THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case Number: 2020-CP-10-03549

Appellate Case Number: 2021-000105

Fred Holland Realty, Inc., and LaJuan Kennedy, ... Appellants,

v.

The City of Folly Beach,.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from the enforcement of the City of Folly Beach's Emergency Ordinance No. 06-20, dated April 6, 2020 and adopted in response to the generational pandemic created by COVID-19. Respondent City of Folly Beach's Appellate Brief in Appeal to Circuit Court ("Folly Beach Brief"), Exhibit No. 3 ("Emergency Ordinance"), Record on Appeal ("RA") 218-21. Among other things, the Emergency Ordinance banned new check-ins for all short-term rentals:

> 11. Starting on April 7, 2020 at 9:00 a.m., no new check-ins are permitted regardless of length of stay, until May 31, 2020. Visitors currently checked-in may remain until the end of their existing reservation.

Emergency Ordinance, Folly Beach Brief, Exhibit No. 3, RA 220.

On April 14, 2020, the City's License Official, Aaron Pope, issued a Notice of Violation and Assessment of Civil Fine to Fred Holland. Notice of Violation, Exhibit No. 8 to Folly Beach's Brief, RA 237-38. According to the Notice, Fred Holland violated Emergency Ordinance 06-20 for allowing a new short-term rental check-in at 403 West Ashley Avenue, Folly Beach, on April

14, 2020. The Notice of Violation assessed a civil fine of $500.00 for each day that the renters remained at the address. The City agreed to cap this accumulating fine at $2,500.

The Emergency Ordinance adopted the City's existing business license enforcement procedures for enforcement and appeals of violations of the Emergency Ordinance:

> 13. Any failure to comply with this ordinance, including efforts to circumvent this ordinance, may be penalized **a) as a civil infraction pursuant to provisions of the City of Folly Beach Code of Ordinances, including Section 110.17 allowing for suspension or revocation of business license may result in the loss of a business license or other measures,** or b) as a violation of S.C. Code Section 16-7-10 (Illegal acts during state of emergency, or c) any other penalties provided by State law, including penalties granted pursuant to Executive Orders issued by the South Carolina Governor. In addition, the Governor has authorized cities to seek an injunction, mandamus, or other appropriate legal action in the courts of the State."

Emergency Ordinance, Section 13, Folly Beach Brief, Exhibit No. 3 (emphasis added), RA 220.

As stated in Section 13 of the Emergency Ordinance, infractions of the Emergency Ordinance were punishable by civil fine, not by criminal penalties. Emergency Ordinance, Section 13, Folly Beach Brief, Exhibit No. 3, RA 220.

Fred Holland requested an administrative review of the Notice of Violation on May 7, 2020. Fred Holland Administrative Appeal, Exhibit No. 9 to Folly Beach Brief, RA 239.

The appeal was heard by the City's Hearing Officer, Christine Varnado, in accord with the Folly Beach Code of Ordinances, Section 110.18, as adopted by the Emergency Ordinance. On July 17, 2020, after briefing, the Hearing Officer issued an initial order ruling that the Emergency Ordinance was enforceable in that 1) the City had authorization to issue the Emergency Ordinance, 2) the Emergency Ordinance was not preempted by the Governor's Executive Order, and 3) the Emergency Ordinance did not criminalize otherwise legal conduct. July 17, 2020 Hearing Officer Order, RA 201-07.

An administrative hearing before Judge Varnado was held on July 30, 2020 to determine

if Fred Holland violated the Emergency Ordinance. Fred Holland presented three witnesses, was given the opportunity to cross the City's witnesses, and introduced 16 exhibits. On August 10, 2020, the Hearing Officer issued a Final Order finding that Fred Holland did violate the Emergency Ordinance, and that the subject renters remained at 403 West Ashley for more than five nights, thus supporting the $2,500 fine issued by the City's License Official. August 10, 2020 Hearing Officer Final Order, RA 208-17.

On August 14, 2020, Fred Holland appealed the Hearing Officer's Orders to the Circuit Court for Charleston County.[1] Notice of Appeal to Circuit Court, RA 490-92. The Hearing Officer filed her return on August 31, 2020. Return of Hearing Officer, RA 487-89. Fred Holland filed its Appellate Brief in the Circuit Court on November 2, 2020. Fred Holland Appellate Brief in Circuit Court, RA 53-71. Folly Beach filed its Circuit Court Appellate Brief on November 3, 2020. Folly Beach Appellate Brief in Circuit Court, RA 169-99. Folly Beach also submitted a Record on Appeal to the Circuit Court on November 4, 2020, which included Folly Beach's Memorandum in Opposition to Fred Holland's Arguments on Alleged Preemption and Constitutional Infirmity of the Emergency Ordinance, the briefing before the City's Hearing Officer. Folly Beach Record on Appeal to Circuit Court, RA 276-371.

On November 6, 2020, the appeal to the Circuit Court was heard by the Honorable Jennifer B. McCoy. Circuit Court Hearing Transcript, RA 19-52. On December 11, 2020 Judge McCoy issued a Form 4 Order affirming the Hearing Officer's rulings and directing Folly Beach to submit a proposed order. Form 4 Order, RA 493-94. On January 8, 2021, Judge McCoy entered her order

[1] "When a judgment is rendered by a magistrates court, by the governing body of a county **or by any other inferior court or jurisdiction**, save the probate court, the appeal shall be to the circuit court of the county wherein the judgment was rendered . . ." S.C. Code Ann. § 18-7-10 (1976) (emphasis added).

affirming the Hearing Officer's rulings and entering judgment against Fred Holland in the amount of $2,500. Circuit Court Order, RA 1-18.

This appeal followed.

STANDARD OF REVIEW

In general, "[i]n an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Temple v. Tec–Fab, Inc.*, 381 S.C. 597, 675 S.E.2d 414, 415 (2009). "The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.*

The Court of Appeals' review of an appeal to the Circuit Court, especially where the Circuit Court judge has affirmed the ruling of a lower court, is particularly circumscribed and generally limited to corrections of errors of law. *Hadfield v. Gilchrist*, 343 S.C. 88, 538 S.E.2d 268, 271 (Ct. App. 2000) ("Unless we find an error of law, we will affirm the judge's holding if there are any facts supporting his decision."); *Stephens v. Wheeler*, 167 S.C. 522, 166 S.E. 727, 728 (1932) ("[Q]uestions of fact as found by the magistrate and concurred in by the circuit judge, which, under many decisions of this court, cannot be considered."); *Brown v. Missouri State Life Ins. Co.*, 136 S.C. 90, 134 S.E. 224, 224 (1926) ("This court cannot consider, on appeal from magistrate's court, a question of fact. . . . Where a finding by the circuit court on appeal from magistrate [court] is supported by any evidence, it is final.") (internal citations omitted).

As stated by the Supreme Court:

> The conclusion of the circuit judge, who has the right to review all the facts, on appeal from a magistrate's court, for the purpose of determining the justice of the case, that the parties have had a fair trial in the inferior court, and that substantial justice has been done, should be given more weight in this court than almost anything else in the consideration of appeals in cases originally heard in the courts of magistrates.

Westbrook v. Jefferies, 173 S.C. 178, 175 S.E. 433, 435 (1934) (quoting *Ward v. Railway Company*, 155 S.C. 54, 151 S.E. 904, 905 (1930)).

With regards to the Hearing Officer's rulings on the validity of Emergency Ordinance 06-20, such ordinances are presumed valid. The Home Rule Act grants broad powers to Folly Beach, and "a presumption of validity attaches to all legislation, especially legislation relating to police power." *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662, 664 (1990); *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 694 S.E.2d 213, 215 (2010) (An ordinance "is a legislative enactment and is presumed to be constitutional."). The exercise of police power is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose. *Id.*

The South Carolina Constitution confirms the broad powers granted under Home Rule are to be liberally construed in favor of the local government:

> 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.

