ALAN WILSON
ATTORNEY GENERAL

October 11, 2017

The Honorable Peter M. McCoy, Jr., Member
South Carolina House of Representatives
420-D Blatt Building
Columbia, SC 29201

Dear Representative McCoy:

We received your opinion request seeking an opinion on the following question:

"May the City of Charleston, which grants nonexclusive franchises for the use of the public rights of way for the purposes of conducting animal-drawn carriage and wagon tours, require that the horses and other animals which are used by the franchise holders take part in a prospective, peer-reviewed, scientific study to aid in determining appropriate working conditions for the animals' welfare?"

Our Office has not received or reviewed the text of any proposed or enacted ordinance relating to this question generally, or setting out testing procedures specifically.

Law/Analysis:

Without the text of a proposed or enacted ordinance, our Office cannot opine definitively on the legality of any such ordinance by the City, and any attempt to do so could only be speculative. Additionally, given the strong vested interests on both sides of this issue, we anticipate a high likelihood that any local legislation in this area will result in litigation. For that reason, we recommend that an interested party petition a court for a declaratory judgment, as only a court of law can interpret statutes and resolve litigation. *See* S.C. Code Ann. § 15-53-20 (2005).

In order to be as responsive as possible to your question, however, we will set out and discuss several general principles of law which we expect might be relevant to your question. Specifically, the City of Charleston (hereinafter the "City") has the power to regulate its public roads and to regulate franchises. S.C. Code Ann. § 5-7-30 (2004). Each of those powers, however, is limited by the intent of the relevant legislation, understood in the context of the Home Rule Amendment to the South Carolina Constitution. *See* S.C. Const. art. VIII, § 17; *see also Op. S.C. Att'y Gen.*, 2014 WL 5303044 (October 1, 2014). Moreover, the City's power in this area is subject to constitutional restrictions. *See, e.g.,* U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 10. Our discussion of these principles follows below.

The City of Charleston has the statutory power to regulate public roads within its jurisdiction, and to grant and regulate franchises to operate for-profit businesses upon those roads. S.C. Code Ann. § 5-7-30 (2004). Regulation of carriage horses by a South Carolina municipality typically is undertaken as an express exercise of the powers granted to those municipalities by the General Assembly in S.C. Code Ann. § 5-7-30 (2004). *See City of Charleston v. Roberson*, 275 S.C. 285, 286, 269 S.E.2d 772, 773 (1980); *see also Op. S.C. Att'y Gen.*, 2011 WL 6120334 (November 1, 2011). Section 5-7-30 contains a broad grant of authority in many subject areas, including "powers in relation to roads, streets, markets, law enforcement, health, and order." S.C. Code Ann. § 5-7-30 (2004). It also specifically empowers a South Carolina municipality to "grant franchises for the use of public streets and make charges for them[1]." *Id.* It appears that current horse carriage regulations typically are undertaken by requiring a carriage operator to enter into a franchise agreement with the city in order to operate a for-profit business upon the public streets.[2] *See* City of Charleston Code of Ord. § 29-201 *et. seq.* (providing for the granting of franchises); *see also Op. S.C. Att'y Gen.*, 2011 WL 6120334 (November 1, 2011) (discussing the grant of a franchise to operate a horse-drawn carriage).

