



ALAN WILSON  
ATTORNEY GENERAL

August 6, 2020

The Hon. Jonathon Hill  
South Carolina House of Representatives  
434-C Blatt Building  
Columbia, SC 29201

Dear Representative Hill:

We received your request seeking an opinion on a "State of Disaster Declaration" passed by Saluda County Council that references certain extraordinary emergency powers, including the suspension or limitation of the sale or transportation of alcoholic beverages and firearms. This opinion sets out our Office's understanding of your question and our response.

**Issue:**

We quote here from your letter:

On March 17<sup>th</sup>, the Saluda County Council declared a state of disaster pursuant to Saluda County Code of Ordinances, Chapter 10, Section 10-35. A copy of the declaration is attached.

The declaration authorizes Saluda County to take actions, including but not limited to:

9. Suspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles.

I am thus making an official request for a legal opinion from your office regarding whether or not this or any other part of this declaration is lawful, constitutional, and enforceable.

**Law/Analysis:**

We begin by setting out general law relating to Home Rule and emergency powers. "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). This Home Rule authority includes the statutory power to pass emergency ordinances pursuant to section 4-9-130:

To meet public emergencies affecting life, health, safety or the property of the people, council may adopt emergency ordinances; but such ordinances shall not levy taxes, grant, renew or extend a franchise or impose or change a service rate. Every emergency ordinance shall be designated as such and shall contain a declaration that an emergency exists and describe the emergency. Every emergency ordinance shall be enacted by the affirmative vote of at least two-thirds of the members of council present. An emergency ordinance is effective immediately upon its enactment without regard to any reading, public hearing, publication requirements, or public notice requirements. Emergency ordinances shall expire automatically as of the sixty-first day following the date of enactment.

S.C. Code Ann. § 4-9-130 (1986).

Moreover, South Carolina law expressly charges local governments with a duty to prepare for emergencies in section 25-1-450:

State, county, and municipal governments shall cooperate in developing and maintaining a plan for mutual assistance in emergencies.

...

(2) County and municipal governments shall be responsible for:

(a) Organizing, planning, and otherwise preparing for prompt, effective employment of available resources of the county or municipality to support emergency operations of the municipalities of the county or to conduct emergency operations in areas where no municipal capability exists.

(b) Coordinating support to municipal emergency operations from other sources including state and federal assistance as well as support made available from other municipalities of the county.

(c) Developing and implementing a shelter/relocation plan to protect the populace from the hazards of a nuclear emergency and to provide for the congregate

housing and care of persons displaced or rendered homeless as a result of a natural or man-made emergency.

S.C. Code Ann. § 25-1-450 (Supp. 2019).

As to the validity of a local ordinance, the South Carolina Supreme Court has held 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 proving the invalidity of a local ordinance rests with the party attacking the ordinance and must be proven beyond reasonable doubt. *Id.*

Determining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.

*Hospitality Assn. of S.C. v. County of Charleston*, 320 S.C. 219, 223, 464 S.E.2d 113, 116 (1995). For the purposes of this opinion, we presume without opining that a court would find that the County generally had the power to pass the Declaration and all relevant ordinances as an exercise of their responsibilities to prepare for and meet an emergency in sections 25-1-450 and 4-9-130. *Id.* With this first step satisfied, this opinion will focus on the question of whether any of these are “inconsistent with the Constitution or general law of this State.” *Id.*

Finally,

[W]hile this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state law. Accordingly, an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction.

*Op. S.C. Att’y Gen.*, 2003 WL 21043502 (March 21, 2003) (internal citations omitted).

**Saluda County Ordinance 10-35, State of Disaster Declaration, and  
Subsequent Emergency Ordinances**

In order to fully respond to your question, this opinion will discuss a series of local Saluda County measures: Ordinance 10-35, apparently passed in 1982; the Disaster Declaration

of March 17, 2020 (the “Declaration”); and a series of three Emergency Ordinances for COVID-19, passed on March 19, May 11, and July 8 of 2020.