S.C. Const. art. VIII, § 17.

In reviewing the discretionary decision of a legislative body, our courts have been hesitant to substitute their judgment for that of elected representatives. *McSherry v. Spartanburg County Council*, 371 S.C. 586, 641 S.E.2d 431, 434 (2007). "When the city council of a municipality has acted after considering all of the facts, this court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion." *Gay v. City of Beaufort*, 364 S.C. 252, 612 S.E.2d 467, 468 (Ct.App. 2005).

FACTS

The relevant facts of this appeal are not in dispute. Fred Holland manages rental properties on Folly Beach. On March 19, 2020, Fred Holland rented 208 East Ashley Avenue, Folly Beach to a family from Hanahan, South Carolina. The check-out date was April 14, 2020. First Reservation Sheet, Page 1, Exhibit No. 5 to Folly Beach Brief, RA 230. Because the rental was shorter than 30 days, it was considered a "short-term rental" under City of Folly Beach Ordinance Section 117.01 ("SHORT TERM RENTALS. Residential dwellings rented for less than 30 days, used in a manner consistent with the residential character of the dwelling.").

On March 28, 2020, during the renters' stay at 208 East Ashley, the City of Folly Beach passed an Emergency Ordinance banning all new check-ins at short-term rentals on Folly Beach:

> 11. Starting on March 29, 2020 at 9:00 a.m., no new check-ins are permitted at any short-term rental, hotel, or other overnight accommodation. **Visitors currently checked-in may remain until the end of their existing reservation**.

March 28, 2020 Emergency Ordinance, Exhibit No. 10 to Folly Beach Brief, RA 245-46 (emphasis added). Under the plain terms of the March 28, 2020 Emergency Ordinance, the renters could stay at the rental until the end of their existing reservation, April 14, 2020, but could not make a new reservation.

The family staying at 208 East Ashley Avenue decided they wanted to continue their stay on Folly Beach past their check-out date of April 14. On April 1, 2020, the family made a second reservation with Fred Holland at a new property, 403 West Ashley Avenue, with a new rental rate, and new rental term. Second Reservation Sheet, Exhibit No. 6 to Folly Beach Brief, RA 233-34; Fred Holland Appeal, Paragraph 6, Exhibit No. 9 to Folly Beach Brief, RA 241-42. The second reservation was for 17 days from April 13 to April 30. Fred Holland accepted this new reservation even though new short-term rental check-ins were banned at that time.

On April 6, 2020, the City of Folly Beach passed an Amended Emergency Ordinance 06-20 (the "Emergency Ordinance") that barred *all* new check-ins (not just short-term rentals) at any overnight accommodation for any length of stay starting on April 7, 2020:

> 11. Starting on April 7, 2020 at 9:00 a.m., no new check-ins are permitted regardless of length of stay, until May 31, 2020. Visitors currently checked-in may remain until the end of their existing reservation.

Emergency Ordinance, Folly Beach Brief, Exhibit No. 3; RA 220.

Fred Holland checked the Hanahan family into its new rental at 403 West Ashley Avenue on April 13, 2020, after Folly Beach's check-in ban went into effect. Fred Holland Appeal, Section 6, Exhibit No. 9 to Folly Beach Brief; RA 241-42. The Second Reservation Sheet generated by Fred Holland confirms that the new reservation was for a new property, at a new rental rate, for a new time period. Second Reservation Sheet, Exhibit No. 6 to Folly Beach Brief, RA 233-34.[2] Since that check-in was after April 7, 2020, it was a violation of the Emergency Ordinance ban on new check-ins.

On April 14, 20201, Fred Holland was charged with a violation of the Emergency Ordinance and an assessment of a civil fine for allowing the new rental check-in at 403 West Ashley Avenue. Notice of Violation, Exhibit No. 8 to Folly Beach Brief, RA 237-38.

Fred Holland appealed, and the Hearing Officer ruled that the Emergency Ordinance was valid and that Fred Holland had violated it. August 10, 2020 Hearing Officer Final Order, RA

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[2] Fred Holland notes that the renting family did not want to move back home for health reasons. Fred Holland Brief, Pages 4-5. The City did not "evict" or otherwise charge the guests and would have allowed them to stay at the original property at 208 East Ashley if Fred Holland had contacted the City about the situation. Fred Holland Appeal, Section 7 (noting that City would allow renters to extend existing reservations), Exhibit No. 9 to Folly Beach Brief, RA 242. Instead, Fred Holland kicked the renters out of 208 East Ashley to make room for the owners, Fred Holland Appeal, Section 6, RA 241-42, and never came to the City to find a way to allow the family to stay without increasing the number of renters on the island.

208-17. The Circuit Court Judge on appeal also agreed that Fred Holland violated the Emergency Order. Circuit Court Order, RA 1-18.

Fred Holland mis-states the record on several matters that are, in any case, entirely irrelevant to the case at hand. Fred Holland insinuates that the Mayor governed the City by fiat or otherwise acted nefariously at the beginning of the pandemic. Although the Emergency Ordinance granted the Mayor certain powers to adopt "other protective measures," at no time did the Mayor exercise those powers. All actions taken were with the approval of City Council. Certainly, the Emergency Ordinance that Fred Holland violated was adopted by City Council in compliance with S.C. Code Ann. § 5-7-250(d). Fred Holland's repeated insinuation that the Folly Beach Mayor governed by the City by fiat is both false and entirely irrelevant to the issues at hand.

Similarly, Fred Holland repeatedly suggests that the City's COVID-19 Updates were legally binding pronouncements made by the Mayor acting alone. This assertion is both false and irrelevant. The City's COVID-19 Updates were issued by City staff, not the Mayor, to help explain the current status of the Emergency Ordinances, and how to comply with them. The Updates were explanations, not new laws. These Updates were necessitated in no small part by Fred Holland's persistent efforts to skirt the dictates of the Emergency Ordinances, such as moving renters to other properties and claiming it is not a new "check-in." There is nothing nefarious about a City attempting to help its citizens understand how the City is reacting to a generational pandemic.

Further, Fred Holland's manufactured outrage over Folly Beach's brief checkpoint and beach restrictions is particularly irrelevant to the issues at hand. The checkpoint and the City's beach restrictions were removed on March 27, 2020, COVID Update 7, RA 95, (although the State's beach restrictions remained in place) before the adoption of the Emergency Ordinance that Fred Holland violated. And, of course, Fred Holland was not charged with violating those laws.

Finally, Fred Holland's suggestion that Folly Beach did not prosecute other violators of the Emergency Ordinance is not supported by any admissible evidence in the record, was not considered relevant by either the Hearing Officer or Circuit Court Judge, and would not excuse Fred Holland's actions in any case.

ARGUMENT

I. FOLLY BEACH IS GRANTED UNEQUIVOCAL AND BROAD AUTHORITY BY STATE LAW TO ISSUE EMERGENCY ODINANCES.

> 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.

Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc., 361 S.C. 576, 606 S.E.2d 468, 470 (2004) (quoting *Hosp. Ass'n of S.C., Inc. v. Cty. of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995)).

With regards to the first step of the inquiry, Folly Beach is given broad authority to pass laws to protect public health in times of an emergency by two separate state statutes. First, the Home Rule Act, S.C. Code Ann. § 5-7-30 (1976), grants all municipalities broad powers to enact ordinances to preserve general welfare and public health:

> Each municipality . . . may enact . . . 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 (emphasis added).

"The powers of a municipality [granted under the Home Rule Act] 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. Code Ann. § 5–7–10 (2004).

"This grant of power for purposes of municipal legislation is as broad and comprehensive as it was within the power of the State to delegate. It is a grant of the sovereign police power of the State itself, limited alone (1) by the territorial confines of the municipality authorized to exercise it, and (2) by the proviso that legislation thereunder shall not be inconsistent with the laws of the State." *Charleston v. Jenkins*, 243 S.C. 205, 133 S.E.2d 242, 243 (1963). Thus, standing alone, the Home Rule Act clearly imparts Folly Beach with the police power to enact ordinances to preserve public health.