The leading case in South Carolina regarding horse-drawn carriages is *City of Charleston v. Roberson*, 275 S.C. 285, 269 S.E.2d 772 (1980). This South Carolina Supreme Court case considered a city ordinance, passed under Section 5-7-30, which "prohibited [horse-drawn carriages] from operating on all or part of eight streets in the City's historic district." 275 S.C. at 286-87, 269 S.E.2d at 773. Our Supreme Court upheld the ordinance as constitutional, and reinstated the conviction of the municipal trial court for its violation. *Id.* The Court in *Roberson* reiterated, as our state's highest Court had in prior cases, that "[n]o one has the inherent right to carry on his private business along the public streets. Such rights can exercised only under such terms and conditions imposed by the city authorities." 275 S.C. at 287, 269 S.E.2d at 773 (quoting *Radio Cab Co. v. Bagby*, 224 S.C. 28, 31, 77 S.E.2d 264 (1953) and *Huffman v. City of Columbia*, 146 S.C. 436, 450, 144 S.E. 157, 162 (1928)). The *Roberson* Court went on to discuss the reasonableness of the ordinance in light of "[t]he expressed purpose of [relieving] traffic congestion," and opined that "even if the ordinance depreciated the value of respondent's property, this factor would not be sufficient to establish its invalidity." 275 S.C. at 288, 269 S.E.2d at 773[3]. We note, however, that the carriage operator in *Roberson* "had no written or oral

---

[1] "A municipality can grant, renew, or extend a franchise only by ordinance." *Quality Towing, Inc. v. City of Myrtle Beach,* 345 S.C. 156, 167, 547 S.E.2d 862, 867 (2001) (citing S.C. Code Ann. § 5-7-260(4) (Supp. 2000)).

[2] Our Office has not seen or reviewed any such franchise agreement.

[3] Westlaw also records at least one subsequent case which interpreted *Roberson* in the context of City of Charleston ordinances. In *Classic Carriage Co. v. City of Charleston*, the Court of Common Pleas, sitting in appellate jurisdiction over the appeal from the City of Charleston Tourism Commission, concluded that "*Roberson* implicitly rejects the argument that the motor vehicle code preempts the City's right to place limits on the commercial operation of carriages on the streets of the City." *Classic Carriage Co. v. City of Charleston*, 2004 WL 5204180 (S.C.Com.Pl.) (2004). The circuit court also discussed how carriage franchises in Charleston tend to operate in

contract with the City." Thus, the decision in *Roberson* predates the currently franchise scheme, which apparently was enacted in 1983. *See* City of Charleston Ord. No. 1983-22, § 56, 5-10-83.

More recently, our Office relied upon *Roberson* and Section 5-7-30 in a 2011 opinion to discuss whether a municipality could grant an exclusive franchise, as opposed to a non-exclusive franchise, to operate a horse-drawn carriage within city limits. We quote from that opinion at length here for its exposition of South Carolina law related to franchises of this kind:

> A "franchise" is a "special privilege[] conferred by government upon individuals, and which do[es] not belong to the citizens of the country, generally, of common right." *Bank of Augusta v. Earle*, 38 U.S. 519, 595 (1839). "It is essential to the character of a franchise that it should be a grant from the sovereign authority . . . ." *Id.* "No one has the inherent right to carry on his private business along the public streets. Such rights can be exercised only under such terms and conditions imposed by the [appropriate] authorities." *Huffman v. City of Columbia*, 146 S.C. 436, 450, 144 S.E. 157, 162 (1928). Thus, the privilege to offer passengers transportation for hire upon the public streets may be described as a franchise. *E.g., City of Memphis v. State ex rel. Ryals*, 179 S.W. 631, 635 (Tenn. 1915) ("[J]itney operators . . . as common carriers, have no vested right to use the [streets] without complying with a requirement as to obtaining a permit or license. The right to make such use is a franchise . . . ." (quoted with approval by *Huffman*, 146 S.C. at 446, 144 S.E. at 160)).
>
> It is well-established in the law of this State that the General Assembly has plenary power to regulate, or even prohibit, the conduct of a business offering passengers intrastate transport for hire upon the public streets. *E.g., Huffman*, 146 S.C. 436, 144 S.E. 157 (citing numerous authorities from other jurisdictions). States often have delegated to municipalities the power to set the terms and conditions upon which such businesses may operate. *E.g., City of Charleston v. Roberson*, 275 S.C. 285, 269 S.E.2d 772 (1980) (prohibiting horse drawn sightseeing vehicles from operating on certain streets); *Radio Cab Co. v. Bagby*, 224 S.C. 28, 77 S.E.2d 264 (1953) (requiring taxicabs to park only at their regular stands when not engaged in transporting passengers); *Huffman*, 146 S.C. 436, 144 S.E. 157 (fixing routes and schedules for jitneys).

