9280/9830

ALAN WILSON
ATTORNEY GENERAL

February 17, 2015

The Honorable Joe Daning
Representative, District No. 92
310-B Blatt Building
Columbia, SC 29211

Dear Representative Daning:

Attorney General Alan Wilson has referred your letter dated August 25, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue: Pursuant to our discussion, it is this Office's understanding that a constituent within your District is concerned with the constitutionality of Goose Creek Ordinance No. 13-009 and would like to know if revenue from the Local Hospitality Tax established by the City of Goose Creek pursuant to S.C. Code § 6-1-720 et seq. and the ordinance may be used to pay for a recreational facility.

Law/Analysis: Goose Creek Ordinance No. 13-009 establishes a Local Hospitality Tax, referred to as a "local hospitality fee," on all prepared food and beverages within the City of Goose Creek.[1] As far as the constitutionality of ordinance, this Office begins and ends with the presumption that a municipal ordinance is valid. This opinion in no way makes a determination as to the constitutionality of the ordinance, as only a court may declare an ordinance unconstitutional. See Ops. S.C. Atty. Gen., 1998 WL 485264 (August 9, 1988); 1998 WL 383512 (March 31, 1988); 1988 WL 485247 (March 17, 1988); 1986 WL 289836 (September 15, 1986). As this Office has previously stated:

> [w]e start with the basic proposition that a county ordinance would be entitled to a presumption of validity. Consistent with Article VIII of the South Carolina Constitution, which mandates Home Rule, a county possesses police power to enact ordinances to further the health and welfare of its residents. See [S.C. Code Ann.] § 4-9-30. As the Supreme Court of South Carolina cautioned in Rothschild v. Richland County Bd. of Adjustment, 309 S.C. 194, 420 S.E.2d 853, 855 (1992), "it is well settled that ordinances, as with other legislative enactments, are presumed constitutional; their unconstitutionality must be proven beyond a reasonable doubt." A court will not declare an ordinance invalid unless it is clearly

[1] "Local Hospitality Tax" is capitalized because it is a specific reference to a statutorily-defined tax referred to as the "local hospitality tax" in South Carolina Code § 6-1-710, et seq. Please note the statute defines the tax as "a tax on the sales of prepared meals and beverages sold in establishments or sales of prepared meals and beverages sold in establishments..." while Goose Creek Ordinance No. 13-009 refers to it as "prepared food and beverages." S.C. Code § 6-1-710(2); see also Op. S.C. Atty. Gen., 2003 WL 22682938 (October 17, 2003) (noting the distinction between prepared meals and food prepared).

> in conflict with the general law. Hospitality Ass'n of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995). Keeping in mind the presumption of validity and the high standard which must be met before an ordinance is declared invalid, we note that, while this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with State law. Accordingly, an ordinance will continue to be enforced unless and until set aside by a court of competent jurisdiction. Op. S.C. Atty. Gen., 2003 WL 21043502 (March 21, 2003).
>
> In Hospitality Ass'n, the Court recognized the test for resolving the issue of the validity of a local ordinance vis-a-vis State law. There, the Court stated that:
>
> > [d]etermining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.
>
> [Hospitality Ass'n of S.C. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113,] 116 [(1995)]. The Court referenced [S.C. Code] § 4-9-25, which provides that:
>
> > [a]ll counties of the State ... have authority to enact regulations, resolutions, and ordinances ... 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. Atty. Gen., 2013 WL 1803938 (April 18, 2013). As quoted above, this Office does not declare an ordinance valid or invalid, as only a court may determine the constitutionality of a statute or ordinance. Id. A municipality may impose a local hospitality fee pursuant to South Carolina Code Section 6-1-720, which is referenced in the beginning of Goose Creek's ordinance. Therefore, it appears Goose Creek has the statutory authority to enact an ordinance creating a hospitality fee, as it is our opinion that the ordinance meets the first part of the validity test as established by Hospitality Ass'n. As long as neither the ordinance nor the implementation thereof violates the Constitution or general laws of this State, we also believe a court should find the Goose Creek ordinance to be valid under the second part of the validity test. While the ordinance mentions many statutes (S.C. Code §§ 6-1-720, -730) and references, but does not specifically list, others (e.g. S.C. Code § 6-1-770), there are additional requirements in the ordinance not addressed by the Local Hospitality statutes. However, unless you have a specific question regarding constitutionality, we will presume the ordinance is constitutional.

