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Office of the Attorney General

State of South Carolina
Opinion No. 84-66
June 11, 1984

***1** George L. Schroeder
Director
Legislative Audit Council
620 Bankers Trust Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:
You have asked our advice concerning § 40–29–10 et seq. which provides for the regulation of massage parlors and the licensing of masseurs and masseuses in this State. Specifically, you have asked about the power of counties and municipalities to regulate massage parlors, assuming first the nonexistence of § 40–29–10 et seq., and then its existence.

Section 40–29–10 et seq. was recently addressed in considerable detail in my letter to you, dated May 25, 1984. Therein, it was noted the following:
Section 40–29–10 et seq. represents the codification of Act No. 281 of 1975, entitled 'An Act to Regulate Massage Parlors, Health Salons, Physical Culture Studios, Clubs or Establishments, and Similar Establishments, With Exceptions, And to Provide A Penalty.' Generally, the Act provides for the licensing of those engaged in the
businesses, trade or professions commonly known as massage parlors, health salons, physical culture studios, clubs or establishments by whatever name designated, wherein physical culture, massage, hydrotherapy or other physical treatment of the human body is carried on or practiced.

Section 40–29–30. The statute defines a 'masseur' and 'masseuse' (§ 40–29–20) and further provides that the South Carolina State Law Enforcement Division (SLED) shall receive applications for licensure. By the statute, applicants are required to provide written recommendations showing proof of good moral character, as well as a health certificate from a medical doctor. Also required is a license fee of five hundred dollars and an annual renewal fee of two hundred and fifty dollars. Upon the completion of its investigation, SLED is required to forward the application to the governing body of the appropriate municipality or county, together with its own recommendation 'to issue or refuse to issue a license.' See, §§ 40–29–30 through –50.

The Act further empowers persons licensed under the Act to train 'masseurs and masseuses under his supervision in his studio or establishment' under certain conditions (§ 40–29–70). It also requires licensed persons to file with SLED the names of all employees, their home addresses, home telephone numbers and places of employment (§ 40–29–70) and keep records concerning persons 'treated' at his or her establishment (§ 40–29–80). The Act further requires SLED periodically to inspect premises licensed thereunder and for good cause to revoke the license upon hearing (§ 40–29–90). Section 40–29–100 prohibits an establishment licensed under the Act to operate at certain times (Sundays and certain A.M. hours). Section 40–29–110 forbids licensed persons 'to treat a person of the opposite sex' except in certain circumstances. And § 40–29–120 makes it unlawful for 'persons under the age of eighteen to patronize any massage parlor or similar establishment licensed thereunder unless such person carries with him at the time of such patronage, a written order directing the treatment to be given signed by a regularly licensed physician.'

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***2** Addressing first your question as to whether municipalities and counties could regulate massage parlors, assuming § 40–29–10 et seq. were not in existence, we believe there is little doubt that municipalities could regulate such establishments pursuant to the general police powers given them under state law. Section 5–7–30 of the Code of Laws of South Carolina (1976) broadly empowers municipalities 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 . . ..

This section purports to give municipalities general police powers. McCoy v. York, 193 S.C. 390, 8 S.E.2d 905 (1940). The powers delegated therein to protect the public health are particularly broad, Ward v. Darlington, 183 S.C. 263, 190 S.E. 826 (1937); indeed such power is 'as broad and comprehensive as it was within the power of the State to delegate.' Clegg et al. v. City of Spartanburg, 132 S.C. 182, 185, 128 S.E. 36 (1925). Our Supreme Court has concluded that this provision empowers municipalities to regulate beer and wine, Arnold v. Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943) as well as pool and billiard rooms, Clegg v. Spartanburg, supra. 'The only limitations upon this power of the State . . . are the constitutional guaranties which safeguard personal liberty and private property.' Clegg, supra, 132 S.C. at 185.

Moreover, '[i]t is settled law that the licensing and regulation of massagists and massage parlors is within the legitimate exercise of a municipality's police powers.' McQuillin, Municipal Corporations, § 24.123(a) (3d ed. revised). The regulation of massage parlors is a legitimate governmental activity for the protection of the public health and welfare. Schaeffer v. Kleinknecht, (Mo. App.), 604 S.W.2d 751 (1980). But it is universally recognized, both by the general law and § 5–7–30, that a municipal ordinance cannot conflict with 'a state law of general character and statewide application . . .', 56 Am.Jur.2d, Municipal Corporation, § 374. However, it is also well established by our Supreme Court that where the state law is silent and the municipal law speaks, 'there can be no conflict between them.' Arnold v. City of Spartanburg, 201 S.C. 523, 536, 23 S.E.2d 735 (1943). See also, 62 C.J.S., Municipal Corporations, § 144. Accordingly, assuming that § 40–29–10 et seq. were not existent, a municipality probably could reasonably regulate massage parlors pursuant to the general police powers bestowed upon it by § 5–7–30. Cf. Schaeffer v. Kleinknecht, supra.

