 629 S.E.2d at 631 (analyzing Jasper County's authority to pass an ordinance under "home rule" and Section 4-9-25); Quality Towing, Inc., 340 S.C. at 37, 530 S.E.2d at 373 (looking to "home rule" to determine whether a locality had authority to pass an ordinance regarding a local towing issue). Under Section 4-9-25, counties generally possess authority to regulate subjects which they believe are "necessary and proper," including the security, general welfare, health, preservation of peace and order and convenience of the county, so long as such regulations are "not inconsistent with the Constitution and general laws of this State." See S.C. Code Ann. § 4-9-25 ("All counties of the 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.").

Here, in reviewing the extent of a county's "home rule" powers, we believe there is simply no authority to pass additional legislation or policies concerning restrictions on an individual's ability to qualify for the agricultural real property classification. Specifically, a county's police powers under Section 4-9-25 only enable them to pass legislation regarding "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.*" Id. (emphasis added). None of these powers encompass the subject of classification and assessment of real property for purposes of the statewide property tax, nor does additional regulation of real property classification and assessment aid the county in preserving health, peace, order or good government. To the contrary, and as noted in your letter, county-level legislation on this matter would create a situation in which landowners in different counties would be required to go through different procedures to receive a property classification defined and regulated under state law. This would be the opposite of creating order and promoting good government.

Moreover, county regulation within this subject matter appears to be "inconsistent with the Constitution and general laws of this State," the limiting clause contained within Section 4-9-25 of the Code. As detailed below, South Carolina law has preempted local legislation in this area on the basis that it is expressly and exclusively delegated to the General Assembly pursuant to the South Carolina Constitution, and is a subject matter thoroughly regulated by state statutory law and regulatory law in a field requiring statewide uniformity. See City of Charleston v. County of Charleston, 363 S.C. at 530, 611 S.E.2d at 922 (concluding the state constitution requires uniformity of property tax laws); Martin, 324 S.C. at -- , 478 S.E.2d at 274 (noting the State Constitution requires uniformity of property tax laws); S.C. Const. Art. VIII, § 14 (explaining local government cannot set aside general law provisions regarding "the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.").

2. Preemption

In Sandlands, the Court, when evaluating whether a local ordinance is preempted by state law, looks to "federal preemption concepts" meaning the Court will review whether the ordinance is expressly preempted, impliedly preempted or preempted under an implied conflict analysis. 394 S.C. at 462, 716 S.E.2d at 285. "Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area," Id. at 462, 716 S.E.2d at 286; "[i]mplied field preemption occurs when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity," Id. at 465, 716 S.E.2d at 287; and "[i]mplied conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." Id. at 467, 716 S.E.2d at 288. In this instance, we believe that county legislation within the area of classification and assessment of agricultural real property is both expressly and impliedly preempted by South Carolina constitutional, statutory and regulatory law.

a. Express Preemption

Because South Carolina Constitutional Law expressly provides the General Assembly with the authority to determine and define the parameters of real property classifications for purposes of assessing tax ratios under the property tax, we believe, under the cannon of "*expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*" meaning "to express or include one thing implies the exclusion of another or the alternative," that localities are preempted from legislating within the area of assessing and classifying real property for purposes of the state property tax. See Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) (utilizing the cannon of "*expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*" to invalidate a local option ordinance as the locality was preempted by state law).

Article Ten, Section One of the South Carolina Constitution states that the "General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of real and personal property." S.C. Const. Art. X, § 1. Continuing, Section One sets forth the classifications for uniform taxation and in subsection (4)(A) explains that agricultural real property used for such purposes "shall be taxed on an assessment equal to four percent of its value" so long as the individual, partnership or corporation owning or leasing the property meets certain requirements. S.C. Const. Art. X, § 1(4)(A)(i-iv).

Additionally, under Article Ten, Section Two of the South Carolina Constitution, the General Assembly is tasked with, *inter alia*, defining "the classes of property and values for property tax purposes of the classes of property." S.C. Const. Art. X, § 2. Specifically, subsection (a) of Article Ten, Section Two explains, "[t]he General Assembly may define the classes of property and values for property tax purposes of the classes of property set forth in Section 1 of this article and establish administrative procedures for property owners to qualify for a particular classification." S.C. Const. Art. X, § 2(a). Further, subsection (c) of Article Ten, Section Two adds that "[s]tatutes pertaining to the methods of assessment of property for ad valorem taxation not in conflict with this article shall continue in force until changed by an act of the General Assembly." S.C. Const. Art. X, § 2(c). This Office has previously interpreted Article Ten, Section Two as conferring "authority upon the General Assembly to set forth what lands qualify for taxation with the agricultural assessment." Op. S.C. Att'y Gen., 1991 WL 632955 (March 20, 1991).