Op. S.C. Att'y Gen., 2011 WL 6120334 (November 1, 2011). Our 2011 opinion went on to note, however, that this power to grant and regulate franchises is not unlimited. *Id.* We ultimately

---

practice. *Id.* Please note that trial court orders can be useful for their reasoning, but have no precedential value. *See Op. S.C. Att'y Gen.*, 1995 WL 803674 (June 9, 1995).

concluded that the ability of a municipality to grant an exclusive franchise was "questionable" due to anti-trust legislation, such as the Sherman Act. *Id.*

Outside of the area of carriage operators, our Supreme Court also has held up Section 5-7-30 and its precursor legislation as a valid source of authority for municipalities to undertake a variety of other regulatory actions. For example, in *South Carolina Electric & Gas v. Awendaw*, our Supreme Court upheld the imposition of a franchise fee on a utility operator which served customers in a newly-annexed section of a municipality, even where the town and the utility had not yet completed a franchise agreement. *S.C. Elec. & Gas v. Awendaw*, 359 S.C. 29, 596 S.E.2d 482 (2004). And in *Owens v. Owens*, our Supreme Court in 1940 upheld the decision of the City of Columbia to install parking meters[4] for the first time as a valid action under the grant of authority in Section 7233 of the 1932 South Carolina Code of Laws, the precursor legislation to the current version of Section 5-7-30.[5] *Owens v. Owens*, 193 S.C. 260, 8 S.E.2d 339 (1940).

Of course, to the extent that the City relies upon state legislation for its legal authority to pass an ordinance, that authority can only extend so far as the General Assembly intended when it passed the statute. *Cf. Op. S.C. Att'y Gen.*, 2011 WL 6120334 (November 1, 2011) ("Even in the absence of a constitutional prohibition against the granting of exclusive franchises by municipalities, such grants may not be made if the legislature has not delegated the power to do so.") As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). However, Section 5-7-30 is properly understood as Home Rule legislation, which must be liberally construed in favor of local governments. As this Office has also opined:

> "Article VIII of the South Carolina Constitution mandates 'home rule' for local governments and requires all laws concerning local government to be liberally

[4] The original fee structure was set at "a penny for twelve minutes of parking time in some areas, and a five cent coin for one hour in other areas." *Owens v. Owens*, 193 S.C. 260, 8 S.E.2d 339 (1940).

[5] Section 7233, S.C. Code of Laws of 1932 grants, in relevant part, the "power and authority to make, ordain and establish all such rules, by–laws, regulations and ordinances respecting the roads, streets, markets, police, health and order of said cities and towns, or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of said cities and towns . . . ."

> 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 municipalities to enact ordinances in relation to "any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it[.]" S.C. Code Ann. § 5-7-30 (2004). 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, municipalities cannot set aside general law on subjects requiring statewide uniformity. *See* S.C. Const. Art. VIII, § 14(5)-(6) (1895) (explaining local government cannot set aside general law provisions regarding "criminal law and the penalties and sanctions for the transgression thereof" nor can it set aside general law concerning "the . . . administration of any governmental service or function. . . . which requires statewide uniformity.").

Op. S.C. Att'y Gen., 2014 WL 5303044 (October 1, 2014).