We begin with the text of Saluda County Ordinance 10-35. The first two paragraphs of this codified ordinance generally deal with the duties and responsibilities of County Council during a state of emergency, which it also refers to as a “state of disaster.” Subsection (c) of Ordinance 10-35 also sets out a list of purported extraordinary powers of the Council during a declared state of emergency:

- (c) *Additional powers of county council.* In addition to any other powers conferred by law, the county council may under the provisions of this article:
  - (1) Suspend existing laws and regulations prescribing the procedures for conduct of county business if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency;
  - (2) Utilize all available resources of county government as reasonably necessary to cope with a disaster emergency;
  - (3) Transfer the direction, personnel or functions of county departments and agencies or units thereof for purposes of facilitating or performing emergency services as necessary or desirable;
  - (4) Compel performance by elected and appointed county government officials and employees of the duties and functions assigned in the county emergency operations plan;
  - (5) Contract, requisition and compensate for goods and services from private sources;
  - (6) Direct and compel evacuation of all or part of the population from any stricken or threatened area within the county if such an action is deemed necessary for preservation of life or other disaster mitigation, response or recovery;
  - (7) Prescribe routes, modes of transportation and destinations in connection with evacuation;

- (8) Control ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein;
- (9) Suspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles;
- (10) Make provisions for the availability and use of temporary housing;
- (11) Suspend or limit nonemergency activities and prohibit public assemblies.

Saluda County Code of Ordinances § 10-35(c). A scrivener's note to the Ordinance reads "Res. Of 10-11-1982, § 5." We interpret that to mean that Ordinance 10-35 codifies a measure passed by Saluda County over thirty-seven years ago in 1982.

Next, we examine the specific language of the Saluda County Disaster Declaration of March 17, 2020 (the "Declaration"). The Declaration begins,

As cases of the Coronavirus increase causing an imminent threat to the citizens and visitors of Saluda County, it is necessary for Saluda County to implement emergency planning for anticipated problems and prepare for emergency actions needed to confront the challenges of the Coronavirus. A state of disaster may be declared by county council if it determines that a disaster has occurred, or that the threat thereof is imminent, and extraordinary emergency measures are deemed necessary to cope with the existing or anticipated situation.

Therefore, Saluda County Council, hereby declares a State of Disaster in accordance with the Saluda County Code of Ordinances, Chapter 10, Section 10-35 today, March 17, 2020, effective at 11:30 AM.

The Declaration then sets out a list beginning with "Actions include, but are not limited to." The list reproduces verbatim the 11 enumerated powers set out in Ordinance 10-35(c). This includes the power to "[s]uspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles" as quoted in your letter.

While the Declaration quotes Ordinance 10-35, that ordinance in turn tracks the language of S.C. Code Ann. § 25-1-440 in many sections. In particular, paragraphs 1-4 and 6-8 of the Ordinance are nearly-verbatim copies of the text of section 25-1-440 as the state law existed in 1982, when the ordinance was passed. The only material change was to convert the references to the branches of state government such that Ordinance 10-35 purported to grant the same powers

to the county. The remaining paragraphs of the ordinance were inserted without clear origin, including paragraph 9 that contains the language quoted in your letter.

Furthermore, it has come to our attention that this ordinance is not unique. At least one other county in South Carolina also has precisely the same list of enumerated powers in their own emergency ordinance. *See* Richland County Code of Ordinances § 2-139(3)(e). A few prior opinions of this Office reference a general push in the 1970s for counties to prepare civil defense and emergency operations plans. *See, e.g., Op. S.C. Att’y Gen.*, 1976 WL 22876 (February 11, 1976). This particular list of purported powers may be more common in local codes than we realize at this time.

However, it appears the Declaration only recognized the Ordinance purported to authorize these actions to be taken by the County. The Declaration did not undertake any effective action other than to declare that an emergency existed.