Again assuming that Section 40–29–10 et seq. is nonexistent, the question of a county's power to regulate massage parlors is somewhat more problematical. No statute expresses with the same precision as does § 5–7–30 with regard to municipalities, that counties possess general police powers. Our Supreme Court has stated, moreover, that a county possesses 'only such powers and can perform only such duties as are expressly or impliedly conferred or imposed upon it by constitutional or statutory provisions . . ..' Williams, v. Wylie, 217 S.C. 247, 60 S.E.2d 586 (1950). Thus, we must address ourselves to the question of whether § 4–9–10 et seq., which bestows upon counties 'home rule' was intended to confer upon those entities general police powers. We conclude that it was.

***3** In 1972, the people of South Carolina approved Article VIII of the South Carolina Constitution. The ratification of that Article by the General Assembly occurred in March, 1973. Article VIII is entitled 'Local Government.' Those portions of Article VIII relative to counties are as follows:

'§ 1 Powers of political subdivisions continued.—The powers possessed by all counties, cities, towns, and other political subdivisions at the effective date of this Constitution shall continue until changed in a manner provided by law.

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'§ 7. Organization, powers, duties, etc., of counties; special laws prohibited.—The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of government services provided. Alternate forms

of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.

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'§ 17. Construction of Constitution and laws.—The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

See also, Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976).

In an attempt to comply with the constitutional mandate, in 1975 the General Assembly enacted into law Act No. 283. Duncan, 228 S.E.2d at 97. Act No. 283 of 1975 is now codified at Section 4–9–10 et seq. or what is commonly known as the Home Rule Act. The South Carolina Supreme Court has described the powers delegated by the Home Rule Act, particularly § 4–9–30, as a 'vast extent of authority . . ..' Duncan, supra. Section 4–9–30(5) empowers counties

(5) 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; (emphasis added).

With respect to this and other provisions of the Home Rule Act, the Supreme Court has stated:

***4** We think it a fair summary to say that . . . each county conducts its own governmental affairs (without the necessity of periodic General Assembly intervention) much like municipalities have heretofore operated in this State. This is consistent with the recommendations of the Constitutional Study Committee which proposed new Article VIII. In referring to Section 7, the committee said, 'Of course, this restriction would demand that there be an active governing body in each county which would have general powers of local government similar to those now exercised by municipal councils.' (emphasis added).

Duncan, 228 S.E.2d supra at 97. And with regard to Section 4–9–30, this office has concluded that the provision 'make[s] a general grant of police power to counties.' Op. Atty. Gen., December 18, 1978. We have also stated that '[t]he Home Rule Act permits counties to provide by ordinance for public safety and to provide penalties for violations thereof, § 4–9–30(5)(14)', Op. Atty. Gen., May 22, 1979, and that

County governments are given the function of providing for public health and safety. § 4–9–30(5) S.C. CODE, 1976. The general law permits local governments to regulate, under its police powers, the possession or consumption of beer and wine in a public place.

Op. Atty. Gen., January 6, 1978.

While not entirely free from doubt, [1] we believe these prior conclusions to be correct. Section 4–9–30(5) enumerates and bestows upon counties a considerable number of traditional police power functions, such as sewage collection, public health, public safety, etc. While it is true these appear to be dealt with in the context of the power of the county to levy taxes and make appropriations, it should also be emphasized that Section 4–9–30(5) also empowers the county 'to provide for the regulation and enforcement of the above . . ..' Certainly, this portion of the provision could be read as authorizing counties generally to regulate

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and enforce such regulations in those traditional police powers areas enumerated. Such a reading is consistent with the mandate of Article VIII, § 17 that 'all laws concerning local government shall be liberally construed in their favor.' Accordingly, we believe that general police powers constitute ' p owers, duties and responsibilities granted local government subdivisions . . . by law which can be . . . fairly implied . . .' from the Home Rule Act. Id.; see also, Sections 4–9–30(6); 4–9–30(14) power 'to enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violations thereof . . .' ; 4–9(16.1); 4–9(16.2) abate nuisances . This conclusion, again, is in accord with several prior opinions of this office and with the case law interpreting the Home Rule Act. See, e.g., Duncan v. York County, supra; see also, Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974). And it is entirely consistent with Article VIII's purpose that 'each county conduct its own governmental affairs . . ..' Duncan, 228 S.E.2d at 97. [2]

***5** Thus, assuming that § 40–29–10 et seq. were not existent, counties, like municipalities, probably could reasonably. regulate massage parlors pursuant to the police powers bestowed upon them by the Home Rule Act. [3] See, § 40–29–10 (regulation of massage parlors is for the protection of the general health, safety, welfare and morals of the citizenry of this State).

