ALAN WILSON
ATTORNEY GENERAL

March 29, 2020

The Hon. Jeff Bradley
South Carolina House of Representatives District 123
306B Blatt Bldg.
Columbia 29201

Dear Rep. Bradley:

We received your request seeking an opinion on the extraordinary powers of the Governor during a state of emergency. This expedited opinion sets out our Office's understanding of your question and our response. Our guidance herein, as with any other opinion of this Office, is advisory only.

In view of the Governor's issuance of a new declaration of emergency on March 28, 2020, and with the benefit of additional time, we are adding additional authorities to our original opinion. These authorities supplement the original opinion but do not in any way change the reasoning or conclusion. We note that the new declaration of emergency states the following:

> If or to the extent that any political subdivision of this State seeks to adopt or enforce a local ordinance, rule, regulation, or other restriction that conflicts with this Order, this Order shall supersede and preempt any such local ordinance, rule, regulation, or other restriction.

Executive Order of Governor of South Carolina 2020-15 §6(B).

Issue:

Do the Governor's extraordinary powers in a state of emergency preempt similar orders of counties and municipalities during the same state of emergency?

Law/Analysis:

This opinion has been expedited and will not undertake an exhaustive analysis of all applicable law. It should be read and understood in the context of the law cited and the current circumstances.

We affirm that the previous opinion of this Office dated September 5, 1980 and relating to compulsory evacuations by municipalities controls in this instance. *Op. S.C. Att'y Gen.*, 1980

WL 81975 (September 5, 1980). That opinion concluded that only the Governor was empowered to exercise extraordinary emergency powers under Section 25-1-440. *Id.* The opinion noted that "there is no enumerated power expressly conferred upon such political subdivisions as would reasonably include the extraordinary authority . . . ." *Id.* It further observed that "within such extraordinary power lies the extraordinary opportunity for abuse," but also that "no one would seriously challenge that such an emergency power may be needed given the ever present potential of enemy attack, epidemic, natural disaster or nuclear accident." *Id.* (emphasis added). The opinion reasoned that the Legislature had balanced those competing interests by vesting the power in the Governor exclusively. *Id.*

Additionally, we highlight this language from our 1980 opinion in particular:

> Each provision [of Home Rule] makes clear that the grant of power is subject to the general law of the State.
>
> . . .
>
> The empowering of any government or officials with the authority to order and compel an evacuation, thereby forcibly separating its citizens from their homes, businesses, property and even families is clearly at odds with the fundamental rights, freedoms and privileges which are the bedrock of our nation.

Op. S.C. Att'y Gen., 1980 WL 81975 (September 5, 1980).

This conclusion that the Governor's emergency powers preempt those of counties and municipalities is equally applicable to the pandemic created by COVID-19. Accordingly the 1980 opinion is affirmed and is provided as guidance to counties and municipalities.

Furthermore, Section 25-1-440 expressly begins by stating that during a state of emergency, "the Governor . . ., as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State." S.C. Code Ann. § 25-1-440(a) (2018). To that end, the Governor "is empowered with the following additional authority to adequately discharge this responsibility." *Id.* The corollary to this is that while local governments retain their Home Rule powers during a state of emergency, they do not have extraordinary emergency powers. They cannot exercise the emergency powers delegated to the Governor by the General Assembly. As additional persuasive support for this conclusion, consider this reasoning of the Michigan Supreme Court:

> It is conceded in the present case that, in the event the Governor exercises any of the powers granted to him by [the emergency powers law], local government has no power to act. Conversely, it must be concluded, if the Governor does not elect to exercise any of the powers granted to him, local government is without power to act since the field of permitted action has been entirely preempted by the State law.

Walsh v. City of River Rouge, 385 Mich. 623, 189 N.W.2d 318 (Mich. 1971).

Additional authority may be found in Art. VIII § 14(5) of the State Constitution which prohibits local governments from setting aside the State's criminal laws. As our Supreme Court consistently has held, Art. VIII § 14 forbids a local government from making activity criminal which is legal under state law. *See Beachfront Entertainment, Inc. v. Town of Sullivan's Island*, 379 S.C. 602, 606, 666 S.E.2d 912, 914 (2008) (smoking); *Palmetto Princess, LLC v. Town of Edisto Beach*, 369 S.C. 50, 631 S.E.2d 76 (2006) (day cruises); *Op. S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015) (and cases cited therein). Here the Governor's executive orders have made certain actions criminal, but others remain legal, for the duration of the executive order. However, the emergency ordinances in question deem these same actions, which are legal under state law, to be criminal within the limits of that political subdivision – arguably in violation of Art. VIII § 14(5).

Of course, all of these powers are subject to any applicable constitutional limitations. We do not undertake to set out an exhaustive list of those constitutional protections here, and any particular case would have to be considered on its merits. We refer the reader to our opinion issued March 24 to Chief Mark Keel concerning enforcement of Section 16-7-10 for more discussion of this issue. *Op. S.C. Att'y Gen.*, (March 24, 2020) ("Some examples of these fundamental constitutional protections are the freedom of religion inherent in a church or other religious meeting, or a wedding or funeral; the constitutional protections of the family unit; and the freedom of assembly for political purposes.") (internal citations omitted).

Additionally, as we have reiterated on numerous occasions, "the autonomy and authority of counties has increased significantly since the advent of Home Rule." *Op. S.C. Att'y Gen.*, 2012 WL 1036301 (March 20, 2012). This Office has consistently supported the broad Home Rule powers of counties and municipalities. Nothing in this opinion should be construed in derogation of the numerous prior opinions of this Office expounding on that power entrusted to local officials.

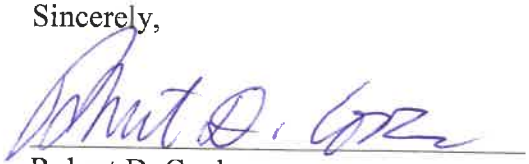
Conclusion:

In conclusion, consistent with our 1980 opinion, we reaffirm that local government cannot exercise the emergency powers delegated to the Governor by the General Assembly. As our General Assembly codified into the law of our State, "the Governor . . . as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State." S.C. Code Ann. § 25-1-440(a) (2018). Therefore, counties and municipalities should be aware that any unauthorized exercise of such emergency powers could subject these political subdivisions to liability at the behest of a private citizen with requisite legal standing.

However, this Office has opined on many prior occasions that a municipal ordinance is a legislative enactment and is presumed to be constitutional." *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999). The unconstitutionality of an ordinance must be proven beyond a reasonable doubt. *Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 532, 476 S.E.2d 477, 481 (1996). 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 statutes. Thus, we have recognized that an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction. *See, e.g., Op. S.C. Att'y Gen.*, 2010 WL 1808719 (April 9, 2010).

Of course, all of these powers are subject to any applicable constitutional limitations. We refer the reader to our opinion issued March 24, 2020 to Chief Mark Keel concerning enforcement of Section 16-7-10 for more discussion of this issue. This Office has consistently supported the broad Home Rule powers of counties and municipalities. However your questions do not concern day-to-day Home Rule authority, but the extraordinary powers delegated to the Governor during these extraordinary times. Those powers are exclusive and may be exercised only by the Chief Executive of the State.

Sincerely,



Robert D. Cook
Solicitor General

cc: The Hon. Henry McMaster, Governor of South Carolina (via counsel)
Mark Keel, Chief of SLED

Ryan Alphin, South Carolina Police Chief's Association
Jarrod Bruder, South Carolina Sheriff's Association
South Carolina Association of Counties
Municipal Association of South Carolina