It appears that the County has passed three Emergency Ordinances subsequent to the March 17<sup>th</sup> Declaration. Our Office has reviewed the following:

- Saluda County Emergency Ordinance for COVID-19 dated March 19, 2020;
- Saluda Emergency Ordinance for COVID-19 Amendment No. 2 dated May 11, 2020;  
and
- Saluda County Emergency Ordinance for COVID-19 Amendment No. 3 dated July 8, 2020.

Not one of these three Emergency Ordinances reference the sale of alcohol, firearms or explosives in any way. Moreover, each of these Emergency Ordinances both cite and seek to conform to the state law governing emergency county ordinances set out in S.C. Code Ann. § 4-9-130 (1986).

#### **Purported Authority to Regulate Firearms and Alcohol**

Next, we consider whether there is any conflict between the Disaster Declaration and state law. The Declaration does describe certain local powers which a court may conclude are invalid. First, we believe a court would conclude that any local move to “[s]uspend or limit the sale, dispensing or transportation of firearms” would be preempted by section 23-31-510 of the South Carolina Code. Section 23-31-510 provides in relevant part that:

No governing body of any county, municipality, or other political subdivision in the State may enact or promulgate any regulation or ordinance that regulates or attempts to regulate:

(1) the transfer, ownership, possession, carrying, or transportation of firearms, ammunition, components of firearms, or any combination of these things ....

S.C. Code Ann. § 23-31-510 (Supp. 2019). Further, Section 23-31-520 of the Code provides that:

This article [including Section 23-31-510] does not affect the authority of any county, municipality, or political subdivision to regulate the careless or negligent discharge or public brandishment of firearms, nor does it prevent the regulation of public brandishment of firearms during the times of or a demonstrated potential for insurrection, invasions, riots, or natural disasters. This article denies any county, municipality, or political subdivision the power to confiscate a firearm or ammunition unless incident to an arrest.

S.C. Code Ann. § 23-31-520 (2007).

As you know, our Office has issued several prior opinions addressing this firearm preemption. An opinion issued on December 2, 2019 set out a succinct summary of our consistent conclusions:

In order to be unmistakably clear, our Office consistently has construed Sections 23-31-510 and -520 to mean that the General Assembly intended that State law expressly occupy the entire field of South Carolina firearm regulation and preempt any local ordinance on the same subject, except where local regulation are expressly permitted by those same statutes.”

*Op. S.C. Att’y Gen.*, 2019 WL 6794777 (December 2, 2019) (emphasis in original).

We do not believe the purported emergency power to “[s]uspend or limit the sale, dispensing or transportation of firearms” can reasonably be characterized as a regulation of merely the “careless or negligent discharge or public brandishment of firearms” as permitted in in section 23-31-520. Therefore we believe section 23-31-510 preempts this purported local power. S.C. Code Ann. § 23-31-510. We refer the reader to our 2019 opinion and these other prior opinions for a much fuller discussion of the applicable law: *Ops. S.C. Att’y Gen.*, 2017 WL 6940255 (December 29, 2017) (concluding that a municipal ordinance related to “possession of

loaded rifle or shotgun on public property” was preempted by Section 23-31-510), 2019 WL 4894126 (September 19, 2019) (concluding that a municipal ordinance attempting to regulate homemade firearms was preempted by Section 23-31-510).

However, as noted above, the March 17<sup>th</sup> Declaration merely reproduced the text of Ordinance 10-35. Our Office is not aware of any action by the Council actually attempting to regulate firearms pursuant to this Declaration. The three Emergency Ordinances for COVID-19 passed by the County do not reference firearms in any way.

Next, we consider the purported authority to “suspend or limit the sale, dispensing or transportation of alcohol” also listed in Ordinance 10-35 and reproduced in the Declaration. This also raises a possible preemption issue because the Department of Revenue is the exclusive authority to regulate alcohol sales in South Carolina:

The State, through the department, is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors, is authorized to establish conditions or restrictions which the department considers necessary before issuing or renewing a license or permit, and occupies the entire field of beer, wine, and liquor regulation except as it relates to hours of operation more restrictive than those set forth in this title.

