



ALAN WILSON
ATTORNEY GENERAL

September 19, 2023

The Honorable Leon D. "Doug" Gilliam
Member
South Carolina House of Representatives
3347 Buffalo-W. Springs Highway
Buffalo, South Carolina 29321

Dear Representative Gilliam:

We received your letter requesting an expedited opinion of this Office concerning the enforcement of noise and nuisance ordinances by the City of Clinton (the "City"). You included section 50-80 from the City of Clinton Code of Ordinances with your letter, which you provide as follows:

Sec. 50-80. – Creating a nuisance.

Whenever any business concern or the inmates, occupants or owners of any house or premises in the city shall so improperly conduct themselves, their business or their premises as to become a nuisance to the adjacent neighbourhood, or detrimental to the interests of the same and **shall be reported** to the municipal judge **by three or more responsible citizens of the immediate neighbourhood**, then it shall be lawful for the municipal judge to cause the offending parties to be brought before him for trial, and upon conviction, the offending parties shall each be subject to punishment as provided in section 1-14 (Emphasis Supplied).

(Code 1977, § 17-102; Code 1995, § 50-137)

Specifically, you ask the following questions:

First, can the City of Clinton, under current law in our state, refuse to enforce its ordinance until three responsible citizens report an ordinance violation?

Second, can the City of Clinton limit such reporting to responsible citizens only? If they can, in your opinion, then who determines what constitutes a "responsible citizen"?

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Third, under existing state law, can the City of Clinton require a petition be submitted to their municipal court judge? Does doing so require a municipal court judge to exceed the authority they are granted under state law?

Law/Analysis

First, you inquire whether the City of Clinton (the “City”) may choose not to enforce the ordinance until three responsible citizens report an ordinance violation. We believe it is within the City’s discretion to decide whether to enforce its own ordinances. Pursuant to South Carolina law, governmental entities are “not liable for a loss resulting from . . . (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies” S.C. Code Ann. § 15-78-60 (emphasis added). As stated by our Supreme Court in Adkins v. Varn, 312 S.C. 188, 192, 439 S.E.2d 822, 824 (1993), “[t]he statute clearly exempts from liability any loss resulting from the failure to enforce an ordinance” As such, the decision whether to enforce a particular ordinance is within the province of the City.

Next, you inquire as to whether the City can limit reporting of violations to “responsible citizens” and who determines what constitutes a “responsible citizen”? To answer these questions, we must consider the validity of the ordinance. As we stated in 2009,

we must begin with the presumption that ordinances are presumed valid and enforceable and will not be struck down by a court unless they are “palpably arbitrary, capricious or unreasonable.” U.S. Fidelity & Guar. Co. v. City of Newberry, 257 S.C. 433, 438-39, 186 S.E.2d 239, 241 (1972) (citations omitted). Our courts employ a two-step process to determine the validity of a local ordinance. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

The first step is to ascertain whether the county had the power to enact the ordinance. If the state has preempted a particular area of legislation, then the ordinance is invalid. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the county had the power to enact the ordinance, then the Court ascertains whether the ordinance is inconsistent with the Constitution or general law of this state.

South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006).

Op. Att’y Gen., 2009 WL 1968616 (S.C.A.G. June 12, 2009).

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As such, we must begin with the presumption that the City’s ordinance is valid and enforceable. Section 5-7-30 of the South Carolina Code (Supp. 2022) provides the following authority to municipalities:

Each municipality of the State, in addition to the powers conferred to its specific form of government, 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
....

S.C. Code Ann. § 5-7-30. Section 5-7-10 of the South Carolina Code (2004) and section 17 of article VIII of the South Carolina Constitution (2009) instruct us to liberally construe this authority. See S.C. Code Ann. § 5-7-10 (“The powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities.”); S.C. Const, art. VIII, § 17 (“The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.”).

We believe a court likely would find enacting an ordinance to prohibit nuisances is “necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government” This determination is consistent with prior opinions of this Office finding local governments may regulate nuisances. Ops. Att’y Gen., 2021 WL 1832300 (S.C.A.G. Mar. 1, 2021) (stating “we believe Richland County has the power to adopt an ordinance regulating nuisances.”); 2018 WL 1324038 (S.C.A.G. Mar. 9, 2018) (“Cities and counties in South Carolina are . . . empowered to adopt public nuisance ordinances. This authority falls generally within the police power of these political subdivisions.”); 2008 WL 2614993 (S.C.A.G. June 24, 2008) (stating “litter control and regulation of nuisances falls within a county’s authority to enact ordinances affecting health and general welfare.”). Accordingly, we believe the City likely had authority to enact an ordinance to prohibit nuisances.

