North Carolina General Assembly
House of Representatives

PHONE: (704) 619-7580
EMAIL: DAN.BISHOP@NCLEG.NET
WEB: WWW.NCGA.STATE.NC.US

REPRESENTATIVE DAN BISHOP
104TH DISTRICT

February 1, 2016

VIA HAND DELIVERY

Honorable Mayor Jennifer Roberts
Honorable Members of the Charlotte City Council
600 E. 4th St., 15th Floor
Charlotte, NC 28202

Re: Public accommodations ordinance expansion

Dear Mayor Roberts and Members of Council:

According the media reports, you will again take up the expansion of the City's public accommodations ordinance that failed last March, beginning at your dinner meeting on February 8. Although I disagree with the proposal on policy grounds, I write now to explain why you lack legal authority for this action.

I also will explain a danger you may not have considered — that the collateral result of exceeding your authority here may be to invalidate the existing public accommodations ordinance, which has for almost 50 years expressed the community's consensus against discrimination on grounds of race, color, religion, national origin and, except for in "[r]estrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private," sex. Charlotte, N.C., Code § 12-59 (Municode Corp. 2004 & Supp. 33 Jul. 27, 2015). It would be tragic for an overreach to destroy that legacy of a more moderate and consensus-oriented time.

The place to begin is with the basic structure of local government in North Carolina. As most of you know, there is no "home rule" provision for municipalities in our state constitution. The general principle is that cities can exercise only those powers granted by the General Assembly in express terms and those necessarily or fairly implied in or incident to express powers. This is sometimes referred to, loosely, as Dillon's Rule. *See Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 153, 731 S.E.2d 800, 809 (2012).

The City Attorney can confirm for you that the General Assembly has never delegated to cities generally, or Charlotte specifically, express authority to adopt a public accommodations nondiscrimination ordinance. By contrast, Charlotte's charter, including in the version most recently enacted by the General Assembly, does contain such express authority in one area alone, housing: "The Council may adopt ordinances prohibiting discrimination on the basis of race, color, sex, religion, handicap, familial status, or national origin in real estate transactions."

N.C. Sess. Laws 2000-26 § 6.151(a) (emphasis added).[1] Indeed, because this express authority exists,[2] the City Attorney concluded last year that Council could not modify the classifications (by adding sexual orientation, gender identity, gender expression, etc.) to Charlotte's housing nondiscrimination ordinance. He believed, correctly, that this express charter authority limits you to the categories expressly stated. It should strike you as counterintuitive that the absence of any express authority to legislate nondiscrimination for public accommodations affords you broader power than you have in the area of housing. That flies in the face not only of Dillon's Rule, but also common sense.

The only other statute granting cities authority touching on nondiscrimination policy authorizes establishment of "human relations, community action and manpower development programs." N.C. Gen. Stat. § 160A-492. This means a program to "study [] problems in the area of human relations, [] promot[e] [] equality of opportunity for all citizens," and encourag[e] the employment of qualified people without regard to race." *Id.* This statute does not grant you substantive power to regulate discrimination.

The absence of any expressly delegated authority begs the question what authority supported the existing public accommodations ordinance. In fact, there may not have been sufficient authority. To address that glaring issue, the existing ordinance begins with a declaration that it is based on the City's "licensing and police powers." Charlotte, N.C., Code § 12-56. It is a dubious claim.

Cities reaching beyond their authority have often sought to rely on these general powers, which are now found in General Statutes Sections 160A-174 and -194.[3] The League of Municipalities has argued to our appellate courts at least twice that these powers make cities mini-legislatures, exercising the full police power of the State. And that argument has been rejected twice by the North Carolina Supreme Court.

In *Williams v. Blue Cross and Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E.2d 415 (2003), a local government claimed authority under its police and licensing powers for a comprehensive employment nondiscrimination ordinance. The argument failed, and the ordinance was struck down.

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[1] See also N.C. Gen. Stat. § 160A-499.2, which superficially appears to be a general law extending this express housing nondiscrimination regulatory authority to all municipalities, except that the concluding subsection makes it applicable only "to municipalities that have permanent population of 90,000 or more according to the most recent decennial census and that are the location of a recurring special accommodation event requiring temporary accommodations for at least 50,000 people." This appears to describe only High Point and the annual furniture show there.

[2] This charter authority may itself be defective on grounds that it violates limitations on "local acts" in N.C. Const. Art. II, § 24(1)(j).

[3] The reference to Section 6.41 of the Charter is obsolete. It refers to a provision of the 1965 charter, N.C. Sess. Laws 1965-713 p. 21, which is absent from the 2000 reenactment.

