ALAN WILSON
ATTORNEY GENERAL

March 1, 2021

The Honorable Todd Rutherford
Member
South Carolina House of Representatives
Post Office Box 1452
Columbia, South Carolina 29202

Dear Representative Rutherford:

We received your letter requesting an opinion of this Office as to the constitutionality of an ordinance adopted by Richland County in April of 2019. As you explain in your letter,

> The ordinance, No. 013-19HR . . . created a public nuisance section to Chapter 18, entitled Offenses. In doing so, it also defines public nuisance and creates criminal penalties for any entity that is deemed to be a public nuisance. Based on previous opinions from your office, this may violate Article VIII, Section 14 of our Constitution that states criminal laws must not be set aside when local governments enact ordinances.
>
> Additionally, the ordinance seems to be arbitrary and capricious in that it gives the sheriff, without any oversight, the power to exercise "emergency abatement" thus, shutting down a business deemed a public nuisance. It further gives the county "License Official" the authority to determine whether or not to suspend or revoke the license. After a business is shut down and the license is suspend or revoked the property is deadbolt shut barring the owner any access until the appeal is heard by county council. The appeal process is also problematic because there are no standards or legal standing on how county council is to reach their decision and there is no necessary oversight by a neutral and detached magistrate.

Law/Analysis

As we explained in a 2017 opinion,

> Initially, we note that the courts have consistently recognized the basic principle that a local ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. See McMaster v. Columbia Bd.

> of Zoning Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional."), citing Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984); Op. S.C. Atty. Gen., 2003 WL 21471503 (June 4, 2003). An ordinance will not be declared invalid unless it is clearly inconsistent with general state law. Hospitality Ass'n of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995). Only the courts, and not this Office, possess the authority to declare such an ordinance invalid.

Op. Att'y Gen., 2017 WL 1095386 (S.C.A.G. Mar. 14, 2017).

However, in order to give guidance on your question, we consider the two-step process courts employ to determine whether an ordinance is valid.

> First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. Id. If, however, the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State. Id.

Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

We must first consider whether Richland County had the power to enact Ordinance No. 013-19HR (the "Ordinance"), creating a criminal penalty for individuals operating businesses found to be a public nuisance as defined in the Ordinance. Section 4-9-25 of the South Carolina Code (2021) provides:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

In past opinions, this Office recognized a county's authority to regulate nuisances based on section 4-9-25. See Op. Att'y Gen., 2008 WL 2614993 (S.C.A.G. June 24, 2008) (stating "litter control

and regulation of nuisances falls within a county's authority to enact ordinances affecting health and general welfare."). Moreover, section 4-9-30 of the South Carolina Code (2021) specifically gives counties the following authority:

> (14) to enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violations thereof not to exceed the penalty jurisdiction of magistrates' courts. Alleged violations of such ordinances shall be heard and disposed of in courts created by the general law including the magistrates' courts of the county. County officials are further empowered to seek and obtain compliance with ordinances and regulations issued pursuant thereto through injunctive relief in courts of competent jurisdiction. No 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; and
>
> . . .
>
> (16.2) To obtain injunctive relief in the Court of Common Pleas to abate nuisances created by the operation of business establishments in an excessively noisy or disorderly manner which disturbs the peace in the community in which such establishments are located. Such injunctive relief shall be initiated by petition of the County Attorney in the name of the County Council not sooner than ten days following noncompliance with a written notice to the owner of the offending establishment or his agent to cease and desist in the conduct or practice which disturbs the peace and good order of the area. The provisions of this item are supplemental to Chapter 43 of Title 15.
>
> . . . .

In an opinion issued in 1985, citing to the provisions in 4-9-30 quoted above as well as section 15-43-130 of the South Carolina Code (establishing the existence of nuisance in a criminal proceeding) and section 4-9-45 of the South Carolina Code (providing police jurisdiction in coastal counties and contemplating counties might enact ordinances providing criminal penalties to abate nuisances), we concluded "a county possesses the power to adopt an ordinance providing criminal penalties for the making of excessive noise, and that such an ordinance would not violate the State Constitution or the Home Rule Act." Op. Att'y Gen., 1985 WL 166075 (S.C.A.G. Sept. 24, 1985). Accordingly, we believe Richland County has the power to adopt an ordinance regulating nuisances. However, we must also consider whether the ordinance is preempted by state law.

