



ALAN WILSON
ATTORNEY GENERAL

October 27, 2017

Teresa A. Knox, Esq.
P.O. Box 667
Columbia, South Carolina 29202

Dear Ms. Knox:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter reads as follows:

I am writing this letter to request an opinion regarding tobacco retail licensing. The clear majority of states require a tobacco retail license to sell tobacco products....

I would like your opinion on the issue of political subdivisions of the state enacting laws regarding retail tobacco sales. Specifically, are political subdivisions permitted by South Carolina law to implement tobacco retail licensing? Further, are political subdivisions permitted by South Carolina law to enact laws and/or regulations that would impact the tobacco retail environment in order to benefit public health?

Law/Analysis

It is this Office's opinion that a court likely would find political subdivisions of the State have the authority to enact ordinances which implement retail tobacco licensing within their jurisdictional boundaries. The South Carolina Code of Laws provides that each municipality 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... a business license tax on gross income, but a wholesaler delivering goods to retailers in a municipality is not subject to the business license tax unless he maintains within the corporate limits of the municipality a warehouse or mercantile establishment for the distribution of wholesale goods; ... If the person or business taxed pays a business license tax to a county or to another

municipality where the income is earned, the gross income for the purpose of computing the tax must be reduced by the amount of gross income taxed in the other county or municipality.

S.C. Code Ann. § 5-7-30. Similarly, each county government is granted authority “to levy uniform license taxes upon persons and businesses engaged in or intending to engage in a business, occupation, or profession.” S.C. Code Ann. § 4-9-30(12). These statutes expressly grant the State’s municipalities and counties authority to levy business license taxes. Under this authority, if a political subdivision establishes a tobacco retail licensing program by ordinance, it will be presumed to be valid as a legislative enactment. S.C. Const. art. VIII, § 17 (“[A]ll laws concerning local government shall be liberally construed in their favor.”); Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 425, 593 S.E.2d 462, 467 (2004) (“A municipal ordinance is a legislative enactment and is presumed to be constitutional.”); Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 554, 397 S.E.2d 662, 664 (1990) (“a presumption of validity attaches to all legislation...”). However, when an ordinance is challenged, the South Carolina Supreme Court has established a two-step process to determine its validity as follows:

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); see also Beachfront Entm't, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 666 S.E.2d 912 (2008); Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). Therefore, this Office’s opinion will examine whether the South Carolina Code of Laws preempts retail tobacco licensing by local ordinance and whether such an ordinance otherwise conflicts with the South Carolina Code of Laws.

1. The South Carolina Code of Laws does not preempt local licensing of retail tobacco businesses.

In Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990), the South Carolina Supreme Court developed a test to determine when a statute will be found to preempt a political subdivision from passing an ordinance which bears on a particular area of legislation. The Court found that such a statute will “pre-empt an entire field” where it “manifest[s] a legislative intent that no other enactment may touch upon the subject in any way.” Id.; Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 94, 530 S.E.2d 890, 893 (2000) (same). The Court subsequently clarified that such “preemption must be explicit, not implicit.” Foothills Brewing Concern, Inc., 377 S.C. at 364, 660 S.E.2d at 269. In application,

the Court has rarely found that a statute explicitly manifests a legislative intent to preempt a particular area of legislation. See Foothills Brewing Concern, Inc., *supra*; Beachfront Entm't, Inc., *supra*; Denene, Inc., *supra*; Bugsy's, *supra*. However, in Wrenn Bail Bond Serv., Inc. v. City of Hanahan, 335 S.C. 26, 515 S.E.2d 521 (1999), the Court found a particular statute which did satisfy this stringent test. The Wrenn Court held that Title 38, Chapter 53 of the South Carolina Code of Laws which regulates the licensing of bail bondsmen and their runners preempted any local legislation on the subject. The Court cited S.C. Code Ann. § 38-53-80 which provides in part that “[n]o license may be issued to a professional bondsman or runner except as provided in this chapter.” 335 S.C. at 28, 515 S.E.2d at 522. The Court held that it was “clear from the plain language of § 38-53-80 that the legislature intended to preempt the entire field of professional licensing for bail bondsmen.” *Id.* Thus, a political subdivision of the State would have no authority to enact an ordinance implementing retail tobacco licensing if the South Carolina Code of Laws contains a similarly explicit statement of legislative intent to preclude regulation of retail tobacco sales.