Second, municipalities are explicitly granted the right to pass special emergency ordinances to meet public emergencies affecting life, health and safety along with a procedure to follow in adopting emergency ordinances:

> (d) **To meet public emergencies affecting life, health, safety or the property of the people, [a municipal] 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 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. § 5-7-250(d) (1976) (emphasis added). Defendant Folly Beach's Emergency Ordinances have been passed in compliance with this statute. Emergency Ordinance, Exhibit No. 3 to Plaintiff's Brief, RA 218-21.

Appellant Fred Holland has argued that this is simply a procedural statute. The first sentence of Section 5-7-250(d) explicitly states that municipalities have the right to pass emergency ordinances: "To meet public emergencies affecting life, health, safety or the property

of the people, [a municipal] council may adopt emergency ordinances." S.C. Code Ann. § 5-7-250(d). By its plain terms, the statute grants Folly Beach both the power and the procedure to pass emergency ordinances.

In the context of the broad grant of power under the Home Rule Act and the explicit grant of power to pass emergency ordinances in Section 5-7-250(d), any imagined limitation on Folly Beach's police powers during a time of emergency would have to be explicit and clear. No such limitation exists either in state law or in the Governor's Executive Orders. No law states that municipalities cannot exercise emergency powers. No law states that municipalities cannot restrict access during a state of emergency. No law states that municipalities cannot regulate short-term rentals. Rather, the general assembly has seen fit to grant cities a procedure to utilize its emergency powers.

To be clear, the City's police powers are derived from the State. *Jenkins,* 133 S.E.2d 242 at 243 ("Governmental authority known as the police power is an inherent attribute of state sovereignty. It can belong to cities or other subordinate government agencies or divisions of the state when and as conferred by the state."). Thus, the General Assembly and possibly the Governor, if they wished, could explicitly limit the City's police powers. No such limitation has been adopted.

Governor McMaster has steadfastly refused to impose any broad restriction on municipalities' emergency powers.[3] Nor has the state legislature. Without an explicit repeal of

[3] Governor McMaster recently demonstrated that he is fully capable of issuing explicit limitations on the emergency powers of municipalities. Executive Order No. 2021-23, Section 2.D, adopted on May 11, 2021, explicitly bans most municipal mask ordinances:

> For the foregoing reasons, to the extent any county, municipality, or political subdivision of this State continues to impose any ordinance, order, or other measure that requires the general public within its jurisdiction to wear a Face Covering and has relied in whole or in

the powers granted by the Home Rule Act and Section 5-7-250(d), the City is fully within its rights to enact emergency ordinances and to enforce its police powers, including the indisputable power to regulate short-term rentals.

It is beyond question that Folly Beach's Emergency Ordinance limiting short-term rentals for a brief period of time was enacted to protect the public health. In a typical year, 1 million visitors from outside the Charleston County area stay overnight on Folly Beach. *See Folly Beach 2014 Economic Impact Study* (College of Charleston Office of Tourism Analysis).[4] Managing and temporarily reducing those visitors at the peak of a generational pandemic created by a highly infectious disease susceptible to social transmission is undoubtedly a public health concern of the highest order. Appellant fails to offer a scintilla of scientific or medical evidence that Folly Beach's restrictions are not an appropriate measure to address this pandemic.[5]

II. FOLLY BEACH'S EMERGENCY ORDINANCE DOES NOT CONFLICT WITH GOVERNOR MCMASTER'S EXECUTIVE ORDER NO. 2020-19.

As pointed out above, neither Governor McMaster nor the state legislature have attempted to put any broad limitations on, or preemption of, municipalities' emergency powers derived from

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> part on the undersigned's prior authorization or declarations of a State of Emergency as part of the basis for imposing, or for the duration of, a Face Covering requirement, **I have determined and do hereby declare that any such ordinance, order, or other measure is invalid and preempted** in accordance with Section 10(C) of this Order. (emphasis added)

So Governor McMaster has recently banned most local mask ordinances, but previously he never issued any such preemption declaration for municipal emergency ordinances addressing short-term rentals, much less a broad preemption of all municipal emergency ordinances.

[4] https://www.cityoffollybeach.com/wp-content/uploads/2015/04/Folly-Beach-Econ-Impact-Exec-Summary.pdf

[5] Fred Holland did not argue before the Hearing Officer that the adoption of the Emergency Ordinance was arbitrary or without any factual support, so Folly Beach did not address that issue at the "trial court" level. However, if there is any question regarding the need for action during a global generational pandemic, Folly Beach could have presented scientific articles, data, affidavits, and statements from qualified experts all supporting Folly Beach's actions during this pandemic.

the Home Rule Act and S.C. Ann. § 5-7-250(d) during this generational pandemic. There have certainly been no limits placed on Folly Beach's regulation of short-term rentals.

The Governor's Executive Orders have all included language banning local laws that *conflict* with his Executive Orders:

> If or to the extent that any political subdivision of this State seeks to adopt or enforce a local ordinance, rule, regulation, or other restriction **that conflicts with this Order**, this Order shall supersede and preempt any such local ordinance, rule, regulation, or other restriction.

Executive Order No. 2020-19, Section 3(B), Exhibit No. 4 to Folly Beach Brief; RA 229 (emphasis added). Executive Order No. 2020-19, which was in place at the time that Fred Holland was charged with a violation of Folly Beach's Emergency Ordinance, preempted any local ordinance that ***conflicts*** with the Executive Order. The Executive Order did not declare a broad field preemption of all local emergency ordinances addressing short-term rentals.

Folly Beach's Emergency Ordinance banning all new check-ins does not conflict with the Governor's Executive Order No. 2020-19 as a matter of fact and as a matter of law.

A. THE GOVERNOR'S EXECUTIVE ORDER NO. 2020-19 PROHIBITED CHECK-INS FROM ALL AREAS UNDER A CDC TRAVEL ADVISORY, WHICH INCLUDES THE ENTIRETY OF THE UNITED STATES.

Governor Henry McMaster's Executive Order No. 2020-19, dated April 3, 2020, Exhibit No. 4 to Folly Beach Brief; RA 222-29, banned new reservations or bookings at short-term rentals:

> B. I hereby order and direct that effective Friday, April 3, 2020, at 5:00 p.m., any and all individuals, entities, or establishments engaged in the provision of short-term rentals, vacation rentals, or other lodging accommodations or operations in exchange for consideration (collectively "Lodging"), as set forth below, in the State of South Carolina are prohibited from making or accepting new reservations or bookings **from or for individuals residing in or travelling from any country, state, municipality, or other geographic area subject to or identified in a CDC travel advisory or other CDC notice as a location with extensive community transmission of COVID-19**, to include the Tri-State Area (consisting of the States of New York, New Jersey, and Connecticut).

Executive Order No. 2020-19, Section 1(B), Exhibit No. 4 to Folly Beach Brief, RA 227 (emphasis

added).

Executive Order No. 2020-19 was in place when Folly Beach passed its Emergency Ordinance and when Fred Holland violated that Emergency Ordinance. Fred Holland would have the Court focus on the non-exclusive reference to the "Tri-State Area," but the Executive Order is, in fact, much broader. The Executive Order bans rentals to all persons from any area "identified in a CDC travel advisory or other CDC notice as a location with extensive community transmission of COVID-19." This language brings the Executive Order in line with the Folly Beach Emergency Ordinance because at the time the CDC had issued travel advisories for the United States as a whole.

