

THE STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
COLUMBIA

OPINION NO. _____

November 17, 1993

SUBJECT: Taxation and Revenue - Proposed Ordinance
Imposing Limited Municipal Accommodations Tax.

SYLLABUS: It is likely a court would find the proposed ordinance is within the authority of a municipality to provide for government services deemed necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government. Notwithstanding such a determination, a court, however, would most likely find the proposed ordinance invalid since the purposes and uses of the funds from the municipal accommodations tax and the state local option sales tax are in conflict. Accordingly, it is likely that a court would find the proposed ordinance invalid.

TO: Honorable Jennings G. McAbee
House of Representatives
District 12 McCormick-Greenwood-Saluda

FROM: Sarah G. Major *SGM*
Assistant Attorney General

QUESTION: Is the proposed ordinance establishing a Beach Preservation Fee for the Town of Hilton Head Island a valid ordinance?

APPLICABLE LAW: S.C. Constitution Article VIII, Section 9; S.C. Code Ann. Section 5-7-30 (Supp. 1992); S.C. Code Ann. Section 4-10-10 et seq. (Supp. 1992).

DISCUSSION:

The proposed ordinance under review imposes a fee at the rate of two percent on the "rental or charge for any rooms, campground spaces, lodgings, or sleeping accommodations furnished to transients . . ." The funds generated by the ordinance are " . . . to contribute to the cost of the improvement, maintenance, nourishment and renourishment of the beaches of Hilton Head Island . . ." You inquire as to the validity of such an ordinance.

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It must first be noted that an ordinance, when properly approved, is entitled to a presumption of legality and constitutionality. See Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985); South Carolina Digest, Municipal Corporations, Key 122(2). Further, while this office may comment on the validity of an ordinance, only a court can actually declare an ordinance invalid or unconstitutional.

The South Carolina Constitution, Article VIII, Section 9, authorizes the General Assembly to provide by general law for the "powers, duties, functions and responsibilities of the municipalities" in this state. Pursuant to this constitutional authority, the General Assembly, by general law, in Section 5-7-30, conferred certain powers upon municipalities. These powers include the following:

Each municipality of the State . . . may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting 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, including the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them . . .

The validity of a municipal ordinance does not turn upon the General Assembly providing specific statutory directions. Rather, so long as the ordinance is within the broad confines of Section 5-7-30 and does not conflict with constitutional or state law, the ordinance will be upheld.

. . . taken together, Article VIII, and section 5-7-30, bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and

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convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state.

Williams v. The Town of Hilton Head Island, SC, Opinion No. 23839, April 12, 1993.

Thus, the ordinance must meet two criteria. First, the ordinance must provide for government services deemed necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order and, good government; i.e. the public interest test. Assuming the first test is satisfied, the second requires the ordinance must not be inconsistent with the Constitution and general law of South Carolina; i.e. the conflicts test.

It is likely a court would find the public interest test is satisfied here. The ordinance states the purpose is ". . . to contribute to the cost of the improvement, maintenance, nourishment and renourishment of the beaches of Hilton Head Island . . ." Preservation of beaches and the beach/dune system is well within the range of government services promoting the general welfare of the citizens. See S.C. Code Ann. Section 48-39-250 (Supp. 1992) (where the state expresses its interest in a well-maintained beach/dune system) and S.C. Code Ann. Section 48-39-260(5) (Supp. 1992) (where beach nourishment is encouraged).

While the public interest test is satisfied, it is likely a court would find the ordinance invalid under the conflicts test. An ordinance is improper and is thus void if it conflicts with the general law of the state on a matter of statewide concern or application. 56 Am.Jur.2d, Municipal Corporations, Sections 361 and 374; Town of Hilton Head Island v. Coalition of Expressway Opponents, ___ S.C. ___, 415 S.E.2d 801 (1992); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928). In deciding if a conflict exists, a court examines the entire field of legislation on the subject as well as deciding if the ordinance contains express or implied conditions which are inconsistent and irreconcilable with applicable state statutes. McAbee v. Southern Rwy. Co., 166 S.C. 166, 164 S.E. 444 (1932); City

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of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963); Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990).

Here the ordinance appears to present an irreconcilable conflict with the state imposed local option sales tax. The South Carolina General Assembly has provided a state plan for local sales taxes which requires statewide uniformity. Sections 4-10-10 through 4-10-100 allow counties to implement a local sales and use tax within the county by voter referendum. The local sales tax is applicable to municipalities within the county boundaries. The local option sales tax is imposed on items subject to sales tax under Chapter 36 of Title 12, S.C. Code of Laws and includes not only the sales tax on tangible personal property (see S.C. Code Ann. Section 12-36-910 (Supp. 1992)) but also the sales tax on accommodations (see S.C. Code Ann. Section 12-36-920 (Supp. 1992)). The same charges for accommodations are also covered by the Hilton Head Island ordinance.

The state local option sales tax law establishes a uniform system. The law is specific as to the use of the local option sales tax revenues in that the statutes establish a formula for distributing the funds among the municipalities within the county and in sharing the funds between the county itself and the municipalities. (See Sections 4-10-40 and 4-10-50). Additionally, Section 4-10-60 provides that counties collecting in excess of five million dollars from the local option tax must distribute a portion of their tax revenues to other local option counties to assure that each participating county receives a minimum distribution.

The imposition by municipalities of a sales or accommodations tax other than the state authorized local option sales tax would defeat the taxing scheme established by the General Assembly. The state imposed local sales tax requires that the revenue be used for property tax relief. No such requirement is present in the ordinance here under review. Further, there is no sharing of revenues with other entities under an ordinance such as the current one. Wealthy municipalities could avoid the state imposed requirements of sharing their local sales tax revenues and thus derive substantial funds for the sole benefit of the municipality. For example, because of the required sharing between counties and cities and the required distribution of funds to poorer counties, a major metropolitan jurisdiction could potentially raise greater revenue through an ordinance such as the one here under review than under the state provided local option.

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Such actions are in conflict with the uniform local option sales tax.

In summary, the Hilton Head Island ordinance taxes accommodations. Since the General Assembly has passed a uniform method of imposing a local tax on accommodations and other personal property, a local ordinance taxing either accommodations or personal property would conflict with the State's uniform method of taxation and would likely be found invalid.

CONCLUSION:

It is likely a court would find the proposed ordinance is within the authority of a municipality to provide for government services deemed necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government. Notwithstanding such a determination, a court, however, would most likely find the proposed ordinance invalid since the purposes and uses of the funds from the municipal accommodations tax and the state local option sales tax are in conflict. Accordingly, it is likely that a court would find the proposed ordinance invalid.

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