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ALAN WILSON
ATTORNEY GENERAL

October 1, 2014

Chief H. Harold Brown
Chief of Police, Elgin Police Department
P.O. Box 277
Elgin, South Carolina 29045

Dear Chief Brown:

We are in receipt of your June 12, 2014 opinion request regarding the validity and enforcement of Town Ordinance 224¹ which you explain “restricts all electronic communication in a . . . school zone.” Specifically, you ask whether Town Ordinance 224 is valid in light of the newly-enacted Section 56-5-3890 of the Code which deals with the unlawful use of a wireless electronic communication device while operating a motor vehicle.² Continuing, you ask in the event Town Ordinance 224 is valid, whether it should be enforced through a town summons or a Uniform Traffic Ticket. Because local legislation regulating the use of wireless electronic communication devices while driving is now expressly preempted pursuant to the terms of Section 56-5-3890(G), we believe Town Ordinance 224 is now invalid and cannot be enforced by either a town summons or a Uniform Traffic Ticket.

I. Law/Analysis

When determining the validity of a local ordinance, we begin with the principle that “[a]n ordinance is a legislative enactment and is presumed to be constitutional.” Southern Bell Tel. & Tel. Co. v. City of Spartanburg, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). The burden of

¹ Elgin Town Ordinance 224 criminalizes the “use of a wireless communication device while operating a motor vehicle in a school zone” during the hours of 7AM until 7PM Monday through Friday. Town of Elgin Mun. Code Ord. 224(1) (enacted May 13, 2014). The crime is classified as a misdemeanor and is punishable by a fine of “no more than one hundred dollars or imprisoned not more than 30 days, or both” where a sign conforming to the requirements of subsection (3)(a-c) is erected in the school zone and on school property. Town of Elgin Mun. Code Ord. 224(2)-(3).

² Section 56-5-3890 of the Code, titled “[u]nlawful use of a wireless electronic communication device while operating a motor vehicle” was enacted on June 9th of this year as part of Act 260 of the 2013-2014 legislative session. 2014 S.C. Acts 120th Legis. Sess. No. 260 (eff. date June 9, 2014). Specifically Act 260, in its legislative title, explains, among other things, that the purpose of Section 56-5-3890 is to “provide that it is unlawful for a person to use a wireless electronic communication device to compose, send, or read a text-based communication while operating a motor vehicle on the public highways of this State.” 2014 S.C. Acts 120th Legis. Sess. No. 260. To this end, Section 56-5-3890(B) expressly prohibits individuals from using “a wireless electronic communication device to compose, send, or read a text-based communication while operating a motor vehicle on the public streets and highways of this State.” S.C. Code Ann. § 56-5-3890(B) (2014).

proving the invalidity of a local ordinance rests with the party attacking the ordinance. Id. “Determining whether a local ordinance is valid is a two-step process.” Bugsy’s, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). The first step is to determine whether the local governmental body at issue had the power to adopt the ordinance. Id. As stated most recently in Sandlands C&D, LLC v. Horry County, 394 S.C. 451, 716 S.E.2d 280 (2011), our Supreme Court now evaluates this question on two fronts: (1) whether local government possesses the authority to enact the ordinance; and (2) whether state law preempts the area of legislation. 394 S.C. at 460, 716 S.E.2d at 284. “If no such power existed, the ordinance is invalid and the inquiry ends.” Bugsy’s Inc. v. City of Myrtle Beach, 340 S.C. at 93, 530 S.E.2d at 893. If, on the other hand, local government had the power to enact the ordinance, the second step of the analysis is to determine whether the ordinance is consistent with the Constitution and general law of the State. Id.

A. Power to Enact the Ordinance and Preemption

“Article VIII of the South Carolina Constitution mandates ‘home rule’ for local governments and requires all laws concerning local government to be liberally construed in their favor.” South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 402, 629 S.E.2d 624, 631 (2006) (citing S.C. Const. Art. VIII, § 17); see also Quality Towing Inc. v. City of Myrtle Beach, 340 S.C. 29, 37, 530 S.E.2d 369, 373 (2000). The rationale underlying “home rule” is that “different local governments have different problems that require different solutions.” Quality Towing, 340 S.C. at 37, 530 S.E.2d at 373. Pursuant to the constitutional mandate of “home rule” the General Assembly has delegated general authority to its municipalities to enact ordinances in relation to “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[.]” S.C. Code Ann. § 5-7-30 (2004). That said, because the rationale underlying home rule only applies in instances where the State has either expressly or impliedly delegated its legislative authority to local government, municipalities cannot set aside general law on subjects requiring statewide uniformity. See S.C. Const. Art. VIII, § 14(5)-(6) (1895) (explaining local government cannot set aside general law provisions regarding “criminal law and the penalties and sanctions for the transgression thereof” nor can it set aside general law concerning “the . . . administration of any governmental service or function . . . which requires statewide uniformity.”). This principle specifically applies with respect to the regulation of highways as Section 56-5-30 of the Code, while prohibiting local legislation *conflicting* with state law, expressly permits regulation which is not in conflict with state law and is *additional* to that which is regulated under Chapter Five of Title 56. See S.C. Code Ann. § 56-5-30 (2004) (“The provisions of this chapter shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance, rule or regulation *in conflict with the provisions of this chapter unless expressly authorized herein*. Local authorities may, however, subject to the limitations prescribed in § 56-

5-930, adopt *additional traffic regulations which are not in conflict with the provisions of this chapter.*") (emphasis added).