On April 7, 2020, when Folly Beach's Emergency Ordinance went into effect, the CDC advised travelers to avoid all nonessential travel in the United States and also advised travelers to follow all state and local rules:

> # Coronavirus and Travel in the United States
>
> **Avoid all nonessential travel in the United States**
>
> **CDC recommends you stay home and avoid all nonessential travel within the United States. This includes travel of any distance (across town, state and country) by air, bus, train and car.** COVID-19 is spreading in every state, and travel increases your chances of getting and spreading the virus. This guidance does not apply to workers in critical infrastructure industries.
>
> The State or local government where you are may have issued orders or provided guidance more restrictive than these federal guidelines. In that case, **follow the state or local orders and guidance.**

CDC, "Coronavirus and Travel in the United States," April 7, 2020, Exhibit No. 12 to Folly Beach

Brief, RA 252 (emphasis added).[6]

In addition, the CDC's website makes clear that all countries, including the United States, were under a travel advisory during the pandemic. CDC, "COVID-19 Travel Recommendations by Country," Exhibit No. 13 to Folly Beach Brief, RA 253-54.[7]

Thus, every country, every state, and every locality, including South Carolina and Hanahan, where the renters came from, were under a CDC travel advisory. Indeed, the CDC additionally recommended compliance with all local orders, which would include Folly Beach's Emergency Ordinance.

The Executive Order No. 2020-19 banned short-term rentals to anyone from a location under a CDC travel advisory. Since the CDC had placed the entire country under a travel advisory (and adopted local orders regarding same), the Governor's Executive Order applied to all short-term rentals to persons from South Carolina and Hanahan. In other words, the Governor banned all short-term rentals by the plain language of his Executive Order No. 2020-19 due to its adoption of the broad advisories issued by the CDC. Thus, Executive Order No. 2020-19 and Folly Beach's Emergency Ordinance were in complete accord and banned the exact same activity: no short-term rental check-ins for any person from a location under a CDC travel advisory, which covered the entire country at the time. Although the language used was different, Governor McMaster's Executive Order and Folly Beach's Emergency Ordinance did not differ at all in their impact, but rather imposed identical restrictions.

Rather than prohibiting or preempting local efforts, the Governor in fact authorized

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[6] https://web.archive.org/web/20200407122127/https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html (archived website from April 7, 2020).

[7] https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html The archived website would not display the map on this page, but this page has not changed since the pandemic began in March.

municipalities to enforce the Governor's orders. Executive Order No. 2020-19, Section 2.A, Exhibit No. 4 to Folly Beach Brief, RA 228, explicitly authorized municipalities and their law enforcement officers "to do whatever may be deemed necessary to maintain peace and good order during the State of Emergency and to enforce the provisions of any Order issued by the undersigned in connection with same." The Executive Order also authorized any city official "to enforce the provisions of this Order and any prior or future Orders issued in connection with the present State of Emergency, as necessary and appropriate, in the courts of the State by injunction, mandamus, or other appropriate legal action."

Thus, in addition to the Home Rule Act and S.C. Ann. § 5-7-250(d), Folly Beach relied upon the authority granted by the Governor's Executive Orders to pass emergency ordinances and ban short-term rentals for a brief period during the height of the COVID pandemic.

B. EVEN IF FOLLY BEACH'S EMERGENCY ORDINANCE EXPANDED THE SHORT-TERM RENTAL RESTRICTIONS CONTAINED IN THE GOVERNOR'S EXECUTIVE ORDER, THE EMERGENCY ORDINANCE AND EXECUTIVE ORDER WOULD NOT BE IN CONFLICT UNDER SOUTH CAROLINA LAW.

Even if the Court ignores the fact that Executive Order No. 2020-19 and Folly Beach's Emergency Ordinance both ban all short-term rental check-ins, as a matter of law, a local ordinance can expand on the restrictions of a state law without being in conflict with that state law. "Conflict preemption occurs when the [local] ordinance hinders the accomplishment of the [state] statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." *S.C. State Ports Authority v. Jasper Cty.*, 368 S.C. 388, 629 S.E.2d 624, 630 (2006) (citations omitted). Generally, additional local regulations that merely supplement state law does not result in a conflict. *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196, 199 (2002) (citations omitted).

> [I]n 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 . . . If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand."

Town of Hilton Head, 397 S.E.2d at 664 (*quoting McAbee v. Southern Ry. Co.*, 166 S.C. 166, 164 S.E. 444, 445 (1932)).

In *Jenkins*, 133 S.E.2d at 242, the Court determined that a city ordinance which prohibited businesses from on-premises service or consumption of any wines or malt liquors between 1:30 a.m. and 7:30 a.m. did not conflict with a state statute making it unlawful to sell wine or beer between midnight Saturday and sunrise Monday. Noting the ordinance merely imposed additional requirements on commercial establishments in the city, the Court concluded the ordinance was neither inconsistent nor irreconcilable with the State statute, and its passage was a proper and valid exercise of the city's police power. *Id.*

In *Denene*, the City of Charleston banned on-premises consumption of alcohol between 2:00 a.m. and 6:00 a.m. on Mondays through Saturdays. At the time, S.C. Code Ann. § 61-4-120 (1976) prohibited the sale of alcohol "between the hours of twelve o'clock Saturday night and sunrise Monday morning . . . Municipal ordinances in conflict with this section are unenforceable." *Denene*, 574 S.E.2d at 199. The Court found that the City's ban did not conflict with the state prohibition because "additional regulation to that of State law does not constitute conflict therewith." *Id.* In other words, additional regulations are "neither inconsistent nor irreconcilable with the State statute." *Id.*

Fred Holland seems to believe that if a local ordinance is not identical to a state law, it is in conflict with that state law. That is not how conflict preemption works. Nothing in Defendant Folly Beach's Emergency Ordinance conflicts with state law or the Governor's Executive Orders.

Both the Executive Orders and Folly Beach's Emergency Ordinance can be enforced at the same time without conflict. The Executive Order at the very least barred all check-ins of visitors from the "Tri-State Area." Folly Beach's Emergency Ordinance barred all check-ins of visitors from any state. Thus, the Folly Beach Emergency Ordinance merely imposed a broader ban. It is not in conflict with the Executive Order because both the Executive Order and Emergency Ordinance can be enforced without conflict. As such, there is no conflict and no preemption of the City's Emergency Ordinance by the Governor's Executive Order.

III. FOLLY BEACH'S EMERGENCY POWERS ARE NOT PREEMPTED BY STATE LAW.

Fred Holland also argues that the City's Emergency Ordinance is preempted by state law pursuant to either implied or explicit field preemption. Fred Holland has specifically cited South Carolina Code Ann. § 25-1-440(a) (1976), which grants the Governor emergency powers, as preempting the entire field of emergency actions.

This argument is directly refuted by the Home Rule Act and S.C. Code Ann. § 5-7-250(d), which unequivocally grants Folly Beach the power to pass emergency ordinances "[t]o meet public emergencies affecting life, health, safety or the property of the people, [a municipal] council may adopt emergency ordinances." It is hard to imagine how explicit field preemption, much less implied field preemption, can arise when there is a specific grant of authority to municipalities to pass emergency ordinances. Certainly, Fred Holland has never explained how this could occur.

To be clear, Section 25-1-440 does not contravene, repeal or limit Section 5-7-250(d). Nothing in Section 25-1-440 restricts the emergency powers of local governments. Nothing in Section 25-1-440 states that the Governor's emergency powers belong exclusively to the Governor. Nothing in Section 25-1-440 preempts emergency powers held by local governments. Fred Holland's argument points to no language in Section 25-1-440 preempting local law and

contravening Section 5-7-250(d). As pointed out above, stating that municipalities cannot pass ordinances that *conflict* with state law is not the equivalent of a blanket preemption. *Denene*, 574 S.E.2d at 199.