S.C. Code Ann. § 61-2-80 (2009) (emphasis added). Our Supreme Court has held that this law and its predecessor do allow for some limited local action. *See Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662 (1990) (state law did not preempt application of local sign ordinance to a liquor store); *see also Denene, Inc. v. City of Charleston*, 359 S.C. 85, 596 S.E.2d 917 (2004) (city could require bars to close between 2 a.m. and 6 a.m. on Mondays through Saturdays). However, we are not aware of any reported South Carolina case where a county sought by ordinance to outright suspend the sale of alcohol pursuant to section 61-2-80.

But neither are we faced with such an ordinance here. While the Declaration invokes Ordinance 10-35 to declare an emergency exists, our Office is not aware of any action by the Council actually attempting to regulate alcohol pursuant to this Declaration.

#### **Purported Authority to Exercise Other Emergency Powers**

You also ask whether “any other part of this declaration is lawful, constitutional, and enforceable.” We observe again that the only actions taken in the March 17<sup>th</sup> Declaration were to declare that an emergency existed, and to reproduce a portion of the text of the county’s

emergency ordinance. It does not appear that the Declaration sought to actually enforce any other measure. However, the incorporated language does raise one additional issue.

As noted above, many portions of Saluda County Ordinance 10-35 track the language of S.C. Code Ann. § 25-1-440. In particular, paragraphs 1-4 and 6-8 of the Ordinance reproduce verbatim the text of section 25-1-440 as the state law existed in 1982, when the Ordinance was passed. The only material change was to convert the references to the state, such that the modified language purported to grant the same powers to the county council within its jurisdiction. For example, where the General Assembly charged the Governor with the power to “direct and compel evacuation of all or part of the populace from any stricken or threatened area” in section 25-1-440(7), a past county council arrogated to itself the power to “[d]irect and compel evacuation of all or part of the population from any stricken or threatened area within the county” in Ordinance 10-35.

As long ago as 1980, our Office has opined that only the Governor may compel an evacuation during a declared state of emergency in the manner contemplated here. *Op. S.C. Att’y Gen.*, 1980 WL 81975 (September 5, 1980). Our Office has issued another opinion recently on section 25-1-440, which affirmed “local government cannot exercise the emergency powers delegated to the Governor by the General Assembly” in section 25-1-440. *Op. S.C. Att’y Gen.*, 2020 WL 2044370 (March 29, 2020). To the extent that the Declaration or Ordinance 10-35 purport to authorize the county to exercise such powers, we believe that they are preempted by section 25-1-440. *Id.*, see also *Op. S.C. Att’y Gen.*, 2020 WL 2044369 (March 24, 2020) (discussing constitutional limitations on the state law emergency powers).

We reiterate two additional points, however. First, this particular list of purported powers is not unique to Saluda, and it may be more common in local codes than we realize at this time. See, e.g., Richland County Code of Ordinances § 2-139(3)(e). Second, it appears the March 17<sup>th</sup> Declaration only recognized the Ordinance purported to authorize these action to be taken by the County. In contrast, each of the three Emergency Ordinances passed by the current Saluda County Council both cite and seek to conform to the state law governing emergency county ordinances set out in S.C. Code Ann. § 4-9-130 (1986).

#### **Conclusion:**

In conclusion, the Saluda County Disaster Declaration of March 17, 2020 only declares that an emergency exists and reproduces the language of Saluda County Ordinance 10-35, which apparently was passed many years prior. The Declaration tracks the language of Ordinance 10-35 but does not undertake any of these actions in itself.