But we must also consider whether the ordinance runs afoul of state law. In your letter, you expressed concern for whether requiring three or more “responsible citizens” to report a nuisance violates a provision in the South Carolina Constitution prohibiting any law abridging “the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances.” S.C. Const. art. I, § 2 (2009). We are not aware of any South Carolina case law interpreting this provision regarding reporting a violation of the law. However, at least one federal court determined reporting violations of the law “is at the core of protected First Amendment speech” under the United States Constitution. Edwards v. Habib, 397 F.2d 687, 690

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(D.C. Cir. 1968). Thus, we are concerned the ordinance is only enforced upon the report of “responsible citizens.” The ordinance does not specify who is a “responsible citizen,” so potentially this term could be interpreted in a way that violates the South Carolina Constitution by restricting the right of people to petition the government.

We also believe the ordinance could be held invalid by a court on other grounds. The ordinance is violated when a person “improperly conduct[s] themselves . . . to become a nuisance to the adjacent neighborhood, or detrimental to the interests of the same” We are concerned a court could find this ordinance is unconstitutionally vague as to not satisfy due process under section 3 of article I of the South Carolina Constitution. As explained by our Supreme Court:

“The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication.” In re Anonymous Member of S.C. Bar, 392 S.C. 328, 335, 709 S.E.2d 633, 637 (2011) (citation omitted); City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (citation omitted). Consequently, a statute may be unconstitutionally vague where “(1) it does not provide fair notice of the conduct proscribed,” or “(2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed[.]” In re Gentry, 142 Mich.App. 701, 369 N.W.2d 889, 893 (1985).

S.C. Dep’t of Soc. Servs. v. Michelle G., 407 S.C. 499, 505, 757 S.E.2d 388, 392 (2014). Improper conduct, such that it becomes a nuisance, could include a variety of behavior leaving the City’s residents to guess as to what it means and what behaviors violate the ordinance. Therefore, we believe a court could find the ordinance does not provide notice as to what conduct triggers a violation and leaves unlimited discretion to the trier of fact to determine whether an offense has been committed.

Moreover, we also believe the ordinance may violate section 14 of article VIII of the South Carolina Constitution. In an opinion issued by this Office in 2021, we considered whether a county ordinance regulating nuisances violated this provision, which requires uniformity regarding the state’s criminal laws. Op. Att’y Gen., 2021 WL 1832300 (S.C.A.G. Mar. 1, 2021). We cited section 15-43-10 of the South Carolina Code pertaining to the use of buildings and places in such a way as to create a nuisance. Id.

This provision states:

(A) A person who erects, establishes, continues, maintains, uses, owns, occupies, leases, or releases any building or other place used for the purposes of lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace in this State is guilty of a nuisance; and the building, place, or the ground itself in or upon which the lewdness, assignation,

prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace is conducted, permitted, carried on, continued, or exists and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining the nuisance also are declared a nuisance and shall be enjoined and abated as provided in this chapter.

(B) As used in this section "continuous breach of the peace" means a pattern of repeated acts or conduct which either (1) directly disturbs the public peace or (2) disturbs the public peace by inciting or tending to incite violence.

(C) Nothing in this section supplants, alters, or limits a statutory or common law right of a person to bring an action in court or the right of the State to prosecute a person for a violation of a statute or common law.

Id. The county ordinance prohibited similar activities as section 15-43-10, but we noted someone violating this provision is subject to an injunction, whereas a violation of the county ordinance results in a criminal misdemeanor charge. Id. Thus, we concluded a court could find "the Ordinance seeks to make illegal acts which are legal under state law and thereby violates section 14 of article VIII." Id.

According to this ordinance, parties violating it are "subject to punishment as provided in section 1-14." City of Clinton, SC Ordinances § 50-80. Section 1-14 of the City of Clinton, SC Ordinances states:

- (a) Any person who is convicted for a violation of the ordinances of the city shall be subject to a maximum fine of not more than \$500.00 or imprisonment for not more than 30 days.
- (b) This section shall apply to violations of all ordinances of the city and for offenses falling within the jurisdiction of the courts of the city that are not otherwise regulated by the South Carolina Code of Laws.