Moreover, like Article Ten Sections One and Two, Article Ten, Section Six of the South Carolina Constitution also addresses the uniform assessment of property tax. In particular, Article Ten, Section Six explains, "the General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State." S.C. Const. Art. X, § 6. However, Article Ten, Section Six goes on to reinforce that despite the delegation of the power to assess and collect the property tax, the General Assembly alone has the power to pass legislation regarding the method of assessment. See S.C. Const. Art. X, § 6 ("The General Assembly shall establish, through the enactment of general law, and not through the enactment of local legislation pertaining to a single county or other political subdivision, the method of assessment of real property within the State that shall apply to each political subdivision within the State.").

Thus, the South Carolina Constitution is clear that the General Assembly, to the exclusion of localities, is responsible for passing uniform legislation regarding the classifications, ratios and assessment of the property tax. S.C. Const. Art. X, § 1; S.C. Const. Art. X, § 2; S.C. Const. Art. X, § 6. Furthermore, while political subdivisions such as counties may administer the property tax through assessment and collection, our constitution collectively explains that they lack the authority to enact local legislation regarding the classification, valuation and method of assessing property subject to the tax. S.C. Const. Art. X, § 1; S.C. Const. Art. X, § 2; S.C. Const. Art. X, § 6. As a result, we believe that local legislation on this

subject matter is expressly preempted by the State Constitution meaning state law does not authorize counties to place additional requirements on timberland owners seeking to have their property classified and assessed as agricultural real property.

b. Implied Preemption

We further believe that, since South Carolina statutory and regulatory law place uniform requirements on landowners seeking to have timberland assessed and classified as agricultural real property, a subject matter which we have explained is an area of law requiring statewide uniformity, local legislation within this sphere would be impliedly preempted even if were not expressly preempted. As stated previously, "[i]mplied field preemption occurs when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." Sandlands, 394 S.C. at 465, 716 S.E.2d at 287. Here, it appears state statutory and regulatory law, while not required to meet both of these requirements, does so and results in this field of local legislation being impliedly preempted as well.

Pursuant to the constitutional provisions mentioned above, the General Assembly enacted Section 12-43-220 of the South Carolina Code which, like Article Ten, Section One, provides various ratios of assessment and sets forth both tax classifications and methods of assessment for the various property classifications subject to the property tax. S.C. Code Ann. § 12-43-220 (as amended by 2014 S.C. Acts 133). As noted above, property classified and assessed as agricultural real property is taxed at four percent of its fair market value unless it is later determined to be subject to additional taxation in the form of roll-back taxes. See S.C. Code Ann. § 12-43-220(d)(1) (setting forth the agricultural real property taxation rate); S.C. Code Ann. § 12-43-220(d)(4)(A-D) (2014) (setting forth the assessment of property subject to the roll-back tax).

South Carolina statutory law also defines the phrase "agricultural real property" and sets forth both the permissible and impermissible uses of property for purposes of classifying and assessing property under the property tax. Specifically, "agricultural real property" includes *inter alia* "any tract of real property which is used to . . . produce . . .trees" including property used for forestry so long as "at least fifty percent" of the property qualifies as such, and "no other business for profit is being operated thereon." S.C. Code Ann. § 12-43-230(a) (2014). Section 12-43-232(1)(a) adds that, where the tract is used to grow timber, the tract must be either five acres or more; contiguous to or under the same management system as a tract meeting the minimum acreage requirement; or owned in combination with other tracts of qualifying non-timberland agricultural real property. S.C. Code Ann. § 12-43-232(1)(a) (2014). Under item (a), "tracts of timberland must be devoted actively to growing trees for commercial use." Id. Item (b) further explains that Christmas Tree farms may qualify for assessment as agricultural real property under item (a) in certain circumstances. S.C. Code Ann. § 12-43-232(1)(b) (2014).

Moreover, where property "is in agricultural use and is being valued, assessed, and taxed" as agricultural real property, but "is applied to a use other than agricultural," such property is "subject to additional taxes . . . referred to as roll-back taxes." S.C. Code Ann. § 12-43-220(d)(4) (2014). The formula to be utilized by assessors in calculating roll-back taxes is detailed in Section 12-43-220(d)(4), items (A) through (D) of the Code. See S.C. Code Ann. § 12-43-220(d)(4)(A-D) (setting forth the assessment of property subject to the roll-back tax). As a result, South Carolina's statutory scheme not only places uniform requirements on landowners seeking to have their property assessed and classified as agricultural real property, but also requires that such property is in fact utilized in such a manner.[2]