As we explained in a 2008 opinion,

> To preempt an entire field, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Bugsy's, 340 S.C.

> at 94, 530 S.E.2d at 893 (citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990)). Furthermore, "for there to be a conflict between a state statute and a municipal ordinance 'both must contain either express or implied conditions which are inconsistent or 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.'" Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at 553, 397 S.E.2d at 664 (quoting McAbee v. Southern Rwy., Co., 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932)).

Op. Att'y Gen., 2008 WL 4489051 (S.C.A.G. Sept. 22, 2008).

Section 15-43-10 of the South Carolina Code (2005) pertains to use of buildings and places in such a way as to create a nuisance. This provision states:

> (A) A person who erects, establishes, continues, maintains, uses, owns, occupies, leases, or releases any building or other place used for the purposes of lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace in this State is guilty of a nuisance; and the building, place, or the ground itself in or upon which the lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace is conducted, permitted, carried on, continued, or exists and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining the nuisance also are declared a nuisance and shall be enjoined and abated as provided in this chapter.
>
> (B) As used in this section "continuous breach of the peace" means a pattern of repeated acts or conduct which either (1) directly disturbs the public peace or (2) disturbs the public peace by inciting or tending to incite violence.
>
> (C) Nothing in this section supplants, alters, or limits a statutory or common law right of a person to bring an action in court or the right of the State to prosecute a person for a violation of a statute or common law.

S.C. Code Ann. § 15-43-10.

As stated in subsection (A), the remedy for violating this provision is an injunction. In section 15-43-80 of the South Carolina Code (2005), the Legislature provides for the abatement of the nuisance once a court determines the nuisance exists.

> If the existence of the nuisance be established in an action, as provided in this chapter or in a criminal proceeding, an order of abatement shall be entered as part of the judgment in the case. The order shall direct the removal from the building or place of all fixtures, furniture, musical instruments or movable property used in conducting the nuisance, shall direct the sale thereof in the manner provided for the sale of chattels under execution and shall direct the effectual closing of the building or place against its use for any purpose and so keeping it closed for a period of one year, unless sooner released.

S.C. Code Ann. § 15-43-80.

The Ordinance, which you provided with your request letter, is similar to section 15-43-10, in that it addresses the existence of nuisances. The Ordinance specifies businesses, as opposed to places, which are declared public nuisances. Some of the nuisances defined under the Ordinance appear to be similar to the nuisances described in section 15-43-10. Like section 15-43-10, the Ordinance considers businesses engaging in prostitution, sale of illegal drugs, and those who continuously breach the peace to be public nuisances. In fact, the Ordinance refers to section 15-43-10 in its definition of "public nuisance" and its definition of "continuous breach of the peace" is almost identical to the definition provided in section 15-43-10(B). However, the Ordinance goes further than the provisions contained in chapter 43 of title 15 in declaring additional types public nuisances and including businesses that conduct illegal gambling operations, manufacture and sale of alcohol illegally, manufacture of illegal drugs, and businesses that require "excessive public safety response" and details what constitutes an "excessive public safety response." In addition, violations of the Ordinance result in a criminal misdemeanor charge for a person who "erects, establishes, continues, maintains, uses owns, leases, or releases, or serves as lessor or lessee of any building in such a way as to create a public nuisance." Whereas, violations under chapter 43 of title 15 result in an injunction and an order of abatement. Only if these orders are violated, does a criminal charge of contempt arise. S.C. Code Ann. § 15-43-70 (2005).

In considering whether the Ordinance is preempted by state law, initially we note nothing in chapter 43 of title 15 expressly precludes local governments from enacting ordinances related businesses engaged in nuisance activities. Thus, we must consider whether such preemption is implied. Preemption is implied when "the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006). Initially, we do not find evidence in chapter 43 of title 15 of the Legislature's intent to occupy the field of regulating nuisance businesses. We do not believe by enacting section 15-43-10 of the South Carolina Code, the Legislature intended to provide for a uniform means of enjoining and abating all nuisances.