Accordingly, a court faced with a challenge to the validity of a particular ordinance as an exercise of a power established by the General Assembly in the enactment of Home Rule legislation likely would begin its analysis by construing the statute according to these rules of construction, in addition to other applicable precedent. If that court were to conclude that the particular ordinance exceeded the authority granted to the City by that statute, the ordinance likely would be struck down in the absence of an alternative source of legal authority. *See Hospitality Ass'n of S.C., Inc. v. County of Charleston*, 320 S.C. 219, 224, 464 S.E.2d 113, 116-17 (1995) ("Determining if a local ordinance is valid is essentially a two-step process. . . . [I]f 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[6] of this State."); *cf. Hall v. Bates*, 247 S.C. 511, 519, 148 S.E.2d 345, 349 (1966) (discussing the power of a municipality to pass a health ordinance pursuant to its police power, and omitting any discussion of Section 5-7-30 or its precursors).

---

[6] In your request letter, you note that general state law includes statutes which prohibit animal cruelty, in addition to the franchise law discussed in this opinion. *See, e.g.*, S.C. Code Ann. § 47-1-40 (2002).

Furthermore, the City also is limited by the constitutions of both the United States and the State of South Carolina. As you no doubt are aware, the Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Additionally, the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." US Const. amend. V. Moreover, the Fourteenth Amendment similarly provides that "[no State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment also incorporated additional federal constitutional protections and made them binding upon the states. U.S. Const. amend. XIV, § 1; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (Fourth Amendment incorporation); *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (partial Fifth Amendment incorporation). Similarly, the South Carolina Constitution mandates that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. art. I, § 10. Additionally, the South Carolina Constitution forbids "any person [being] deprived of life, liberty, or property without due process of law." S.C. Const. art. I, § 3.

While we have set out these constitutional limits in order to respond to your question as fully as possible, we cannot speculate whether or how any of these limitations might apply in practice without the text of an ordinance and a particular factual scenario. *Cf. Op. S.C. Att'y Gen.*, 2017 WL 4464415 (September 26, 2017) (discussing the constitutionality of an enacted statute on an "as applied" basis, distinct from facial unconstitutionality, where the law had been passed and a specific course of action was under consideration). Moreover, duly enacted ordinances are entitled to a presumption of constitutionality in South Carolina. As we have previously opined:

> When determining the validity of a local ordinance, we begin with the principle that "[a]n ordinance is a legislative enactment and is presumed to be constitutional." *Southern Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). The burden of proving the invalidity of a local ordinance rests with the party attacking the ordinance. *Id.* "Determining whether a local ordinance is valid is a two-step process." *Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). The first step is to determine whether the local governmental body at issue had the power to adopt the ordinance. *Id.* 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

> this question 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. If, on the other hand, local government had the power to enact the ordinance, the second step of the analysis is to determine whether the ordinance is consistent with the Constitution and general law of the State. *Id.*

Op. S.C. Att'y Gen., 2014 WL 5303044 (October 1, 2014) (internal citation omitted). We simply note that these constitutional restrictions establish the outer limits of the City's power in this case.

Conclusion:

While we cannot speculate on the specifics of what actions the City of Charleston might take in this area, we hope that you find these general principles of law responsive to your question. While Home Rule gives the City substantial power over the streets and franchises within its jurisdiction, any action which might be construed as a search, a seizure, or a taking presents questions of possible constitutional violations. *See discussion, supra.* For that reason, we recommend that the interested parties seek a declaratory judgement, as only a court of law can interpret statutes and make such determinations. *See* S.C. Code Ann. § 15-53-20 (2005). This Office routinely states that our opinions are not attempts to establish or comment upon public policy, and that caveat is particularly appropriate here, where the political process is underway to resolve an ongoing local controversy. Nothing in this opinion should be seen as a comment on public policy or the wisdom of any particular legislative enactment. Our duty is simply to set out the law as clearly as we are able.

We note that this advisory opinion is based only on the question presented, the current law, and the information which you provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Until a court or the General Assembly 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 this matter. If it is later determined that our opinion is erroneous in any way, or if you have any additional questions or issues, please do not hesitate to contact our Office.

Sincerely,

Elinor V. Lister

Elinor V. Lister
Assistant Attorney General

David Jones

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General