A. NO EXPLICIT FIELD PREEMPTION

Field preemption can arise either explicitly or implicitly. First, preemption can arise explicitly when the state legislature says local governments are preempted. *Sandlands C & D, LLC v. Cty. of Horry*, 394 S.C. 451, 716 S.E.2d 280, 286 (2011). "Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." *S.C. State Ports Authority*, 629 S.E.2d at 628.

The General Assembly has not expressly preempted the field of emergency ordinances. Fred Holland has identified no language expressly prohibiting Folly Beach from enacting emergency ordinances. If the General Assembly had wanted to preempt the entire field of emergency ordinances and measures, it could have easily done so by law. Indeed, the South Carolina Code is replete with such actions and language. *See, e.g.*, S.C. Code Ann. § 46-9-220 (1976) ("Local ordinances pertaining to the subject matter assigned by law to the commission [pesticide regulations], whether or not in conflict, are void."); *Barnhill v. City of North Myrtle Beach*, 333 S.C. 482, 511 S.E.2d 361 (1999) (finding preemption of regulating watercraft on navigable waters where statute required local laws to be identical to statute); *Wrenn Bail Bond Service, Inc. v. City of Hanahan*, 335 S.C. 26, 515 S.E.2d 521, 522 (1999) (finding preemption of the field of professional licensing for bail bondsmen through a statute providing, "[no] license may be issued to a professional bondsman or runner except as provided in this chapter").

Instead of preempting the field, the legislature has explicitly authorized local authorities to enact their own temporary emergency ordinances. S.C. Code Ann. § 5-7-250(d). If the legislature

had intended a blanket preemption of emergency powers, it would not have passed a law granting those powers to municipalities along with the procedure to enact them.

Similarly, the Governor has not expressly preempted all local emergency ordinances. Governor McMaster has issued almost 60 Executive Orders related to the COVID-19 pandemic, and not a single one says municipalities cannot enact emergency ordinances pursuant to the Home Rule Act and S.C. Code Ann. § 5-7-250(d). Rather, the Governor has merely stated that local ordinances that *conflict* with his orders are preempted:

> If or to the extent that any political subdivision of this State seeks to adopt or enforce a local ordinance, rule, regulation, or other restriction **that conflicts with this Order**, this Order shall supersede and preempt any such local ordinance, rule, regulation, or other restriction.

Executive Order No. 2020-19, Section 3(B), Exhibit No. 4 Folly Beach Brief, RA 229 (emphasis added).

The Governor clearly knows how to preempt local emergency ordinances. In fact, the Governor has recently explicitly preempted some (but not all) municipal ordinances mandating the use of masks:

> For the foregoing reasons, to the extent any county, municipality, or political subdivision of this State continues to impose any ordinance, order, or other measure that requires the general public within its jurisdiction to wear a Face Covering and has relied in whole or in part on the undersigned's prior authorization or declarations of a State of Emergency as part of the basis for imposing, or for the duration of, a Face Covering requirement, **I have determined and do hereby declare that any such ordinance, order, or other measure is invalid and preempted** in accordance with Section 10(C) of this Order.

Executive Order No. 2021-23, Section 2.D, adopted on May 11, 2021 (emphasis added).[8]

Governor McMaster never issued any such preemption declaration for municipal

[8] https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2021-05-11%20FILED%20Executive%20Order%20No.%202021-23%20-%20Emergency%20Measures%20Regarding%20Face%20Coverings%20Vaccine%20Passports%20%20Other%20Matters.pdf

emergency ordinances addressing short-term rentals, much less a broad preemption of all municipal emergency ordinances.

If the Governor had wanted to preempt all local emergency ordinances, or even just all local emergency ordinances addressing short-term rentals, he could have done so.[9] Instead, the Governor explicitly decided to just preempt those local ordinances that *conflict* with his Executive Orders. As such, there is no explicit field preemption of local emergency ordinances, only a limited conflict preemption.

B. NO IMPLIED FIELD PREEMPTION

Similarly, there is no *implied* field preemption for many of the same reasons set forth above. Implied 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." *Sandlands*, 716 S.E.2d at 287 (quoting *S.C. Ports Authority*, 629 S.E.2d at 628). However, as pointed out in the *Sandlands* opinion where, as here, there is no explicit preemption, and where other legislation grants local governments some authority, such as the Home Rule Act and South Carolina Code Ann. § 5-7-250(d), there is no implied preemption:

> Where the General Assembly specifically recognizes a local government's authority to enact local laws in the same field, the statutory scheme does not evidence legislative intent to occupy the entire field of regulation. *See Denene, Inc. v. City of Charleston,* 352 S.C. 208, 213, 574 S.E.2d 196, 199 (2002) (stating "[i]t would have been unnecessary for the legislature to refer to municipalities' authority to regulate the hours of operation of retail sales of beer and wine if the General Assembly intended to occupy the entire field."); *AmVets Post 100 v. Richland County Council,* 280 S.C. 317, 313 S.E.2d 293 (1984) (where the language of the statute contemplated additional regulation of the game of bingo at the local level, there was not preemption). The SWPMA is silent with respect to control over the flow of local waste generated in the counties and, instead, expressly invites county regulation, planning, authority, and responsibility in the field of solid waste

[9] Indeed, there is some question as to whether Governor McMaster could preempt the entire filed of emergency ordinances in the face of the clear grant of authority to municipalities by S.C. Code Ann. § 5-7-250(d). But that is an argument for another day.

> management. *See, e.g.*, S.C. Code Ann. § 44–96–80(A), (J), (K). Therefore, we find the legislature did not intend for DHEC to occupy the entire field of solid waste management.

Sandlands, 716 S.E.2d at 288.

In this case, the General Assembly has explicitly provided that local authorities have broad powers under the Home Rule Act and can enact emergency ordinances. S.C. Code Ann. § 5-7-250(d). There can be no implied field preemption in the face of an explicit grant of authority.

In addition, the Governor has only preempted local laws that *conflict* with his Executive Orders. He has not issued an order preempting all local emergency ordinances. Thus, there is ample indication that both the General Assembly and the Governor have not impliedly preempted the entire field of emergency powers.

Many other municipalities have also concluded that they can regulate short-term rentals without conflicting with the Governor's Executive Orders. Folly Beach counsel is not aware of any of these local emergency ordinances being ruled invalid or in conflict with the Governor's Executive Orders. The City of Isle of Palms had a ban on short-term rental check-ins until May 12, 2020. Isle of Palms STR Emergency Ordinance, Exhibit No. 14 to Folly Beach Brief, RA 255-56. The City of Myrtle Beach had issued an Emergency Executive Order containing four pages of restrictions on tourist accommodations. Myrtle Beach Emergency Executive Order No. 8, Exhibit No. 15 to Folly Beach Brief, RA 257-61. Edisto Beach banned all new check-ins from March 26, 2020 through April 30, 2020. Edisto Beach Emergency Ordinance, Exhibit No. 16 to Folly Beach Brief, RA 262-63. Numerous other coastal cities have taken similar measures.

The law in South Carolina is clear that local authorities can impose additional restrictions even where the State has enacted laws. *Denene*, 574 S.E.2d at 199; *Fine Liquors*, 397 S.E.2d at 664; *Jenkins*, 133 S.E.2d at 242.

Folly Beach, like every other municipality, is entitled to regulate tourist accommodations within their city limit even during normal times. Many municipalities have placed severe permanent restrictions on short-term rentals. Indeed, the Town of Sullivan's Island, Folly Beach's neighbor to the north, has banned all short-term rentals without challenge. Code of Ordinances, Town of Sullivan's Island, Sec. 21-117. There is simply no legal basis for Fred Holland's contention that such measures violate State law or the Governor's Executive Orders.