However, in your letter, you raise a particular concern as to whether the Ordinance violates section 14 of article VIII of the South Carolina Constitution (2009), which provides:

> 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.

(emphasis added).

Our courts have interpreted this provision a requiring statewide uniformity regarding the criminal laws of this state. In Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), our Supreme Court considered whether a city ordinance banning smoking in restaurants and bars violated section 14 of article VIII. The Court stated:

> We have observed that this subsection of the Constitution requires "statewide uniformity" regarding the criminal law of this State, and therefore, "local governments may not criminalize conduct that is legal under a statewide criminal law." Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272, 274 (1996) (emphasis added); accord Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) (where the Court held that a municipality cannot criminalize nude dancing when State law does not).

Id. at 365, 660 S.E.2d at 269. The Court determined the ordinance made smoking in certain areas an "infraction" rather than a crime. Id. Thus, the Court concluded, "the Ordinance does not 'set aside' the criminal laws of this state. Accordingly, we find trial court erred in finding that the Ordinance violates Article VIII, section 14 of the South Carolina Constitution." Id. at 366, 660 S.E.2d at 270.

In this circumstance, we have the opposite scenario. Violations of the provisions contained in chapter 43 of title 15 do not constitute a crime, but rather give the Attorney General, a solicitor, or a private citizen the ability to bring suit for an injunction. Violations of the Ordinance, on the other hand, will result in a misdemeanor charge. The Ordinance creates a criminal penalty where state law does not. Our Supreme Court in Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997) clarified its holding in Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) and concluded a county cannot enact an ordinance generally banning conduct which is not unlawful under state law. The Court cited to the following legislative history of section 14 of article VIII to support its reading of Connor:

> A special committee was created, headed by John C. West (the "West Committee"), to recommend these revisions. Regarding proposed Article VIII, Section 14 (which was adopted by the legislature verbatim), the West Committee commented, "There are certain fundamentals related to freedom which should be treated only by the State and should not be left to local variation or abuse." Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 91 (1969) (emphasis added). One of the Committee's major concerns regarding this constitutional provision was the "local government's making an act a crime that was not a crime under state law." 2 James L. Underwood, The Constitution of South Carolina 133, 134 (1989). Finally, our language regarding Article VIII, Section 14 in other cases shows that we have consistently interpreted that section broader than only prohibiting local governments from adopting ordinances that conflict with state general law. See Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996) (Davis Adv.Sh. No. 1 at 11, 14) (Construing Article VIII, Section 14(4) as effectively withdrawing the subject "from the field of local concern"); Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987) (stating Article VIII, Section 14 "precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subject encompassed by that section").

Id. at __, 480 S.E.2d at 720. The Supreme Court reiterated this reading of section 14 of article VIII in Beachfront Entertainment, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 606, 666 S.E.2d 912, 914 (2008), finding an ordinance banning smoking in the workplace was "invalid in that it imposes a criminal penalty for smoking in places where smoking is not illegal under State law." While the provisions in chapter 43 of title 15 address some of the behaviors prohibited under the Ordinance, they do not make such behaviors subject to criminal prosecution. Therefore, we believe a court could find the Ordinance seeks to make illegal acts which are legal under state law and thereby violates section 14 of article VIII.

You also mention a concern that the Ordinance seems to be arbitrary and capricious because it gives the Sheriff the ability to shut down a business he or she finds to be a public nuisance as defined under the Ordinance and gives the "License Official" the authority to suspend or revoke an operator's business license. In a 1974 opinion, this Office explained the general rule that

> "- - - a statute or ordinance which vests arbitrary discretion - - - in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals - - - according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform - - - is unconstitutional and void."

Op. Att'y Gen., 1974 WL 21339 (S.C.A.G. Aug. 6, 1974) (quoting 12 A.L.R. 1435 (Originally published in 1921)). In South Carolina State Highway Department v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955), our Supreme Court addressed whether a statute authorizing the highway department to suspend or revoke a driver's license for cause satisfactory to it was an unconstitutional delegation of legislative power. The Court stated:

> As a general rule, 'A statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers.' 42 Am.Jur., page 343. We have held invalid ordinances attempting to vest such arbitrary powers in municipal authorities. Henderson v. City of Greenwood, 172 S.C. 16, 172 S.E. 689; Schloss Poster Advertising Co. v. City of Rock Hill, 190 S.C. 92, 2 S.E.2d 392.

