



ALAN WILSON
ATTORNEY GENERAL

May 5, 2020

The Hon. Alan D. Clemmons
South Carolina House of Representatives
PO Box 11867
Columbia, SC 29211

Dear Representative Clemmons:

We received your request seeking an opinion on an Emergency Executive Order by the City Manager of Myrtle Beach relating to accommodations businesses. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your constituent's letter encloses four pages of an Emergency Executive Order issued by the City Manager of Myrtle Beach and dated March 30, 2020. This Myrtle Beach Order is directed at accommodations businesses, such as hotels, Airbnb, and other short-term rentals. The relayed portion of the Myrtle Beach Order contains two basic provisions. It first mandates a "soft opening period" such that from "May 1 – May 15, accommodations businesses may operate with the reservations on their books on the effective date of [April 30, 2020]." The second basic provision is a lengthy recitation of "sanitation and hygiene measures," which an accommodations business "shall implement . . . where such measures would not create an undue hardship for the individual business." These measures range from surface wipe-down schedules to labor practices, such as leave policies.

The letter also references and encloses a copy of Executive Order No. 2020-19 issued by Governor Henry McMaster. The Governor's Order is directed at "lodging" using a definition which is substantially similar to that of "accommodations businesses" in the Myrtle Beach Order. The Governor's Order partially restricted reservations or bookings by persons residing in or traveling from certain COVID-19 hotspots. That Order also contained certain exceptions for, e.g., persons transporting essential commercial goods or persons assisting with healthcare or public safety.

The Governor's Order also contains a preemption clause, which reads: "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."

Your constituent's letter then requests an opinion on the following:

1. Does the City have the authority to prevent accommodation businesses from taking reservations between May 1 – May 15;
2. Is the City’s Order constitutional under the Commerce Clause and does it impeded interstate commerce;
3. Does the City have the authority to strictly mandate workplace conditions and policies pertaining to hygiene, cleaning procedures, elevator usage, guest check-in procedures and monitoring of symptoms of guests and workers;
4. Can the City issue an order that is in direct conflict with the Governor’s Order and seeks to enforce the same against its businesses and citizens alike; and
5. Any other aspects of the Orders appearing appropriate to review.

Law/Analysis:

We note that our Office has opined recently on the question of whether “the Governor's extraordinary powers in a state of emergency preempt similar orders of counties and municipalities during the same state of emergency.” *Op. S.C. Att’y Gen.*, 2020 WL 2044370 (March 29, 2020). That expedited opinion was issued on March 29, 2020 to Representative Jeff Bradley. We quote here at length from the conclusion of that opinion:

[W]e 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

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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).

Op. S.C. Att'y Gen., 2020 WL 2044370 (March 29, 2020).

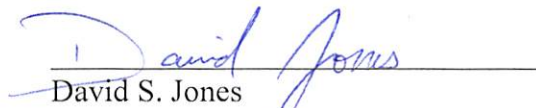
It appears that your constituent's letter essentially presents one example of a factual scenario anticipated by the question in our March 29 opinion. Therefore, the reasoning and conclusion in our March 29 opinion applies to the questions presented by your constituent.

Conclusion:

In conclusion, we reaffirm the expedited opinion of this Office dated March 29, 2020 "that local government cannot exercise the emergency powers delegated to the Governor by the General Assembly." *Op. S.C. Att'y Gen.*, 2020 WL 2044370 (March 29, 2020). We further reaffirm that "a municipal ordinance is a legislative enactment and is presumed to be constitutional," and that "only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state statutes." *Op. S.C. Att'y Gen.*, 2020 WL 2044370 (March 29, 2020). For this same reason, a court likely would apply the same presumption of validity to the Emergency Order issued by the City Manager here.

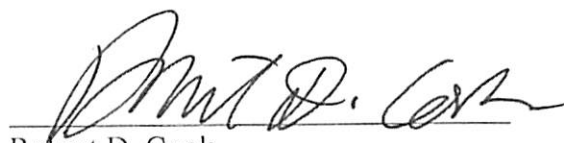
Accordingly, we are enclosing a copy of our expedited opinion dated March 29, 2020 to aid your constituent in assessing how and whether to pursue a binding judicial determination of their questions.

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General