Your next question concerns whether municipalities and counties may regulate massage parlors, assuming Section 40–29–10 et seq. is in existence. We believe that they probably can.

As noted earlier, it is well settled that a municipal ordinance cannot conflict 'with a State law of general character and statewide application.' 56 Am.Jur.2d, Municipal Corporations, § 374. This general rule is in accord with § 5–7–30, bestowing police power upon municipalities. The following sets forth a good summary of the law determining when conflicts between general law and local ordinances occur:
. . . It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits or permits an act which the statute prohibits. Accordingly, it has often been held that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted or required, or authorize what the legislature has expressly forbidden.

Prohibitory municipal ordinances may automatically be ousted by the subsequent passage of a state statute which covers the regulation of the same subject which the municipal ordinance purport to prohibit.

The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription . . .. Unless statutes are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.

56 Am.Jur.2d, Municipal Corporation, § 374. See also, 62 C.J.S., Municipal Corporations, § 143, 144. As our Supreme Court stated in McAbee v. Southern Ry. Co., 166 S.C. 166, 164 S.E. 444, 445 (1932).
The question as to whether or not a municipal ordinance or regulation is in conflict with the general law is sometimes difficult of solution . . .. In order that there be a conflict between a state enactment and a municipal regulation both must contain either express or implied conditions which are inconsistent and irreconcilable with each other. * * * If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand. * * *

***6** As a general rule, additional regulation to that of the State law does not constitute a conflict therewith. * * * Merely because a municipal ordinance is not as broad as the statute does not render it so inconsistent as to make it void.

See also, Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943).

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Section 40–29–50 authorizes SLED to make recommendations in the area of licensing massage parlors. However, the statute also extends to municipalities and counties a role in this process. Section 40–29–50(c) provides that SLED

. . . after completing its investigation, shall forward the application for a license to the governing body of the appropriate municipality or to the governing body of the appropriate county when the location of the business is to be outside of a municipality, together with its recommendation to issue or refuse to issue a license.

The appropriate governing body shall then issue or refuse to issue a license, but no license may be issued unless it is recommended by the division [SLED].

The issuing authority may charge a business license fee on the same basis as other business licenses.

This office has interpreted the foregoing provision as authorizing cities and counties to issue licenses to massage parlors. Op. Atty. Gen., March 30, 1977. Of course, the licensing of an activity and the authority to do so is a major form of governmental regulation. See, State v. Reeves, 112 S.C. 383, 99 S.E. 841 (1917). Accordingly, so long as a municipality or county does not act in contradiction to § 40–29–10 et seq., [4] it may license massage parlors in conformity with the terms of that act.

In addition, it would appear that the Legislature, in enacting Section 40–29–10 et seq., did not intend to preempt counties and municipalities from generally regulating massage parlors so long as these entities do not act inconsistently or in conflict with the Massage Parlor Act itself or any other general law. See, Redwood Gym v. Salt Lake Co. Comm., (Utah), 624 P.2d 1138 (1981). It is true that § 40–29–10 et seq. regulates massage parlors in areas other than licensing (see e.g. § 40–29–100, regulating hours; § 40–29–110, prohibiting the treatment of persons of the opposite sex); by so doing, it could be argued that such represents an intent to preempt further regulation by local entities in these areas. See, Lancaster v. Municipal Court for Beverly Hills J.D., 100 Cal. Reptr. 609, 494 P.2d 681 (1972). However, since the General Assembly saw fit to allow counties and municipalities a role in the licensing of massage parlors, it would appear inconsistent with that intent then to conclude that the Legislature desired to preempt any further regulation by these entities in other areas. If such were indeed the legislative intent, we believe the General Assembly would have stated its objective far more explicitly. Compare, § 61–13–760 (general state law is intended to occupy the entire field of regulating alcoholic liquors). Accordingly, so long as a municipality or county does not act inconsistently or in conflict with § 40–29–10 et seq., or any other general law, [5] these entities may reasonably regulate massage parlors pursuant to their general police powers.

CONCLUSION

***7** In conclusion, it appears that both municipalities and counties possess certain authority to regulate massage parlors whether or not Section 40–29–10 et seq. is existent. If Section 40–29–10 et. seq. is non-existent, cities could regulate massage parlors generally, pursuant to their police powers. As to the county's exercise of police power, we also believe such authority to regulate these establishments presently exists under the Home Rule Act; however, since this question is not free from doubt, legislative clarification is probably advisable. If Section 40–29–10 et seq. is existent, cities and counties still could generally regulate massage parlors, so long as they do not act inconsistently and in conflict with Section 40–29–10 et seq. or any other general law.

Sincerely,

T. Travis Medlock
Attorney General

Footnotes

1 See, Op. Atty. Gen., Op. No. 4118, Sept. 16, 1975. In that opinion, it was concluded that counties do not possess the authority to pass ordinances for the regulation of noise pollution. It was noted that Act No. 283 expressly authorizes municipalities to exercise police powers, while no similar authorization is contained therein with regard to counties. However, it should be noted that, with respect

to the police powers of municipalities, such powers were longstanding, and thus Act No. 283 represented simply a continuation of the same statutory language which had been used to delegate to municipalities general police powers, long before the passage of Act No. 283. See, Code of Laws of South Carolina, § 47–61 (1962); § 47–61 (1952). Thus, as to cities, it was reasonable for the General Assembly to carry forward the same basic statutory wording as before.

With respect to counties, however, the situation was different. No such general police power had existed prior to Article VIII's adoption and the enactment of Act No. 283. The General Assembly thus chose with respect to counties to employ somewhat different language in Act No. 283, enumerating more precisely the areas with which counties were concerned. But, because the statutory language was different from that used to give cities the police power does not mean counties do not also possess police powers in the areas enumerated. Obviously, the General Assembly could reach the same result through the use of different language. And it is well settled that the doctrine of expressio unius est exclusio alterius is 'inapplicable if there is some special reason for mentioning one thing and none for mentioning another which is within the statute.' 2A Sutherland, Statutory Construction, § 47.23. See also, Home Building and Loan Assn. v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139. Here, as stated above, we believe such a reason exists, and thus the doctrine should not defeat legislative intent. Moreover, in light of Article VIII, § 17's mandate that statutes relating to the powers of local government be liberally construed, the fact that Act No. 283 states the powers of counties and cities somewhat differently should not be given undue emphasis.

2 We note also our understanding that counties have, since the enactment of Act No. 283 of 1975, continuously, exercised police powers. While such longstanding practice is not immune from scrutiny, neither can it be disregarded. Cf., Scroggie v. Scarborough, 162 S.C. 218, 233–234, 160 S.E. 596 (1931). It is worthy of note that the General Assembly has not seen fit to amend the Home Rule Act in this area in view of such continued exercise of authority, even though the Act has been amended in other areas on several occasions. See, Sutherland, supra, § 49.09. A contemporaneous and practical interpretation of a statute is 'influential in the construction of statutes . . ..' Sutherland, supra at § 49.03. See also, Morrison v. Barksdale, Harp. 101 (1824).

3 Even if counties did not possess general police powers under the Home Rule Act, they clearly possess some regulatory authority. See § 40–29–10 et seq. (licensing); § 4–27–10 et seq. (zoning); § 4–9–30(5) (appropriations and tax levying authority).

4 Section 40–29–50(c) provides that '[t]he appropriate governing body shall then issue or refuse to issue a license, but no license may be issued unless it is recommended by the division.' (Emphasis added.). Clearly, if SLED recommends against issuance of a license, a county or municipality could not then issue such license. See, Op. Atty. Gen., Dec. 21, 1979.

5 It should here be noted that § 4–9–30(14) provides that '[n]o ordinance including penalty provisions shall be enacted with regard to matters provided for by the general law, except as specifically authorized by such general law . . .'. Of course, the Massage Parlor Act is a general law and it would thus appear that this provision in the Home Rule Act would be applicable, so long as § 40–29–10 et seq. remains in existence. In light of Article VIII, § 17's mandate that the powers of counties are to be liberally construed, and in view of the fact that the Massage Parlor Act itself gives counties a limited role in the area of licensing, it would be reasonable to construe § 4–9–30(14) in this instance as limiting the county only with respect to penalty provisions in those areas specifically mentioned in § 40–29–10 et seq.; under this interpretation, the county would thus not be constrained in enacting penalty provisions as to those matters not covered by § 40–29–10 et seq. [e.g. as to location]. We express no opinion, however, as to whether this suggested reading of § 4–9–30(14) would be adopted by the courts. In any event, § 4–9–30(14) further provides that '[c]ounty officials are . . . empowered to seek and obtain compliance with ordinances and regulations issued pursuant thereto through injunctive relief in courts of competent jurisdiction.' Thus, even in the face of § 4–9–30(14)'s limitation as to 'penalties', counties may still effectively regulate massage parlors.

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