Id. at 595, 86 S.E.2d at 471. The Court disregarded the fact that there was no reason to suggest that the Department would arbitrarily or capriciously revoke a license, but further addressed whether such legislative powers could be delegated to the Department stating:

> 'When courts are considering the constitutionality of an act, they should take into consideration the things which the act affirmatively permits, and not what action an administrative officer may or may not take.' Northern Cedar Co. v. French, 131 Wash. 394, 230 P. 837, 843. 'The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.' 42 Am.Jur., Public Administrative Law, Section 45.

Id. at 595-96; 86 S.E.2d at 471. Because the Court found no standards, except the personal judgment of the administrative officers of the Department, by which to determine whether a license should be revoked, it concluded the statute constituted an unconstitutional delegation of legislative power. Id. at 596; 86 S.E.2d at 472.

In order to determine whether the Ordinance constitutes an unconstitutional delegation of legislative to power to the Sheriff or the License Official, we believe a court would consider whether or not the Ordinance gives unfettered discretion to the Sheriff or the License Official. The Ordinance charges the Sheriff with enforcement of the Ordinance along with the "consultation and concurrence of the County Administrator." The Ordinance provides:

> The Richland County Sheriff ("Sheriff") and the Administrator, acting jointly, may declare a business in violation of this ordinance a public nuisance, and the Sheriff or any Deputy Sheriff may enforce the provisions of this ordinance upon the declaration of a public nuisance as provided for herein by uniform traffic ticket, or warrant or by any other lawful process.

If the Sheriff and the Administrator determine "there is imminent danger to the public from the continued operation of the nuisance business the Sheriff is hereby authorized to immediately undertake emergency abatement of the nuisance by securing, shuttering or closing the business constituting or contributing to the nuisance to ensure that all business activity ceases." The emergency closure also triggers a review of the business's Richland County business license. Within two days of the closure, the License Official must determine whether or not to suspend or revoke the business's license. The Ordinance includes a requirement that

> [i]n all cases of an emergency abatement as described herein, and regardless of the License Official's determination pursuant to subsection (3), there shall be an automatic review of the License Official's determination by the Richland County Council within seven (7) calendar days of the determination or as soon thereafter as is practical, without the need for any party to request such review. This review shall constitute an automatic "appeal" of the matter, to be conducted in accordance with the provisions of subsection (e), "Appeals."

Thus, the Ordinance requires the Sheriff and the Administrator to first determine whether the business's operation falls under the definition of "public nuisance" under the Ordinance. The Ordinance provides fairly specified conditions which apply to all business to make this determination. The Ordinance also requires a determination of "imminent danger" be made by the Sheriff and the Administrator before the Sheriff can physically close the business. The Ordinance does not define what is meant by "imminent danger," but from the common and ordinary meaning, we gather it involves a current or present danger to the public's safety. See Danger Black's Law Dictionary (11th ed. 2019) (defining imminent danger as "1. An immediate, real threat to one's safety that justifies the use of force in self-defense. 2. Criminal law. The danger resulting from an immediate threatened injury sufficient to cause a reasonable and prudent person to defend himself or herself."). A determination of whether imminent danger exists certainly seems subjective, but we do not believe a court would find it is completely arbitrary. Accordingly, while not free from doubt, we do not think a court would find the Ordinance gives the Sheriff and the Administrator absolute, unregulated, and undefined discretion to close a business.

In further support of our beliefs, we found an unpublished opinion by the South Carolina Court of Appeals dealing with a similar issue. In Singh v. City of Greenville, No. 2012-UP-227, 2012 WL 10841379, at *1 (S.C. Ct. App. Apr. 18, 2012), a hotel operator sought to reverse the City of Greenville's (the "City's") revocation of its business license based on the city manager's determination that the business was a "public nuisance" due to the "unusually high number of response calls" by law enforcement as defined in the City's ordinance. Id. The circuit court concluded City Council's directive to the City Manager to determine the motel owner's compliance with the conditions for his business's operations was an unlawful delegation of legislative authority. Id. The Court of Appeals disagreed and found "[t]he City Manager's discretion in determining compliance with the business license ordinance was properly limited by

the ordinance's express guidelines for determining whether Singh's operation of Travel Inn constituted a 'public nuisance.'" Id. The Court further explained the directive

> left little room for the exercise of judgment by the City Manager. The City Manager was essentially left with the ministerial task of determining whether Travel Inn deviated, even once, from the license conditions City Council had placed on it. Therefore, the circuit court erred in concluding that City Council improperly delegated legislative authority to the City Manager.