1. Municipal Authority to Enact the Ordinance

When determining whether local government, in this case a municipality, has authority to legislate, we first look to South Carolina constitutional and statutory law, particularly, as noted above, Article VIII, Section 17's "home rule" provision which, with respect to municipalities, is codified in Section 5-7-30 of the South Carolina Code. See Quality Towing, Inc., 340 S.C. at 37, 530 S.E.2d at 373 (looking to "home rule" to determine whether a locality had authority to pass an ordinance regarding a local towing issue). Specifically, as discussed in subsection (A), municipalities possess authority to regulate ordinances relating to "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[.]" S.C. Code Ann. § 5-7-30(A). Moreover, with respect to the subject matter of regulating traffic on highways, Section 56-5-30 expressly permits localities to pass legislation concerning such matters so long as the legislation is an "additional traffic regulation[]" which "is not in conflict with the provisions of this chapter." S.C. Code Ann. § 56-5-30; Op. S.C. Att'y Gen., 2013 WL 6337704 (November 18, 2013) ("[T]he Legislature has expressly declared that local governments are only authorized to enact traffic regulations *in addition* to those set forth in the [Uniform Traffic Act] to the extent such ordinances do not conflict with the provisions of the [Uniform Traffic Act] unless expressly authorized.") (emphasis in original). As a result, localities possess authority to enact ordinances concerning the regulation of traffic on highways, but only in certain limited circumstances where state law does not preempt such regulation through state-level legislation. Accordingly we now move to the second front regarding a municipality's power to enact an ordinance—preemption.

2. Preemption

When evaluating whether a local ordinance is preempted by state law, our Courts look to "federal preemption concepts" meaning the Court will review whether the ordinance is expressly preempted, impliedly preempted or preempted under an implied conflict analysis. Sandlands, 394 S.C. at 462, 716 S.E.2d at 285. "Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area," Id. at 462, 716 S.E.2d at 286; "[i]mplied field preemption occurs 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," Id. at 465, 716 S.E.2d at 287; and "[i]mplied conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." Id. at 467, 716 S.E.2d at 288. In this instance, we believe that Town Ordinance 224 is expressly preempted pursuant to the terms of Section 56-5-3890(G) of the South Carolina Code.

i. Express Preemption

Despite the powers discussed in Section I(A)(1) regarding a municipality's general authority to pass, pursuant to both "home rule" and Section 56-5-30, "additional traffic regulations which are not in conflict with the provisions of this chapter," it is clear the Legislature, by enacting Section 56-5-3890(G), intended to expressly preempt local regulation concerning the use of wireless electronic communication devices while driving. Specifically, subsection (G) of Section 56-5-3890 states, "[t]his section *preempts local ordinances, regulations, and resolutions adopted by municipalities, counties and other local governmental entities regarding persons using wireless electronic communication devices while operating motor vehicles on the public streets and highways of this State.*" S.C. Code Ann. § 56-5-3890(G) (emphasis added). Thus, Town Ordinance 224, although only regulating the use of electronic communication devices while driving in a school zone, still regulates "persons using wireless electronic communication devices while operating motor vehicles on the public streets and highways of this State," a subject matter expressly preempted from local regulation by the terms of Section 56-5-3890(G). See Sandlands, 394 S.C. at 462, 716 S.E.2d at 286 ("Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area."). This of course results in Town Ordinance 224 being in conflict with "the provisions of this chapter" namely, Section 56-5-3890(G). See S.C. Code Ann. § 56-5-30 (explaining that local government only has the power to pass legislation concerning traffic on the highways where such legislation is not in conflict with state law on the subject matter and is additional to that which is regulated by state law). Accordingly, we believe there is no power to enforce the provisions of Town Ordinance 224 and therefore, it is the opinion of this Office that the ordinance is invalid. See Bugsy's Inc. v. City of Myrtle Beach, 340 S.C. at 93, 530 S.E.2d at 893 ("If no such power existed, the ordinance is invalid and the inquiry ends.").

II. Conclusion

In conclusion, it is the opinion of this Office that local legislation regulating the use of wireless electronic communication devices while driving is now expressly preempted pursuant to the terms of Section 56-5-3890(G) of the South Carolina Code. As a result, we believe Elgin Town Ordinance 224, an ordinance regulating use of "a wireless electronic communication device while operating a motor vehicle in a school zone" is now invalid and is therefore unenforceable.

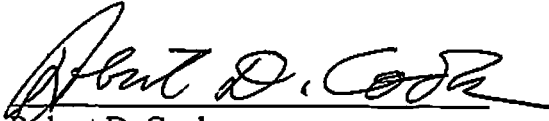
Sincerely,



Brendan McDonald
Assistant Attorney General

Chief H. Harold Brown
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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General