1990 S.C. Op. Atty. Gen. 196 (S.C.A.G.), 1990 S.C. Op. Atty. Gen. No. 90-69, 1990 WL 482456

Office of the Attorney General

State of South Carolina
Opinion No. 90-69
December 5, 1990

*1 The Honorable John C. Land, III
Senator
District No. 36
Drawer G
Manning, South Carolina 29102

Dear Senator Land:
By your recent letter, you have advised that the General Assembly adopted the "Clean Indoor Air Act" during the 1990 legislative session. Prior to passage of the Act, our Office issued two opinions on the general issues of whether a legislative enactment such as the one under consideration would have statewide applicability and whether the General Assembly could preempt regulation of smoking in public places by counties and municipalities. See Ops.Atty.Gen. dated February 8, 1990 and February 27, 1990. Because the version of the Act which was finally adopted varied from the bill under consideration when the previous opinions were rendered, you have inquired as to the statewide applicability of the Act as adopted and whether local political subdivisions are preempted from further regulating smoking.

In construing any legislative enactment, the primary objective of both the courts and this Office is to determine and effectuate legislative intent if at all possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). When terms of a statute are clear and unambiguous, such terms will be applied literally. Anders v. S.C. Parole and Community Corrections Bd., 279 S.C. 206, 305 S.E.2d 229 (1983). Full effect must be given to each section of a statute, and words must be given their plain meanings. Federal Ins. Co. v. Speight, 220 F.Supp. 90 (D.S.C.1963). Too, a statute must be interpreted as a whole and in light of its general scope, tenor, and purpose. Berry v. Atlantic Greyhound Lines, 114 F.2d 255 (4th Cir.1940).

Constitutional Concerns

Within Article VIII of the State Constitution, the article on local governments usually thought of as "home rule," is the following in Section 14:
In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside:

(1) The freedoms guaranteed every person; (2) election and suffrage qualifications; (3) bonded indebtedness of governmental units; (4) the structure for and the administration of the State's judicial system; (5) criminal laws and the penalties and sanctions for the transgression thereof; and (6) 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 foregoing list contains those matters of state law which are not to be set aside by county or municipal ordinance, by virtue of the State Constitution.

It is noted that in portions of the Code of Laws relative to elections (Title 7), criminal laws (Title 16), and the judicial system (Title 14), among many other areas of law, there is no statute specifically precluding counties or municipalities

from adopting ordinances on such subjects; instead, such preclusion is determined by looking for evidence of legislative intent that the General Assembly's enactment occupy the field.

Statutory Considerations

*2 Counties and municipalities are political subdivisions of the State and have only such powers as have been given to them by the State, such as by legislative enactment. Williams v. Wylie, 217 S.C. 247, 60 S.E.2d 586 (1950). Such political subdivisions may exercise only those powers expressly given by the State Constitution or statutes, or such powers necessarily implied therefrom, or those powers essential to the declared purposes and objects of the political subdivision. McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959). In so doing, however, political subdivisions cannot adopt an ordinance repugnant to the State Constitution or laws, which ordinance would be void. Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928).

With that general law in mind, it may be noted that the Home Rule Act (Act No. 283 of 1975) granted certain powers, duties, and responsibilities to counties and municipalities, with certain limitations. By Section 4–9–30 of the South Carolina Code of Laws (1976, as revised) each county government "within the authority granted by the Constitution and subject to the general laws of this State" was given a list of enumerated powers. Similarly, Section 5–7–30 of the Code authorizes municipal government to adopt ordinances, regulations, and resolutions "not inconsistent with the Constitution and general law of this State" with respect to a list of functions specified therein. Considering Article VIII, Section 14 of the Constitution and these two enabling statutes, it is clear that a county or municipality cannot adopt an ordinance which would conflict with the State Constitution or general law.

Provisions of the Act

The Clean Indoor Air Act of 1990 must be examined for indicia of legislative intent in the language used in the Act. The preamble or legislative findings state:
Whereas, it is desirable to accommodate the needs of nonsmokers to be free from exposure to tobacco smoke while in public indoor places; and

Whereas, the Clean Indoor Air Act is an appropriate action to achieve this important objective. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina: ....

Section 2 details areas where smoking is prohibited and exceptions thereto:
It is unlawful for any person to smoke, or possess lighted smoking material in any form in the following public indoor areas except where a smoking area is designated as provided for herein:

(1) Public schools, including pre-schools and day care centers except in enclosed private offices and teacher lounges.