It is this Office’s opinion that the South Carolina Code of Laws does not explicitly manifest a legislative intent to preempt the field of retail tobacco licensing. Title 12, Chapter 21, Article 5 of the South Carolina Code of Laws establishes a taxing and licensing program for cigarettes, cigars, and other tobacco products. Section 12-21-660 establishes the State’s licensing program as follows:

Every person engaged in the business of purchasing, selling or distributing cigars, cheroots, stogies, cigarettes, snuff or smoking or chewing tobacco at wholesale or through vending machines within the State and all cigarette, cigar and tobacco product manufacturers' sales representatives who conduct business in this State shall file with the Department of Revenue an application for a license permitting him to engage in such business. When such business is conducted at two or more separate places, a separate license for each place of business shall be required. A person whose business is conducted through vending machines needs to obtain only one license but shall maintain an up-to-date list of the location of each vending machine operated under this license and each manufacturer's sales representative needs to obtain only one license. The provisions of this section shall not apply to persons who own and stock vending machines for use on their own premises.

Nothing in this section shall be construed as requiring a license for the privilege of buying, selling or distributing leaf tobacco nor shall this section apply to churches, schools or charitable organizations operating booths at state, county, or community fairs or to school or church entertainments.

S.C. Code Ann. § 12-21-660. In contrast to Wrenn, the express language of the statute does not contain prohibitory language. *Cf. Wrenn*, 335 S.C. at 28, 515 S.E.2d at 522 (“No license may be issued... except as provided in this chapter.”). In the absence of an explicit statement regarding

preemption, it is this Office's opinion that Section 12-21-660 and Title 12, Chapter 21, Article 5 of the South Carolina Code of Laws generally do not preempt the field of retail tobacco licensing.

2. A local ordinance which establishes a retail tobacco licensing program does not conflict with the general law of the State.

It is this Office's opinion that a court would likely find a political subdivision of the State can enact retail tobacco licensing by ordinance without conflicting with the general law of the State. The South Carolina Supreme Court explained that additional local regulation of subject matter covered by State law is permissible, and does not necessarily amount to a conflict between the two.

As a general rule, "additional regulation to that of State law does not constitute a conflict therewith." Arnold v. City of Spartanburg, 201 S.C. 523, 536, 23 S.E.2d 735, 740 (1943). Further, in order 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. Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand." McAbee v. Southern Rwy. Co., 166 S.C. 166, 169-170, 164 S.E. 444, 445 (1932). See also Amvets Post 100 v. Richland County Council, 280 S.C. 317, 313 S.E.2d 293 (1984); Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984).

Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at 553, 397 S.E.2d at 664; see also Buggy's, Inc. v. City of Myrtle Beach, 340 S.C. at 95, 530 S.E.2d at 894; Wrenn, 335 S.C. at 29, 515 S.E.2d at 522. Accordingly, even though an ordinance which enacts retail tobacco licensing would create additional regulations beyond those contained in Title 12, Chapter 21, Article 5 of the South Carolina Code of Laws,¹ such an ordinance would not necessarily "conflict" with State law. However, this Office must caution that any retail tobacco licensing ordinance must not "unreasonably" impact the tobacco retail environment. In Denene, Inc. v. City of Charleston, 352 S.C. 208, 215, 574 S.E.2d 196, 199 (2002), the Court addressed when an ordinance which restricts beer and wine sales conflicts with general law where it said, "If an ordinance unreasonably prohibits the sale of beer and wine, in effect banning a business which the State has deemed legal, the ordinance would exceed the police power of the municipality and be unenforceable." Therefore, in drafting a retail tobacco licensing ordinance, the governing body

¹ S.C. DEPT. OF REVENUE, SOUTH CAROLINA CIGARETTE AND TOBACCO TAX MANUAL Chapter 7, 1 (2011) ("A cigarette and tobacco products license is not required of: (1) Retailers that only purchase taxed cigarettes or taxed tobacco products.").

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of a political subdivision should consider whether such an ordinance could effectively ban retail tobacco businesses. It is this Office's opinion that a court would find such an ordinance to conflict with the general law of the State and to be invalid. Because this Office was not provided with a proposed ordinance, we cannot comment on whether a particular licensing plan would conflict with State law. However, it is our Opinion that such a licensing ordinance can be drafted so as not to effectively prohibit retail tobacco sales such that a court would likely find it to be valid.

Conclusion

It is this Office's opinion that a court likely would find political subdivisions of the State have the authority to enact ordinances which implement retail tobacco licensing within their jurisdictional boundaries. In the absence of an explicit statement regarding preemption, it is this Office's opinion that Section 12-21-660 and Title 12, Chapter 21, Article 5 of the South Carolina Code of Laws generally do not preempt the field of retail tobacco licensing. Although an ordinance which enacts retail tobacco licensing would create additional regulations beyond those contained in Title 12, Chapter 21, Article 5 of the South Carolina Code of Laws, such an ordinance would not necessarily "conflict" with State law. If such an ordinance does not effectively prohibit retail tobacco businesses, which are legal under State law, a court would likely find it to be a valid exercise of a political subdivision's authority. See Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008).

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General