Subsection(a) of the penalty indicates, just like the ordinance considered in our 2021 opinion, a violation results in a criminal penalty. Our state's nuisance law only calls for an injunction. Therefore, just as we concluded in our 2021 opinion, a court could find "the [o]rdinance seeks to make illegal acts which are legal under state law and thereby violates section 14 of article VIII." Op. Att'y Gen., 2021 WL 1832300 (S.C.A.G. Mar. 1, 2021).

Nevertheless, we must keep in mind ordinances are presumed constitutional, and their unconstitutionality must be proven beyond a reasonable doubt. Peoples Program for Endangered Species v. Sexton, 323 S.C. 526, 532, 476 S.E.2d 477, 481 (1996). Moreover, only a court, not

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this Office, may declare an ordinance invalid. Op. Att'y Gen., 1985 WL 259116 (S.C.A.G. Jan. 29, 1985). Therefore, we advise this ordinance will remain enforceable until and unless a court rules otherwise.

Next, you inquire as to whether under state law the City can require a petition be submitted to a municipal court judge and whether this would cause the municipal court judge to exceed his or her authority? Section 14-25-45 of the South Carolina Code (2017) gives municipal court judges the following statutory authority:

Each municipal court shall have jurisdiction to try all cases arising under the ordinances of the municipality for which established. The court shall also have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates. The court shall have the power to punish for contempt of court by imposition of sentences up to the limits imposed on municipal courts. The court shall have no jurisdiction in civil matters.

While municipal courts have jurisdiction to try cases, we do not find authority for them to bring criminal charges other than for contempt. As we stated in a 2002 opinion, "A Municipal Court's subject matter jurisdiction over a criminal matter is obtained through the issuance of an arrest warrant or uniform traffic ticket." Op. Att'y Gen., 2002 WL 1925748 (S.C.A.G. July 1, 2002) (citing State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974)). Our Supreme Court goes further instructing, "except in the case of contempt of court, it is judicial misconduct for a judge to initiate criminal charges." In re Newberry Cnty. Magistrate Eng., 367 S.C. 297, 307, 625 S.E.2d 919, 924 (2006).

In a 1997 opinion discussing whether municipal courts can issue advisory opinions, we explained municipal courts' authority as follows:

The municipal courts fall within the unified judicial system, Pickens v. Schmitz, 297 S.C. 253, 376 S.E.2d 271 (1989) and within the doctrine that such courts shall exercise "judicial power" only. Cf. State v. Whittington, 278 S.C. 661, 301 S.E.2d 134 (1983).

Moreover, Art. I, § 8 mandates that each of the three branches of government be kept separate. Such Section provides that

[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Op. Att'y Gen., 1997 WL 783371 (S.C.A.G. Oct. 20, 1997). "Under the separation of powers doctrine . . . the Executive Branch is vested with the power to decide when and how to prosecute

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a case." State v. Thrift, 312 S.C. 282, 291, 440 S.E.2d 341, 346 (1994). Thus, in addition to our belief that a municipal court judge does not have authority to bring charges against someone for violating an ordinance, we also believe allowing a municipal court judge to initiate the prosecution of someone who violates the City's nuisance ordinance may violate the separation of powers doctrine.

Conclusion

As explained above, it is within the City's discretion as to whether it seeks enforcement of a City ordinance and it cannot be held liable for failing to do so. However, we have some concerns as whether the City's nuisance ordinance, which limits a municipal court's jurisdiction to hear violations until it receives reports of a violation from "three or more responsible citizens," violates state law including the right to petition the government in section 2 of article I of the South Carolina Constitution. We are also concerned this ordinance violates due process and may run afoul of section 14 of article VIII of the South Carolina Constitution. Furthermore, we are troubled by the fact the ordinance gives authority to municipal court judges to initiate a case against a defendant, which is not permitted under state law and may violate the separation of powers doctrine. Nevertheless, we must presume an ordinance enacted by the City is valid and enforceable unless and until a court declares otherwise.

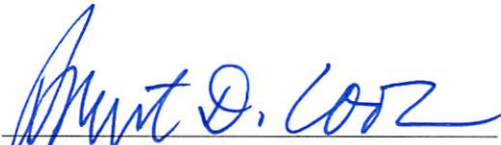
Additionally, in our review of the City's Code of Ordinances we note other ordinances aimed at preventing nuisances, specifically those contained in sections 50-181 et seq.. These ordinances provide a separate set of requirements including reporting requirements. While we do not opine on the validity of these ordinances, we note that many of the infirmities pointed out in our analysis of section 50-80 do not exist under these ordinances.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General