(2) Health care facilities as defined in Section 44–7–130 of the Code of Laws of South Carolina, 1976, except where smoking areas are designated in employee break areas. No section of this act shall prohibit or preclude a health care facility from being smoke free.

(3) Government buildings (except health care facilities as provided for herein), except that smoking shall be allowed in enclosed private offices and designated areas of employee break areas; provided that smoking policies in the State Capitol and Legislative Office Buildings shall be determined by the office of government having control over that area of the buildings.

*3 "Government buildings" shall mean buildings or portions thereof which are leased or operated under the control of the State or any of its political subdivisions, except those buildings or portions thereof which are leased to other organizations or corporations.

(4) Elevators.

(5) Public transportation vehicles, except for taxicabs.

(6) Arenas and auditoriums of public theatres or public performing art centers; except that smoking areas may be designated in foyers, lobbies, or other common areas; and smoking is permitted as part of a legitimate theatrical performance.

Section 3 directs that signs designating smoking and nonsmoking areas be posted in the appropriate areas. Section 4 directs that a reasonable effort be made to prevent smoking areas impinging upon nonsmoking areas by the use of existing physical barriers and ventilation systems.

A penalty for violation of terms of the Act is specified in section 5:
A person who violates Section 2, 3, or 4 of this act is guilty of a misdemeanor and, upon conviction, must be fined not less than ten dollars nor more than twenty-five dollars.

Section 6 provides further:
No person in this State is authorized to require any other person to submit to any form of testing to determine whether or not the person has nicotine or other tobacco residue in his body.

Discussion

There are numerous indicia that, as a matter of law, the General Assembly intended the Act to have statewide applicability and that local political subdivisions would be prohibited, at least implicitly, from further regulation of smoking in public indoor places. The coverage of the Act is extremely broad, in that public schools, pre-schools, day care centers, health care facilities, government buildings of the State or any of its political subdivisions, and arenas and auditoriums of public theatres or public performing arts centers are specifically listed. The penalty for violation is specific and does not leave discretion for a local political subdivision to provide a different (more or less restrictive) penalty. Section 6 refers to "[n]o person in this State," language again very broad and again leaving no discretion for modification by a political subdivision. Considering the Act as a whole, it must be concluded that the General Assembly intended the Act to be comprehensive and to occupy the field.

Because the Act expressly lists those public indoor areas in which persons may not smoke or possess lighted smoking materials and then lists certain areas in which smoking is to be permitted (i.e., enclosed private offices, teachers lounges, taxicabs, and so forth), it is reasonable to conclude that, on the whole, political subdivisions are not free to vary the terms of the Act. A certain amount of discretion is indicated in section 3 as to health care facilities, which are not precluded or prohibited from being smoke-free; express mention of health care facilities as being permitted to designate the facility as smoke-free implies the exclusion of all other regulated political subdivisions or entities not so named to make that designation. Home Bldg & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938). In addition, smoking areas may be designated in foyers, lobbies, or other common areas of public theatres or public performing art centers. Finally, smoking policies in the State Capitol and Legislative Office Buildings are to be determined by the office of government having control of that area of a given building. Other than those noted exceptions, it appears that the General Assembly intended to regulate smoking in a general, comprehensive manner and to preempt further regulation

by local political subdivisions except as noted. Thus, except for health care facilities (many of which are operated by political subdivisions such as a county or special purpose district), a county or municipality would be precluded from designating a public building as smoke-free, for example.

*4 Another indication that local governments (other than health care facilities) may not vary from the Act is found in section 3(3) of the Act among others. Therein it is provided that in government buildings, "smoking shall be allowed in enclosed private offices and designated areas of employee break areas...." (Emphasis added.) The term "shall" generally connotes mandatory compliance. S.C. Dep't of Hwys. and Public Transp. v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986). With the exception of health care facilities, the Act has delineated where smoking or possession of lighted smoking materials may or may not occur. There is no room for the local political subdivision to further act.

Based on the foregoing, it is the opinion of this Office that the Clean Indoor Air Act of 1990 was intended to be of statewide applicability and that, except as noted above, local political subdivisions were preempted from further inconsistent regulation of smoking in public indoor areas.

With kindest regards, I am
Sincerely,

Patricia D. Petway
Assistant Attorney General

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