IV. THE ATTORNEY GENERAL OPINIONS CITED BY FRED HOLLAND ARE NOT BINDING, APPLICABLE, OR PERSUASIVE.

Appellant Fred Holland has cited and quoted extensively from two South Carolina Attorney General Opinions in support of its preemption arguments. *In re Hon. Carmen R. Bunch*, S.C. A.G. Informal Opinion, 1997 WL 255961 (April 21, 1997); *In re Hon. Jeff Bradley*, S.C. A.G. Formal Opinion, 2020 WL 2044370 (March 29, 2020). In reliance on these opinions, Fred Holland argues that Folly Beach has no emergency powers in spite of the Home Rule Act and S.C. Code Ann. § 5-7-250(d). The Attorney General Opinions are not binding, not applicable to this matter, and, in any case, not persuasive.

A. ATTORNEY GENERAL OPINIONS ARE NOT BINDING.

First, the **opinions** offered by the Attorney General carry no legal weight. In the more recent Formal Opinion, *In re Hon. Jeff Bradley*, S.C. A.G. Formal Opinion, 2020 WL 2044370 (March 29, 2020) (hereinafter "Attorney General Opinion"),[10] the Attorney General expressly recognizes that his opinion does not render a municipal ordinance unconstitutional:

> However, this Office has opined on many prior occasions that a municipal ordinance is a legislative enactment and is presumed to be constitutional." *Whaley*

[10] Folly Beach will address the issues raised in this Formal Opinion rather than the earlier Informal Opinion from 1997 because both opinions raise the same legal issues but the Informal Opinion is limited to addressing whether a municipality can declare a state of emergency, whereas the later Formal Opinion is more broad and addresses measures passed during the global pandemic.

> *v. Dorchester County Zoning Bd. Of Appeals*, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999). The unconstitutionality of an ordinance 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). While 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 statutes. Thus, we have recognized that an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction. *See, e.g.*, [*In re Kenneth Gaines*, S.C. A.G. Formal Opinion], 2010 WL 1808719 (April 9, 2010).

In re Hon. Jeff Bradley, S.C. A.G. Formal Opinion, 2020 WL 2044370 *3 (March 29, 2020).

No court has found that Folly Beach's emergency ordinances, or any other municipality's emergency ordinance, are preempted by state law or otherwise barred by the State Constitution. So, this is just another opinion by an attorney working for the government, just like the opinion of counsel for Folly Beach and every other municipality that has passed an emergency ordinance during the pandemic.

B. THE ATTORNEY GENERAL OPINION IS NOT PERSUASIVE.

Second, the Attorney General Opinion is not persuasive on the issue of preemption. The Attorney General concludes that South Carolina Code Ann. § 25-1-440(a) somehow creates a field preemption on emergency powers even though there is no such language in the statute. The Emergency Powers Act nowhere states that municipalities are barred from passing emergency ordinances. Rather, the statute is completely silent on the issue of preemption. Because there is no such explicit restriction on municipalities, the Attorney General has *implied* a field preemption based on the language of Section 25-1-440(a).

In reaching its opinion, the Attorney General completely ignores South Carolina's numerous published opinions on preemption and implied field preemption. For some reason, the Attorney General cites one case on preemption from Michigan, *Walsh v. City of River Rouge*, 385 Mich. 623, 189 N.W.2d 318 (1971), which is based on an entirely different statute than South

Carolina's Emergency Powers Act.[11] The Attorney General offers no explanation as to why it would cite and rely on a Michigan preemption case when there are literally dozens of published and authoritative South Carolina opinions addressing every manner of preemption imaginable, including implied field preemption which the Attorney General appears to be advocating. Of course, the most likely reason for this glaring omission is that the South Carolina court opinions on preemption do not support the Attorney General's conclusive and bald assertion that Section 25-1-440(a) somehow creates an implied blanket preemption. *See, e.g.*, *Sandlands*, 716 S.E.2d at 288 ("Where the General Assembly specifically recognizes a local government's authority to enact local laws in the same field, the statutory scheme does not evidence legislative intent to occupy the entire field of regulation.").

Nor does the Attorney General address the impact of S.C. Code Ann. § 5-7-250(d), which directly contradicts the Attorney General's opinion that municipalities possess no emergency powers. Nor does he address the fact that nearly every municipality in the State has adopted emergency ordinances using that procedure. Nor does he address the fact that the Governor's own Executive Orders only bar local ordinances that conflict with the Executive Orders and do not seek a blanket preemption of all local emergency ordinances. Put simply, courts should not be persuaded by bald, unsupported opinions from the Attorney General that directly conflict with clear statutory law.

Further, it would appear that the Attorney General later altered his opinion on field

[11] The Michigan Supreme Court in *Walsh* actually adopted the same rule as South Carolina on whether a local statute "conflicts" with state law: "In order that there be a conflict between a state enactment and a municipal regulation both must contain either express or implied conditions which are inconsistent and 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." *Walsh*, 189 N.W.2d at 324.

preemption of local emergency ordinances. Last summer, the Attorney General issued a statement approving of local governmental entities passing emergency ordinances requiring mask use. Attorney General Wilson's Statement on Local Mask Ordinances, June 24, 2020, Exhibit No. 17 to Folly Beach Brief, RA 264-65 (http://www.scag.gov/archives/40771#ixzz6a7Mn6ux2). The Statement makes clear that it is ***not*** the Attorney General's opinion that there is an implied field-wide preemption of emergency powers, and that local municipalities do have authority to issue emergency ordinances, in apparent contradiction of the prior Attorney General Opinion.

Specifically, the Attorney General stated:

> **The only question before my office is whether a city can lawfully pass this type of ordinance? The short answer to that question is – yes, a city can pass this type of ordinance.** Our state constitution and state laws have given cities the authority to pass these types of ordinances under the doctrine of Home Rule. The basic premise behind the Home Rule doctrine is to empower local governments (i.e., towns, cities and counties) to effectively govern themselves without interference from state government. There are limits to this power.
>
> One limit to this power would be if the S.C. General Assembly were to preempt a city from passing an ordinance through some state law or specifically prohibit a city from passing an ordinance through some state law. For example, it is our position that a city cannot pass its own gun laws because a state law specifically preempts this action. **However, in this case there is no state law that preempts or prohibits a city from passing this particular ordinance.**
>
> Another limitation on cities passing these kinds of ordinances is that the ordinance cannot be arbitrary or capricious. In other words, if there were no COVID 19 pandemic or public health emergency going on a court might find the requirement to wear a mask arbitrary. That is not the case here.
>
> If there was a riot (as there was a few weeks ago) a city could pass a curfew to get control of the civil unrest. A city could require a mandatory evacuation in the event of a local flood. Normally, a city could pass an emergency order requiring people to leave an area or stay in a particular area for a period of time. An exception to this would be if the Governor issued an emergency executive order then that would preempt a city from passing a different emergency order. **This was our position two months ago when cities were passing their own emergency lock-down orders after Governor McMaster issued his state of emergency order.** That remains our position today.

> The final limitation would be if an ordinance violated a person's constitutional rights. A city has the right to pass these ordinances and the only way to know if someone's constitutional rights have been violated by these ordinances would be on a case by case basis involving very specific facts. In other words, an otherwise lawful ordinance can be applied in a way that violates someone's rights. Based on court precedent, simply requiring someone to wear a mask at the grocery store, or stop smoking in a restaurant, or be home before curfew does not constitute a violation of rights. We would need specific facts to make that determination and we do not have those facts at this time.

Attorney General Wilson's Statement on Local Mask Ordinances, June 24, 2020, Exhibit No. 17 to Folly Beach Brief, RA 264 (emphasis added).

It is difficult to reconcile the Attorney General's Statement on Local Mask Ordinances with its prior Opinion, relied on by Fred Holland, opining that there is some implied field preemption in place. If municipalities can pass an emergency ordinance on masks, there is clearly no implied field preemption on emergency measures. This is truly the only conclusion based on 1) the broad and persistent grant of authority, and 2) the utter failure of the Governor or the legislature to repeal or limit that authority.