By way of background, unlike other taxes such as the Local Option Sales Tax (S.C. Code § 4-10-90 et seq.), the South Carolina Department of Revenue does not administer and collect the Local Hospitality Tax. S.C. Code § 6-1-770. Customarily this Office, like the courts, will defer to the administering agency in a question of implementation. See, e.g., Op. S.C. Atty. Gen., 2014 WL 3414955 (June 13, 2014) (quoting Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986), et al.). Therefore, we will

proceed with the understanding that the Department of Revenue is not the administering agency for the Local Hospitality Tax.

Concerning the Local Hospitality Tax, South Carolina Code § 6-1-730 states:

> (A) The revenue generated by the hospitality tax must be used exclusively for the following purposes:
> (1) tourism-related buildings including, but not limited to, civic centers, coliseums, and aquariums;
> (2) tourism-related cultural, recreational, or historic facilities;
> (3) beach access and renourishment;
> (4) highways, roads, streets, and bridges providing access to tourist destinations;
> (5) advertisements and promotions related to tourism development; or
> (6) water and sewer infrastructure to serve tourism-related demand.
>
> (B)(1) In a county in which at least nine hundred thousand dollars in accommodations taxes is collected annually pursuant to Section 12-36-920, the revenues of the hospitality tax authorized in this article may be used for the operation and maintenance of those items provided in (A)(1) through (6) including police, fire protection, emergency medical services, and emergency-preparedness operations directly attendant to those facilities.
> (2) In a county in which less than nine hundred thousand dollars in accommodations taxes is collected annually pursuant to Section 12-36-920, an amount not to exceed fifty percent of the revenue in the preceding fiscal year of the local hospitality tax authorized pursuant to this article may be used for the additional purposes provided in item (1) of this subsection.

S.C. Code § 6-1-730 (1976 Code, as amended) (emphasis added). While it is clear revenue collected from the Local Hospitality Tax must be exclusively used for purposes listed above in the statute, it seems that revenue used from the Tax for a recreational facility would likely have to apply under (A)(1) (tourism-related buildings including, but not limited to, civic centers, coliseums, and aquariums) or (A)(2) (tourism-related cultural, recreational, or historic facilities). Id.

As a background regarding statutory interpretation, the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is

the intent of the legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)).

For purposes of capital projects and as used in South Carolina Code § 6-1-760, "tourist" is defined as "a person who does not reside in but rather enters temporarily, for reasons of recreation or leisure, the jurisdictional boundaries of a municipality for a municipal project or the immediate area of the project for a county project." S.C. Code § 6-1-760 (1976 Code, as amended). In a 2014 opinion, this Office discussed a similar question noting that "tourist destination" is not defined in the statute and that determining whether an individual project would comply with the statutory intent is a question of fact, which could better be answered by a court. Op. S.C. Atty. Gen., 2014 WL 151141 (March 27, 2014). In that opinion, this Office summarized significant points made in prior opinions regarding the Local Hospitality Tax as follows:

> Moreover, this Office has previously stated concerning the local hospitality tax found in S.C. Code Section 6-1-700 et seq.:
>
> > In reading the provisions contained in the [Local Hospitality] Act as a whole, we understand that the Legislature intended to use hospitality tax revenues to fund projects and infrastructure that promote and further tourism. As we stated in a 2006 opinion discussing the Act, "in our view, the Act creates a mechanism to generate revenue for the promotion of tourism and funds that mechanism by a revenue source which presumably would be affected by an increase in tourism." Op. S.C. Atty. Gen., February 3, 2006.
>
> Op. S.C. Atty. Gen., 2008 WL 5120764 (November 4, 2008). The 2006 opinion also stated concerning the Hospitality Act:
>
> > ...the Act allows counties and municipalities to impose a hospitality tax on certain meals and beverages served in restaurant and restaurant type establishments. S.C. Code Ann. § 6-1-710. Further, the Act requires the revenue generated from hospitality taxes to be kept separate and primarily used for tourism related expenditures. S.C. Code Ann. § 6-1-710. Specifically, section 6-1-730(A) states the expenditures are to be used "exclusively" for what appear to [be] expenses related to the promotion and facilitation of tourism. Thus, in our view, the Act creates a mechanism to generate revenue for the promotion of tourism and funds that mechanism by a revenue source which presumably would be affected by an increase in tourism.
>
> Op. S.C. Atty. Gen., 2006 WL 5120764 (November 4, 2008)

Op. S.C. Atty. Gen., 2014 WL 151141 (March 27, 2014). Therefore, we will not look to other statutes to determine the meaning of the statute but will look to a clear and unambiguous meaning. A clear and unambiguous meaning of the statute would allow a recreational facility as long as it serves to promote and facilitate tourism in accord with the intent of the tax and fits within one of the six purposes listed in South Carolina Code § 6-1-730(A). Determining if a recreational facility serves to promote tourism and would be considered to be "tourist-related" is a question of fact beyond the scope of a legal opinion. This Office issues legal, not factual opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op.

S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)). However, this Office answered a similar question in 2006 where we opined that an athletic house and improvements to an athletic field at a public school would likely be used for the students and staff of the school, rather than for tourists to the area. Op. S.C. Atty. Gen., 2006 WL 3877521 (December 20, 2006). Moreover, there are other cases that may be of assistance in guiding you as to how a court may rule on your question. For example, the West Virginia Supreme Court found upheld a movie theatre deemed a tourist recreational activity destination. See Fountain Place Cinema 8, LLC, v. Morris, 227 W.Va. 249, 707 S.E.2d 859 (2011). Thus, we believe a court will find there must be a direct and casual connection between tourism and the promotion thereof for Local Hospitality Funds to be used in whole or part to pay for a recreational facility.

Moreover, in a 2010 opinion, this Office analyzed whether we thought Clarendon County could use a portion of money collected pursuant to its Local Hospitality Tax to operate and maintain its tourism facility. Op. S.C. Atty. Gen., 2010 WL 2678689 (June 10, 2010). In that opinion, the county relied on South Carolina Code Section 6-1-730 for its authority to do so. Id. This Office analyzed the statute based on rules of statutory interpretation and concluded that as long as the building was tourism-related, funds from the county's hospitality tax could be used for the building. Id.

Furthermore, in 2006, this Office wrote an opinion concluding a municipality may use funds from its hospitality tax for the purposes in Section 6-1-730(B) as long as at least one of the counties where the municipality is located collects the requisite amount. Op. S.C. Atty. Gen., 2006 WL 422564 (February 3, 2006). In that opinion, we discussed how the Local Hospitality Tax appears to be a "mechanism to generate revenue for the promotion of tourism and funds that mechanism by a revenue source which presumably would be affected by an increase in tourism." Id. We also referenced Thompson v. Horry County in support of the interpretation that a municipality may use funds from its hospitality tax within the entire municipality. Id. (citing Thompson v. Horry County, 294 S.C. 81, 362 S.E.2d 646 (1987)).

While the Thompson case dealt with the Accommodations Tax, the Court's conclusion is helpful in determining how the Court may interpret your question regarding the Local Hospitality Tax. In Thompson, the Court concluded state Accommodations Tax funds must be used for "tourism-related" expenditures and used primarily in the area of the county where the tax is collected where practical. Id. Let us examine the how the South Carolina Accommodations Tax defines tourism-related expenditures in its statute. It includes in "tourism-related expenditures" the following:

> (i) advertising and promotion of tourism so as to develop and increase tourist attendance through the generation of publicity;
> (ii) promotion of the arts and cultural events;
> (iii) construction, maintenance, and operation of facilities for civic and cultural activities including construction and maintenance of access and other nearby roads and utilities for the facilities;
> (iv) the criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities. This is based on the estimated percentage of costs directly attributed to tourists;
> (v) public facilities such as restrooms, dressing rooms, parks, and parking lots;
> (vi) tourist shuttle transportation;
> (vii) control and repair of waterfront erosion, including beach renourishment;
> (viii) operating visitor information centers.