Id.

Similar to the City Manager in Singh, the Sheriff and the Administrator are given express guidelines for determining whether a business is a public nuisance under the Ordinance. This determination along with the determination of whether the business poses an imminent danger to the public sets forth the parameters from which the Sheriff and the Administrator perform a ministerial duty.

However, we find the authority given to the License Official to suspend or revoke the business's license is more problematic. Like the statute in Harbin, the Ordinance does not give any parameters by which a License Official should determine whether to suspend or revoke a license, but appears to leave this determination to the License Official's discretion. While the License Official may exercise sound judgment and good faith in determining whether or not to suspend or revoke a license, this does not overcome the unregulated discretion. Therefore, we believe a court may find the Ordinance constitutes an unlawful delegation of power to the License Official.

Lastly, you voice concern that the appeals process does not contain standards upon which County Council shall base its decision and "there is not necessary oversight by a neutral and detached magistrate." Pursuant to the Ordinance, County Council must review all cases of emergency abatement regardless of the License Official's determination. In regard to the standards for revocation or suspension of a business license, we again do not find any additional parameters upon which to base this decision once it is on appeal. Therefore, we agree that any determination by County Council, which is final under the Ordinance, would be based purely upon the County Council's discretion.

As far as a requirement of a review by a neutral and detached magistrate, this requirement usually arises in regard to rights afforded to criminal defendants under the Fourth Amendment to the United States Constitution rather than in the context of a license revocation. See, e.g., United States v. Acosta, 965 F.2d 1248, 1251 (3d Cir. 1992) (stating the Fourth Amendment to the United States Constitution "affords reasonable protection by permitting only a neutral and detached magistrate to review evidence and draw inferences to support the issuance of a search warrant."). While the Ordinance states: "A decision rendered by County Council pursuant to this ordinance shall constitute a final decision of the County," we do not read this as limiting judicial review of the County Council's decision. (emphasis added). The County Council's decision in regard to the

status of a business license remains reviewable by the appropriate circuit court. See S.C. Code Ann. § 18-7-10 (2014); Rule 74, SCRCP. As our Court of Appeals stated in Amrik Singh & SBPS, Inc. v. City of Greenville, 384 S.C. 365, 371, 681 S.E.2d 921, 925 (Ct. App. 2009), a licensee has a "right to appeal the revocation to circuit court for a determination of whether or not the decision was arbitrary, unreasonable, or an obvious abuse of discretion."

Conclusion

Based on our review of the Ordinance, we believe County Council had the power to enact an ordinance regulating nuisance businesses. However, we agree that because the Ordinance makes it illegal to operate a business constituting a public nuisance, we are concerned a court could find the Ordinance violates section 14 of article VIII of the South Carolina Constitution. Nevertheless, only a court, not this Office, may declare the Ordinance unconstitutional. Op. Att'y Gen., 1988 WL 485264 (S.C.A.G. Aug. 9, 1988) ("[T]his Office possessed no authority to declare a county ordinance unconstitutional; only a court would have such authority."). As such, we advise the Ordinance must be complied with unless and until a court rules otherwise.

We do not believe a court would find the authority given to the Sheriff and the Administrator to determine whether or not a public nuisance exists and whether or not to close a business which they believe poses an imminent danger to the public is an unlawful delegation of legislative authority. However, we are concerned that the Ordinance gives undefined discretion to the License Official in determining whether or not to suspend or revoke the business's license. As such, a court may view the authority given to the License Official is an unlawful delegation of authority.

Lastly, while the Ordinance states the County Council's decision regarding the status of the business license is a "final decision of the County," we do not believe a license holder loses their right to judicial review of the County Council's decision.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General