Saluda County Ordinance 10-35 does purport to authorize the Council to act in ways that a court likely would hold are preempted by state law. First, although the Declaration purports to authorize Council to “suspend or limit the sale, dispensing or transportation of . . . firearms,” we believe that any such local action would be preempted by the prohibition in Section 23-31-510(A) on the local regulation of “the transfer, ownership, possession, carrying, or transportation of firearms.” S.C. Code Ann. § 23-31-510(A) (Supp. 2019); *see also Op. S.C. Att’y Gen.*, 2019 WL 6794777 (December 2, 2019). Second, any Council action to “suspend or limit the sale, dispensing or transportation of alcohol” would have to be evaluated in light of the Section 62-1-80, which charges the Department of Revenue with authority to regulate alcohol sales in this State. S.C. Code Ann. § 62-1-80 (2009); *see also Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662 (1990). Finally, we reaffirm that “local government cannot exercise the emergency powers delegated to the Governor by the General Assembly” in S.C. Code Ann. § 25-1-440, upon which Ordinance 10-35 is modeled. *Op. S.C. Att’y Gen.*, 2020 WL 2044370 (March 29, 2020); *see also Op. S.C. Att’y Gen.*, 2020 WL 2044369 (March 24, 2020) (discussing constitutional limitations on the state law emergency powers).

Furthermore, it has come to our attention that this ordinance is not unique. At least one other county in South Carolina also has codified precisely the same list of enumerated powers in their own emergency ordinance. *See, e.g.*, Richland County Code of Ordinances § 2-139(3)(e). A few prior opinions of this Office address a general push in the 1960s and 1970s for counties to prepare civil defense and emergency operations plans. *See, e.g., Op. S.C. Att’y Gen.*, 1976 WL 22876 (February 11, 1976). This particular list of purported powers may be more common in local codes than we realize at this time.

However, our Office is not aware of any action by the Saluda County Council pursuant to this Declaration which involves the specific concerns raised in your letter. Indeed, the Declaration did not take any action at all, except simply to declare that an emergency existed.

We also remember the context of when the Council passed the March 17<sup>th</sup> Declaration. The ongoing COVID-19 pandemic is unprecedented in the living memory of any of our elected leaders. In retrospect, the second and third weeks of March, 2020 proved to be an inflection point. Local governments across this state suddenly realized that the pandemic constituted an imminent emergency unlike any they had seen before, and they were compelled to take immediate action.

In this context, Saluda County Council first declared an emergency on March 17<sup>th</sup> pursuant to Ordinance 10-35, which apparently had been passed decades prior in 1982. The only actions taken in the Disaster Declaration were to declare that an emergency existed, and to

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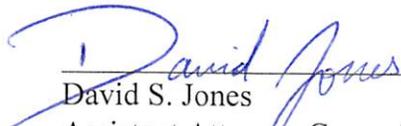
reproduce some language of Ordinance 10-35. Two days later, the same Council issued their first actual Emergency Ordinance for COVID-19. With the benefit of additional time, this Emergency Ordinance and the two subsequent ones sought to conform to S.C. Code Ann. § 4-9-130 (1986), as they must. None of them reference the sale of alcohol, firearms, or explosives in any way.

Thus, while Saluda County Ordinance 10-35 certainly raises serious preemption concerns, at this time it appears that it is not being enforced by the March 17<sup>th</sup> Declaration with respect to the particular issues raised in your letter. Instead, we believe the actions of the current council in their three Emergency Ordinances generally reflect a good-faith effort to respond to the pandemic consistent with section 25-1-450 and in conformity with state law, including section 4-9-130. Any future ordinance or other measure not brought to our attention that sought to exercise these preempted powers would have to be assessed on its own merits.

This Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms. *See, e.g., Op S.C. Att'y Gen., 2015 WL 4596713 (July 20, 2015).*

Our Office has been in contact with the Saluda County Attorney concerning this matter. A copy of this opinion will be provided directly to them for their consideration.

Sincerely,

  
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David S. Jones  
Assistant Attorney General

REVIEWED AND APPROVED BY:

  
\_\_\_\_\_  
Robert D. Cook  
Solicitor General