In addition to the statutory definitions concerning timberland and the agricultural use classification, South Carolina law also permits the Department of Revenue ("the Department") to provide further guidance to determine whether property should be assessed as "agricultural real property." S.C. Code Ann. § 12-43-230(c) (2014). For instance, Regulation 117-1780.1 states that "Agricultural Real Property shall not include any property used as the residence of the owner or others" and adds that such property must be used "for bona fide agricultural purposes." 27 S.C. Code Ann. Regs. § 117-1780.1 (2012). Likewise, Regulation 117-1780.1 says "[r]eal property is not used for agricultural purposes unless the owner or lessee thereof has, in good faith, committed the property to that use" and explains that to determine this, county assessors should look to six factors. Id. This includes: (1) the nature of the terrain; (2) the density of the marketable product (timber, etc) on the land; (3) the past usage of the land; (4) the economic merchantability of the agricultural product; (5) the use or non-use of recognized care, cultivation, harvest and like practices applicable to the product involved, and any implemented plans thereof; and (6) the business or occupation of the landowner or lessee. Id.

Furthermore, the Department, pursuant to the statutory mandate of Section 12-43-230(c), has also created an application for those seeking classification of their property as agricultural real property. See 27 S.C. Code Ann. Regs. § 117-1780.2 (2012) (application setting forth the qualifications for the agricultural real property assessment and defining agricultural real property in addition to qualifying questions regarding whether a piece of property meets the requirements for taxation as agricultural real property). Similarly, the Department, citing to Sections 12-43-210 to 12-43-310 of the Code, promulgated regulations concerning the roll-back tax and its application. 27 S.C. Code Ann. Regs. § 117-1780.3 (2012). According to the Department, these statutes and regulations "as a whole are designed to insure that real property accorded the benefit of a lower assessment actually be agricultural property." S.C. Rev. Ruling #87-9 (eff. November 4, 1987).

With this in mind, we believe that both the breadth and specificity of the statutes and regulations mentioned above indicate a clear intent that the General Assembly, acting consistent

[2] Notably, South Carolina statutory law also provides criminal penalties for those who knowingly and willingly make a false statement on an application for classifying their property as agricultural real property under Section 12-43-340 of the Code.

with its constitutional mandate, sought to thoroughly and pervasively regulate the subject matter of classifying and defining the types of real property subject to the property tax. For purposes of your question, this is particularly so within the sphere of timberland and the definition of agricultural real property. See Sandlands, 394 S.C. at 465, 716 S.E.2d at 287 ("Implied field preemption occurs when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity."). Moreover, as mentioned previously in Section I(A), because the subject matter at issue is one requiring statewide uniformity, we conclude that local legislation on this subject matter is impliedly preempted for this reason as well.[3] Id. Accordingly, it is the opinion of this Office that state law does not authorize counties to regulate the subject matter at issue because, in addition to being expressly preempted as discussed in Section I(A)(2) above, it is also impliedly preempted.

II. Conclusion

In conclusion, while it is true that counties possess general police powers in order to find local solutions to local problems under the auspices of "home rule" and Section 4-9-25, it is equally true that a county's police powers do not extend to passing legislation regarding the classification of real property for purposes of assessing the property tax, nor can they set aside general law on subjects requiring statewide uniformity. See S.C. Const. Art. VIII, § 14 (explaining local government cannot set aside general law provisions regarding "the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity."). The South Carolina Constitution provides that the General Assembly is responsible for passing uniform legislation regarding the classifications, ratios and assessment of the property tax. See S.C. Const. Art. X, § 1 (1895); S.C. Const. Art X, § 2 (1895); S.C. Const. Art. X, § 6 (1895). This is expressly and exclusively regulated through South Carolina constitutional, statutory and regulatory law as the subject matter of such regulation, uniform classification of real property for purposes of assessing the property tax, is a subject matter requiring statewide uniformity. As a result, local legislation within this sphere is both expressly and impliedly preempted under state law. See S.C. Const. Art. X, §§ 1-2; S.C Const. Art. X, § 6; S.C. Code Ann. § 12-43-220; S.C. Code Ann. § 12-43-230; S.C. Code Ann. § 12-43-232; 27 S.C. Code Ann. Regs. § 117-1780.1-3; City of Charleston v. County of Charleston, 363 S.C. at 530, 611 S.E.2d at 922; Martin, 324 S.C. at -- , 478 S.E.2d at 274. Accordingly, it is the opinion of this Office that counties are unauthorized to enact local legislation placing additional requirements on landowners seeking to have timberland classified as agricultural real property.

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[3] We would further note that in a previous opinion of this Office we found the intent of the Right to Practice Forestry Act "is to create a uniform system, statewide for the practice of forestry" and thus concluded "that if there are forestry activities on forest land, local regulation . . . is preempted." Op. S.C. Att'y Gen., 2012 WL 2364243 (June 12, 2012).

Sincerely,

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REVIEWED AND APPROVED BY:

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