

1973 S.C. Op. Atty. Gen. 323 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3641, 1973 WL 21977

Office of the Attorney General

State of South Carolina

Opinion No. 3641

October 10, 1973

*1 1. A municipal ordinance so broad as to prohibit absolutely the sale of beer or wine within town limits would clearly be invalid and unenforceable.

2. A municipal ordinance completely prohibiting the operation of pinball machines within a town would be repugnant to the existing, and controlling, State law.

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Section 47–61, South Carolina Code of Laws (1962), expressly confers upon municipalities the right to exercise some of the police powers of the State. Among other provisions, this statute grants to the municipalities the power to enact ordinances for the preservation of health, peace, order and good government within their boundaries, provided such ordinances are not inconsistent with the laws of the State. A municipality is powerless to prohibit that which the State authorizes, directs, requires, licenses, or expressly permits. [Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 \(1928\)](#). Thus the issue as to both the sale of beer and wine and the operation of pinball machines is whether or not municipal ordinances which completely prohibit such activities are inconsistent with or repugnant to State law.

A. Sale of beer and wine:

Although the General Assembly has not entirely pre-empted the field of beer and wine regulation (as it has with regard to alcoholic liquors; Section 4–121 and 4–122, South Carolina Code of Laws, 1962), it has vested sale responsibility in State agencies for control of many aspects of the regulatory process. The South Carolina Tax Commission administers and collects taxes generated by beer and wine sales and the South Carolina Alcoholic Beverage Control Commission is responsible for licensing and regulating establishments which sell beer and wine. Section 4–212(6), South Carolina Code of Laws (1962), specifically provides that the ABC Commission alone is to determine whether or not a proposed location for the sale of beer and wine is a proper one. There is no statutory authority allowing a municipality to make that decision.

A conflict exists between a state enactment and a municipal regulation when both contain provisions which are inconsistent and irreconcilable with each other. [McAbee v. Southern R. Co., 166 S.C. 166, 164 S.E. 444 \(1932\)](#). A municipal ordinance so broad as to prohibit absolutely the sale of beer and wine within town units would be in direct conflict with legislation authorizing beer sales throughout the State and expressly delegating to a state agency the authority to determine the suitability of proposed locations. Therefore an ordinance to that effect would clearly be invalid and unenforceable. 1957 Ops.Atty.Gen., p. 63.; CF. [Town of Honea Path v. Flynn 255 S.C. 32, 176 S.E.2d 564 \(1970\)](#).

This is not to say that municipalities are entirely excluded from the field of beer and wine regulation. When such an ordinance is regulatory, and not prohibitory in nature (as in the case of restricting hours of sale), it has been held to be a reasonable and valid exercise of the police power. [City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 \(1963\)](#); accord, [Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 \(1943\)](#). Inasmuch as beer and wine sales can not be prohibited by ordinance, the proper course of action for authorities who oppose the conduct of such a business within town limits is to file a protest with the ABC Commission whenever an application is made for such a permit.

B. Operation of pinball machines

*2 Municipalities can not lawfully forbid that which the General Assembly has expressed licensed authorized or permitted 56 Am.Jur. Municipal Corporations Section 374 (1971). Section 5-621, South Carolina Code of Laws (1962), specifically exempts “coin-operated nonpayout pin tables with free play feature” from the category of “games of chance” which are unlawful to possess and operate. Section 5-6600, et seq., further provides that a tax must be paid and a license obtained before any such machine can be used in South Carolina. These sections evince a legislative intent to both authorize and regulate the operation of non-pay pinball machines in the State. Therefore, an ordinance completely prohibiting the operation of such devices within a town would be repugnant to the existing, and controlling, State law. 1953 Ops.Atty.Gen. p. 169, (a copy of this opinion is enclosed for your consideration). Accord, 1965 Ops.Atty.Gen., No. 1788, p. 24.

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