C. THE ATTORNEY GENERAL OPINION ONLY ADDRESSES ORDINANCES PUNISHABLE AS CRIMES.

Finally, the Attorney General Opinion is not applicable here because it focuses on local emergency ordinances that criminalize behavior. In passing the April 6, 2020 Emergency Ordinance, Folly Beach, like many other municipalities, imposed civil infractions, not criminal fines, in its emergency ordinances. Emergency Ordinance, Section 13, Folly Beach Brief, Exhibit No. 3, RA 220. The City adopted civil fines to avoid the *potential* conflict under Article VIII, Section 14(5), after the South Carolina Attorney General opined that local emergency ordinances criminalizing conduct may run afoul of Article VIII, Section 14(5). *In re Hon. Jeff Bradley*, S.C. A.G. Formal Opinion, 2020 WL 2044370 *3 (March 29, 2020).

The only South Carolina cases cited in the Attorney General Opinion address the issue of

whether local emergency ordinances are in conflict with Article VIII, Section 14(5) of the South Carolina Constitution, which prohibits local governments from setting aside the State's criminal laws. Article VIII governs the power of municipalities, and Section 14 places some limits on the laws municipalities can pass:

> In enacting provisions required or authorized by this article, general law provisions applicable to **the following matters shall not be set aside [by municipal law]**:
>
> (1) The freedoms guaranteed every person; (2) election and suffrage qualifications; (3) bonded indebtedness of governmental units; (4) the structure for and the administration of the State's judicial system; (5) **criminal laws and the penalties and sanctions for the transgression thereof**; and (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.

S.C. Const. art. VIII, § 14 (emphasis added).

The reported cases cited in the Attorney General Opinion make clear that the use of civil fines removes the City's action from the purview of Article VIII, Section 14(5), which only regulates criminal penalties. For instance, the Attorney General cites *Beachfront Entertainment, Inc. v. Town of Sullivan's Island,* 379 S.C. 602, 666 S.E.2d 912, 914 (2008), which holds that municipalities can adopt local ordinances that supplement and add additional restrictions on top of state laws so long as they 1) are not preempted by any state law, and 2) do not criminalize the conduct. *See also Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264, 269 (2008) ("Because we find the Ordinance does not criminalize conduct, we hold it does not run afoul of Article VIII, section 14 of the Constitution.").

Imposition of a civil fine does not criminalize conduct. It is a civil fine and does not violate the State Constitution's requirement that municipalities cannot criminalize actions that are legal under state law.

Several other municipalities have taken a similar approach and adopted civil fines rather

than criminal fines in their emergency ordinances following the Attorney General's Opinion. *See* Edisto Beach Emergency Mask Ordinance, Exhibit No. 6 to Folly Beach's Memorandum on Preemption, RA 319-22; Myrtle Beach Emergency Ordinance, Exhibit No. 7, RA 323-27; Kiawah Emergency Ordinance, Exhibit No. 8, RA 328-31; Greenville Emergency Mask Ordinance, Exhibit No. 9, RA 332-34; Charleston Emergency Mask Ordinance, Exhibit No. 10, RA 335-38;[12] Isle of Palms Emergency Mask Ordinance, Exhibit No. 11, RA 339-45; Beaufort Emergency Mask Ordinance, Exhibit No. 12, RA 346-49. Indeed, the Municipal Association of South Carolina (MASC) has published a model mask ordinance that includes a civil infraction penalty, not a criminal penalty. MASC Model Mask Ordinance, Exhibit No. 13, RA 350-55.

Since Folly Beach is seeking to enforce a civil fine or infraction against Fred Holland, the City is not criminalizing actions that are legal under state law. Accordingly, the Emergency Ordinance does not violate South Carolina Constitution Article VIII, Section 14(5), even under the Attorney General's reasoning.

In summary, the Attorney General's Opinion on local emergency powers is not supported by South Carolina statutes or South Carolina case law and does not apply to this matter because it only implicates criminal fines. Finally, the Attorney General appears to have reversed its prior Opinion that there is a field preemption of all local emergency ordinances in any case.

[12] The City of Charleston actually calls for a $100 "infraction" not specified as civil or criminal, but the lack of potential incarceration, low fine amount, and lack of criminal language suggests it is a civil infraction. *See Mun. Ass'n of S.C.*, 606 S.E.2d at 471 ("A statute providing that on a conviction the party guilty of violating it shall be fined or imprisoned or both ordinarily contemplates a criminal proceeding only.") (quoting 36A C.J.S. *Fines* § 9 (2004)).

V. FRED HOLLAND HAS NOT PRESERVED ITS PERFUNCTORY ARGUMENT THAT FOLLY BEACH'S EMERGENCY ORDINANCE WAS "ARBITRARY AND CAPRICIOUS" OR OTHERWISE UNCONSTITUTIONAL.

Fred Holland makes a brief, unsupported argument that Folly Beach's Emergency Ordinance was "arbitrary and capricious" and unconstitutional. Fred Holland Brief, Page 18. To be clear, any argument that the Emergency Ordinance was unconstitutional (other than a violation of South Carolina Constitution Article VIII, Section 14(5) addressed above) would be a drastic expansion of this appeal and Fred Holland's prior appeals. It would represent a major pivot legally and would also open up the record to the veritable avalanche of documentation that Folly Beach relied upon in adopting its Emergency Ordinances during the height of the pandemic, including scientific articles, data, affidavits, and statements from qualified experts all supporting Folly Beach's actions during this pandemic.

Fred Holland's argument that the Emergency Ordinance was arbitrary and capricious was not incorporated in Fred Holland's original appeal to the Hearing Officer. Fred Holland Administrative Appeal, Exhibit No. 9 to Folly Beach Brief, RA 239-44. Fred Holland did not make this argument in its Memorandum on Preemption submitted to the Hearing Officer. Fred Holland Memorandum in Support of Appellant's Claim of Preemption, dated July 9, 2020, RA 162-68. The Hearing Officer did not rule on any such claim in her initial Order on Preemption. July 17, 2020 Hearing Officer Order, RA 201-07. Fred Holland did not make this argument during the trial of this matter. July 30, 2020 Transcript, RA 373-486. The issue was not addressed in the Hearing Officer's Final Order. August 10, 2020 Hearing Officer Final Order, RA 208-17. The issue was not referenced in Fred Holland's Notice of Appeal to the Circuit Court. Notice of Appeal to Circuit Court, RA 490-92.

For the first time, Fred Holland argued in its Appellate Brief to the Circuit Court that Folly

Beach's Emergency Ordinance "is contrary to the Constitution and Law of the State of South Carolina because it is in fact arbitrary and capricious." Fred Holland Appellate Brief in Circuit Court, Page 15, RA 67. The "argument" cited no case law, grossly misstates the basis for the City's actions, and attacks the City's decision to briefly set up a check point on the island during the height of the pandemic, something that has nothing to do with this appeal. This half-page "argument" is duplicated virtually word for word in the current the appeal. In its order affirming the holding of the Hearing Officer, the Circuit Court did not address the argument because it was not preserved at the trial court level.

It is black letter law that an issue must be raised and ruled upon by the trial judge to preserve that issue for appeal. *Herron v. Century BMW,* 395 S.C. 461, 719 S.E.2d 640, 642 (2011). Because Fred Holland did not raise this issue at the trial court level, Folly Beach did not have an opportunity to address the argument and present support for its actions, and the Hearing Officer did not have an opportunity "to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). Constitutional arguments are no exception to the preservation rules, and, if not raised to the trial court, the issues are deemed waived on appeal. *Herron,* 719 S.E.2d at 642. In the case of multiple levels of review, issues must be preserved at each level. *Washington v. Muse,* 150 S.C. 414, 148 S.E. 227 (1929). "In criminal appeals from a municipal court, the circuit court does not conduct a de novo review; rather, it reviews the case for preserved errors raised to it by an appropriate exception." *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 706 S.E.2d 6, 8 (2011).

Similarly, Fred Holland's cursory argument which cites no supporting law and no supporting facts is not sufficient to present the issue to this Court. *First Sav. Bank v. McLean,* 314 S.C. 361, 444 S.E.2d 513, 514 (1994) (stating an appellant was deemed to have abandoned an issue

for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113, 120 (Ct.App. 2000) (deeming an issue abandoned if the appellant's brief treats it in a conclusory manner).

Even if Fred Holland had properly preserved this issue, nothing in the South Carolina or U.S. Constitutions prevents Folly Beach from acting to protect the health and safety of its citizens in the face of a generational pandemic. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). The Supreme Court penned those words over a hundred years ago, but they remain relevant today. In *Jacobson*, the Supreme Court upheld a state's exercise of its general police powers to promote public safety during a public health crisis. *Id.* at 25. A state's police power entails the authority "to enact quarantine laws and 'health laws of every description.' " *Id.*

Folly Beach would have gladly provided ample evidence to support its actions at the trial court level. Fred Holland did not make this argument at the initial level, so there is no record on the issue at all. As such, this issue should not be considered for the first time on appeal.

VI. THE HEARING OFFICER CORRECTLY HELD THAT FRED HOLLAND VIOLATED FOLLY BEACH'S BAN ON NEW SHORT-TERM RENTAL CHECK-INS.

Fred Holland has appealed the Hearing Officer's final ruling that it violated the Folly Beach Emergency Ordinance. This was a factual ruling based on facts admitted by Fred Holland and affirmed by the Circuit Court.

The Hearing Officer's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law. *Pope v. Gordon*, 369 S.C. 469, 633 S.E.2d 148, 151 (2006). The Court of

Appeals' review of an appeal to the Circuit Court, especially where the Circuit Court judge has affirmed the ruling of a lower court, is particularly circumscribed and generally limited to corrections of errors of law. *Hadfield*, 538 S.E.2d at 271. Clearly, the Hearing Officer's finding that Fred Holland violated the Emergency Ordinance was not "wholly unsupported by the evidence."

Folly Beach Emergency Ordinance 06-20, dated April 6, 2020, attached as Exhibit No. 3 to Folly Brief, RA __, barred all new check-ins at any overnight accommodation starting on April 7, 2020:

> 11. Starting on April 7, 2020 at 9:00 a.m., no new check-ins are permitted regardless of length of stay, until May 31, 2020. Visitors currently checked-in may remain until the end of their existing reservation.

Emergency Ordinance, Section 11, Exhibit No. 3 to Folly Brief, RA 220.

Fred Holland violated this Emergency Ordinance. A renter checked-in to a short-term rental located at 208 East Ashley on March 19, 2020 with a check out date of April 14, 2020. First Reservation Sheet, Page 1, Exhibit No. 5 to Folly Brief, RA 230. Under the Emergency Ordinance, those renters could stay at the rental until April 14, 2020, but could not make a new reservation. Even though the renters were allowed to stay to the end of their *existing* reservation, they were not allowed to make new reservations or check-ins.

At some point in early April, Fred Holland accepted a second reservation from the guests staying at 208 East Ashley for a new reservation at 403 West Ashley starting on April 13, 2020 for a period of 17 days. Second Reservation Sheet, Exhibit No. 6 to Folly Brief, RA 231; Fred Holland Appeal, Paragraph 6, Exhibit No. 9 to Folly Brief, RA 241-42. Fred Holland's Appeal acknowledges that the family checked in to this new property on April 13, 2020, after the Folly Beach's check-in ban went into full effect. Fred Holland Administrative Appeal, Paragraph 6,

Exhibit No. 9 to Folly Brief, RA 241-42.

Ms. Kennedy, the owner of Fred Holland,[13] testified that there were two different reservations with different properties, different owners, different rental contracts, different rental rates, and different dates. LaJuan Kennedy Testimony, Tr. Pages 65-70, RA 437-42. She also acknowledged that the renters moved from 208 East Ashley to 403 West Ashley on April 13 or 14, 2020, after the Emergency Ordinance short-term rental ban was adopted. Kennedy Testimony, Tr. Page 58, RA 430.

The Second Reservation Sheet provided by the renters confirms that the new reservation was for a new property, at a new rental rate, and for a new time period. Second Reservation Sheet, Exhibit No. 6 to Folly Brief, RA 233. Since that check-in was after April 7, 2020, it was a violation of the Emergency Ordinance ban on new check-ins.

Fred Holland does not dispute the facts, but simply claims that what happened on April 13, 2020 was not a "new check-in" because the renters were already on the island. While the Emergency Ordinance allowed visitors currently checked-in to "remain until the end of their **existing** reservation," it did not allow visitors to make an entirely new reservation at a new property after the ban on new check-ins was imposed. Fred Holland allowed the renters to make this reservation after a ban on new check-ins was initially adopted by the City on March 28, 2020. City of Folly Beach Emergency Ordinance No. 06-20, dated March 28, 2020, Exhibit No. 10 to Folly Brief, RA 245-46. Fred Holland generated a new reservation sheet for the April 13, 2020 check-in. Second Reservation Sheet, Exhibit No. 6 to Folly Brief, RA 233. Fred Holland charged a different rental rate for the two properties. *Id.* Fred Holland allowed the renters to move into a

[13] Fred Holland has inexplicably added its owner, LaJuan Kennedy, as a party to this matter. Ms. Kennedy was not charged with a violation of the Emergency Ordinance.

new rental on April 13, 2020 based on this check-in made after the ban was put in place. *Id.* In short, it was a new check-in.

The fact that the renters previously stayed in a different short-term rental under a different reservation at a different rate does not somehow excuse Fred Holland from checking them into a new rental under a new rental agreement after the ban was put in place. The Hearing Officer agreed, finding that this was a new "check-in" that violated the Emergency Ordinance. August 10, 2020 Hearing Officer Final Order, Pages 8-9, RA 215-16. The Circuit Court agreed that this was a new "check-in." Circuit Court Order, Pages 13-14, RA 13-14. This finding is certainly supported by the facts presented, including the facts admitted by Fred Holland. As such, it should not be overturned on appeal.

CONCLUSION

Based on the foregoing, Respondent Folly Beach would ask that this Court affirm the holdings of the Hearing Officer and the Circuit Court that Fred Holland violated Folly Beach's Emergency Ordinance. In addition, Respondent would ask that the Court affirm the holdings of the Hearing Officer and Circuit Court that the City's Emergency Ordinances are enforceable, constitutional, and not preempted. The City's action was authorized by the Home Rule Act, by S.C. Code Ann. § 5-7-250(d), and by Governor McMaster's Executive Order No. 2020-19, Section 1(B), Exhibit No. 4 to Folly Brief, RA 227. Fred Holland has not pointed to any law or order preempting this broad grant of authority to the City to exercise emergency powers during a generational pandemic.

The only limitation that was imposed on municipalities is the Governor's ban on municipal laws that *conflict* with his Executive Orders. Folly Beach's Emergency Ordinance does not conflict with the Governor's Executive Order No. 2020-19. Both the Emergency Ordinance and

the Executive Order bar short-term rental check-ins to renters from any location. Even if the Folly Beach Emergency Ordinance was more expansive than the Governor's Executive Order, the City's Emergency Ordinance is not in "conflict" with the Governor's Executive Order under South Carolina law, which allows municipalities to impose broader restrictions that can be enforced in conjunction with state law. Finally, by relying on civil fines, Folly Beach's Emergency Ordinance does not criminalize conduct that is legal under state law.

Respectfully submitted,

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September 8, 2021
Folly Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case Number: 2020-CP-10-03549

Appellate Case Number: 2021-000105

Fred Holland Realty, Inc., and LaJuan Kennedy, ... Appellants,

v.

The City of Folly Beach,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

September 8, 2021

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