Just two years ago, our Supreme Court invalidated parts of another ordinance claimed to rest on these general powers. *King v. Town of Chapel Hill*, 367 N.C. 400, 758 S.E.2d 364 (2014). The court explained that the General Assembly only delegated "a portion" of its police power in Section 160A-174, which is best suited to the enactment of health and safety regulations. *Id.* at 406, 758 S.E.2d at 370. The court also noted a risk of "officious and inappropriate" regulation of business by cities under the police power and expressed preference for explicit grants of subject-matter authority by the General Assembly. *Id.* at 409, 758 S.E.2d at 371.

None of this furnishes any comfort about the authority underlying the existing public accommodations ordinance. It is at risk of invalidation if it has to be litigated. What might be said in defense of the existing ordinance, however, is that it did not significantly break new legal ground. It echoed Title II of the federal Civil Rights Act of 1964, which already had outlawed race, color, religion, and national origin discrimination in public accommodations. Our ordinance defined a wider array of "public accommodations" covered, but applied the same nondiscrimination principle as federal law. Perhaps the general municipal police and licensing powers were sufficient for this modest undertaking.

The expanded ordinance you contemplate is an entirely different matter. The classifications are novel, going beyond either federal or North Carolina state law. In so doing, they purport to displace, without action by the General Assembly or Congress, an established general legal principle of the State that businesses, just like their customers, are free to choose with whom to do business. *State v. Cobb*, 262 N.C. 262, 136 S.E.2d 674 (1964). The new classifications have no foundation in the history or traditions of the State. And because the expanded ordinance tacitly requires embracing these unconventional classifications as a condition doing business, the expanded ordinance may impermissibly intrude upon the fundamental state constitutional right to "earn a livelihood" free of arbitrary governmental interference. *See King*, 367 N.C. at 408-09, 758 S.E.2d at 371 (explaining right established by N.C. Const. Art. I, § 1 "fruits of their labor" clause).

All of these circumstances make it likely that the police and licensing powers will fail to sustain your expanded ordinance. But there is another factor that makes your lack of authority exceedingly clear. Your insistence on imposing a radical change in bathroom management and use policy leads the ordinance into a square conflict with positive state law in two respects.

One conflict is with the North Carolina Building Code, which is adopted by the State Building Code Council under express delegation of authority by the General Assembly. *Greene v. City of Winston-Salem*, 287 N.C. 66, 75, 213 S.E.2d 231, 237 (1975). It governs the construction, as well as the use and occupancy, of the "facilities" that your ordinance would regulate as "public accommodations." 2012 N.C. Bldg. Code § 101.2 (Int'l Code Council, Inc. 3d prtg. 2014). It expressly mandates the numbers of toilet and lavatory facilities in buildings. And it mandates that, in most commercial buildings, "[w]here plumbing fixtures are required, separate facilities shall be provided for each sex." *Id.* §§ [P] 2902.1, 2902.2, Table 2902.1

(emphasis added). It also specifically requires signage for each facility "designating the sex." *Id.* § 2902.4.

However much it may seem to epitomize modern progressive government, the law will not permit subjecting building owners and occupants to conflicting requirements: to construct, label and operate separate, sex-specific bathroom facilities, on one hand, and to not segregate bathrooms by sex, on the other hand. The revised ordinance — by consolidating sex with the other prohibited characteristics, eliminating the existing exemptions for bathroom and shower facilities, and adding gender identity and gender expression — creates exactly this conflict.

In addition, by forbidding facility operators from segregating gang showers by sex, the expanded ordinance also would conflict with the state's criminal indecent exposure statute, which expressly forbids facility operators from permitting cross-sex exposure of people's "private parts." N.C. Gen. Stat. § 14-190.9.

Whenever a local exercise of police power conflicts with state law, the local action is invalid. *Greene v. City of Winston-Salem*, 287 N.C. 66, 73, 213 S.E.2d 231, 236 (1975). Indeed, our Supreme Court has held specifically that this rule applies when a local ordinance conflicts with — or addresses the same subject matter as — the Building Code. *Id.* at 75-76, 213 S.E.2d at 237.

It is, therefore, clear that the expanded ordinance will be invalid. Furthermore, if it must be invalidated through litigation, because you will have "acted outside the scope of [your] legal authority," "the court may award reasonable attorneys' fees" to the party challenging the ordinance. N.C. Gen. Stat. § 6-21.7. This could easily be hundreds of thousands of dollars. And if the court finds that you abused your discretion — for example, by ignoring the warning in this letter — an award of fees to the challenger will be mandatory. *Id.*

I hope that this information will be beneficial in helping you to avoid a costly legal error for the City.

Very truly yours,

Rep. Dan Bishop

cc: Robert Hagemann, City Attorney
Email list
Media