S.C. Code § 6-4-10(4)(b) (1976 Code, as amended). The statute also defines "travel" and "tourism" as "the action and activities of people taking trips outside their home communities for any purpose, except daily commuting to and from work." S.C. Code § 6-4-5(4) (1976 Code, as amended).

A 2003 opinion written by this Office also cited the Thompson case. Op. S.C. Atty. Gen., 2003 WL 21043497 (April 2, 2003). While that opinion discussed the definition of tourism pursuant to the Accommodations Tax (S.C. Code § 6-4-5(4)), its analysis may also be helpful in answering your question. Id. It states:

> Relative to Section 6-4-10, the General Assembly has chosen to define "tourism" as "... the action and activities of people taking trips outside their home communities *for any purpose*, except daily commuting to and from work (Emphasis added)." Obviously, the General Assembly has broadly defined tourism. This broad definition is indicative of an intent that "tourism-related expenditures" also be broadly interpreted. Accordingly, it is certainly reasonable to conclude that the promotion of performing art groups, festivals, and historical events would be related to the "... activities of people taking trips outside their home communities for any purpose...." Further, Section 6-4-10(4)(b) provides that "[t]he funds must not be used as an additional source of revenue to provide services normally provided by the county or municipality but to promote tourism and enlarge its economic benefits through advertising, promotion, and providing those facilities and services which enhance the ability of the county or municipality to attract and provide for tourists." Again, this provision seems to indicate the intention of the General Assembly that "tourism-related expenditures" be given an expansive reading, allowing the counties or municipalities flexibility in their efforts to "... attract and provide for tourists." In Thompson v. Horry County, 294 S.C. 81, 362 S.E.2d 646 (Ct.App.1987), the Court of Appeals reviewed the application of S.C. Code Ann. § 12-35-720(1), the predecessor to Section 6-4-10, and stated that "... it makes sense to give counties some flexibility as to how and where they spend accommodations tax revenues." While some amendments have been made since the Thompson opinion was issued, it is our view that the cited portion remains relevant to any interpretation of Section 6-4-10 as it currently exists.

Op. S.C. Atty. Gen., 2003 WL 21043497 (April 2, 2003) (emphasis added). Furthermore, as our State's Supreme Court has previously stated in regards to the Accommodations Tax implemented by a municipality, the ability to discern how to best promote tourism was delegated to the municipality by the Legislature. City of Myrtle Beach v. Tourism Expenditure Review Committee, 2005 WL 3308567 (SCALC 2005). One principle cited in the Myrtle Beach case was:

> the Latin princip[le] of ita[] [l]ex scripta est ('so the law is written') in Beaty v. Richardson, 56 S.C. 173, 180, 34 S.E. 73, 76 (1899), stating that 'the legislature must have intended to mean what it has plainly expressed, and consequently there is no room for construction...Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be.'

City of Myrtle Beach at 8.

Conclusion: This Office will presume a municipal ordinance is constitutional on its face. Regarding the use of revenue from a municipality's Local Hospitality Tax, the revenue must be exclusively used for one of the six specific purposes listed in South Carolina Code § 6-1-730(A). As to whether a recreational facility fits within one of those purposes depends on facts specific to the facility, which would need to be determined on a case-by-case basis and is outside the scope of a legal opinion. Op. S.C. Atty. Gen., 2011 WL 6959374 (December 5, 2011). We note that this Office is only issuing a legal opinion based on the current law at this time. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law may interpret statutes and make such determinations. S.C. Code § 15-53-20. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

1