

The State of South Carolina



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Office of the Attorney General

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September 24, 1985

The Honorable Olin I. Blanton, Jr.
Magistrate, District 6
600 16th Avenue North
Myrtle Beach, South Carolina 29577

Dear Judge Blanton:

You have asked this Office to examine Horry County Ordinance No. 6-83, pertaining to excessive noise within unincorporated areas of Horry County, to determine whether the ordinance is constitutional and, further, is authorized by the terms of Section 4-9-30, Code of Laws of South Carolina (1976 & 1984 Cum. Supp.).

Ordinance No. 6-83 makes it unlawful for persons to make excessive, unnecessary, or unusually loud noises which disturb others within the unincorporated areas of Horry County. The term "excessive, unnecessary, or unusually loud noise" is defined to be "any sound regulated by this Ordinance which is plainly audible at a distance of 200' from its source." Complaints, constituting prima facie evidence of others being disturbed and penalties are also specified. Seven exemptions are listed, including such sounds as emergency vehicles, church and school bells, lawn mowers, and so forth.

In considering the constitutionality of an ordinance, such ordinance is presumed to be constitutional in all respects. An ordinance will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). All doubts of constitutionality are generally resolved in favor of constitutionality. Moreover, while this Office may comment upon constitutional problems, it is solely within the province of the courts of this State to declare an ordinance unconstitutional; until such time, the ordinance should be followed.

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Article VIII, Section 7 of the Constitution of South Carolina provides that "[t]he General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties. ..." Article VIII, Section 17 states that the constitutional provisions and all laws concerning local governments are to be liberally construed, and further that powers, duties, and responsibilities granted to local governments by the Constitution shall include those fairly implied and not prohibited by the Constitution. As stated in Terpin v. Darlington County Council, Opinion No. 22351 (S.C. July 9, 1985), "Article VIII was intended to return county government to a local level." (Opinion No. 22351, Davis' Advance Sheets No. 34, page 14.) See also Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976).

Act No. 283 of 1975, commonly called the Home Rule Act, is codified at Section 4-9-10 et seq. of the Code. Section 4-9-30 designates the powers of a county and includes the following:

(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

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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. 1/

* * *

With the exceptions of Section 15-43-10 (buildings or places used for lewdness as nuisance) and Section 4-9-30 (16.2), supra, there do not appear to be provisions or criminal penalties in the general law of this State providing for abatement of noise as a nuisance in a criminal proceeding. See, Terpin v. Darlington County Council, supra. It must be determined whether these two Code sections would preclude enactment of an ordinance containing a criminal penalty for the making of excessive noise.

Sections 15-43-130 and 4-9-45 appear to contemplate criminal proceedings relative to nuisances (i.e., noise). Section 15-43-130 provides:

In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction the county attorney or solicitor of the district shall proceed promptly under this chapter to enforce the provisions and penalties hereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance.

Providing for police jurisdiction in coastal counties (i.e., Horry), Section 4-9-45 states:

For the purpose of maintaining proper policing, to provide proper sanitation, and to abate nuisances, the police jurisdiction and authority of any county bordering on the

1/ Chapter 43 of Title 15 details the procedures for abatement of nuisances. Unquestionably, noise in some circumstances may be viewed as a nuisance. See cases collected in Annot., 79 A.L.R.3d 253, "Aircraft Overflights As Nuisance," § 5 (Noise); also 6 McQuillin, Municipal Corporations, § 24.98.

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high tide line of the Atlantic Ocean is extended to include all that area lying between the high tide line and the low tide line not within the corporate limits of any municipality. Such area shall be subject to all the ordinances and regulations that may be applicable to the area lying within the boundary limits of the county, and the magistrates' courts shall have jurisdiction to punish individuals violating the provisions of the county ordinances where such misdemeanor occurred in the area defined in this section. [Emphasis added.]

Whether a county has the authority to enact an ordinance to provide criminal penalties for excessive noise must also be considered.

It appears that Section 4-9-45 in particular contemplates that counties might enact ordinances providing criminal penalties dealing with, inter alia, the abatement of nuisances. Section 4-9-45 was adopted in Act No. 300, Section 3, 1980 Acts and Joint Resolutions, effective January 21, 1980. By Opinion No. 84-66, this Office has concluded that counties can most probably exercise police power, which opinion would be consistent with the present interpretation of Section 4-9-45. However, citing Opinion No. 4118, dated December 16, 1975, it was noted that the conclusion of Opinion No. 84-66 was not completely free from doubt. 2/ Opinion No. 4118 concluded that counties lacked police power and could not enact an ordinance providing penalties for noise pollution. Because the 1975 opinion was issued prior to numerous Home Rule decisions by the South Carolina Supreme Court, see Duncan v. York County, supra, for example, and prior to Act No. 300 of 1980, we would reaffirm Opinion No. 84-66, concluding that counties most probably do have police powers. The Terpin case, as well as Section 4-9-45, is supportive of this conclusion. Thus, we conclude that 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.

2/ Copies of Opinions No. 4118 and 84-66 are enclosed herewith for your convenience.

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You have indicated that individuals in the unincorporated areas of Horry County have complained about noise from a helicopter operating near Restaurant Row in Myrtle Beach, near U. S. Highway 17. We further understand that the helicopter is part of a business being operated in the unincorporated area of Horry County. It would appear that the individuals aggrieved by the noise have an option to proceed under Ordinance No. 6-83 to remedy the situation, or Horry County could proceed civilly under Section 4-9-30 (16.2), should Horry County Council deem that a problem exists. This Office does not comment herein on the facts involved or the sufficiency of evidence should either a criminal or a civil remedy be pursued. The individuals aggrieved by the noise may wish to consult with an attorney prior to selecting an appropriate remedy to pursue.

We trust that the foregoing has satisfactorily responded to your inquiry. Please advise if you need additional assistance.

Sincerely,

Patricia D. Petway

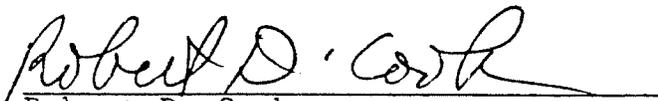
Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosures

cc: Mr. Russell B. Shetterly
S. C. Association of Counties

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions