

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

Howard P. King, Circuit Court Judge

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Case Number 2004-CP-15-347

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Palmetto Princess, LLC, ..... Respondent,

v.

Town of Edisto Beach ..... Appellant.

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FINAL BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

Table of Authorities ..... ii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Facts ..... 1

Argument

I. THE LOWER COURT CORRECTLY HELD THAT TOWN OF EDISTO  
BEACH ORDINANCE § 58-138 VIOLATES ARTICLE VIII, § 14 OF THE  
CONSTITUTION OF THE STATE OF SOUTH CAROLINA ..... 2

A. Municipalities cannot prohibit conduct which is regulated by state law .. 2

i. Appellant incorrectly argues that §58-138 does not conflict with the  
criminal laws of the State ..... 3

ii. The South Carolina Legislature has regulated gambling and  
expressly refused to prohibit gambling vessels ..... 4

B. Appellant incorrectly argues that this Court’s holdings in Diamonds  
and Connor are restricted to matters involving fundamental rights ..... 5

Conclusion ..... 7

**TABLE OF AUTHORITIES**

Cases

Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) . . . . . 2, 3, 6

Diamonds v. Greenville County, 325 S.C. 154, 480 S.E. 718 (1997) . . . . . 2, 3, 4, 6

Hospitality Ass’n of S.C. v. County of Charleston, 320 S.C. 219,  
464 S.E.2d 113 (1995) . . . . . 5

Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000) . . . . . 5, 6

Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001) . . . . . 4, 5

Statutes

S.C. Code Ann. § 5-7-30 (2004) . . . . . 2

2 James L. Underwood, The Constitution of South Carolina, 133 (1989) . . . . . 3

S.C. Const. Art. VIII, § 14(5) . . . . . 2, 5, 6

**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE LOWER COURT CORRECTLY HOLD THAT TOWN OF EDISTO BEACH ORDINANCE § 58-138 VIOLATES ARTICLE VIII, § 14 OF THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA?**

**STATEMENT OF THE CASE**

Respondent hereby adopts and incorporates herein the Statement of the Case prepared by Appellant in its Initial Brief.

**STATEMENT OF FACTS**

Respondent hereby adopts and incorporates herein the Statement of the Facts prepared by Appellant in its Initial Brief.

## ARGUMENT

### I. THE LOWER COURT CORRECTLY HELD THAT TOWN OF EDISTO BEACH ORDINANCE § 58-138 VIOLATES ARTICLE VIII, § 14 OF THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA.

#### A. Municipalities cannot prohibit conduct which is regulated by state law.

Article VIII, § 14(5) of the South Carolina Constitution prohibits a municipality from enacting an ordinance in conflict with the criminal laws of the State of South Carolina. See, Diamonds v. Greenville County, 325 S.C. 154, 480 S.E. 718 (1997); Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994). While a municipality may enact ordinances it deems “proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government,” such ordinances must not be “. . . inconsistent with the Constitution and general laws of this State.” S.C. Code Ann. § 5-7-30 (2004). The lower court correctly held that Town of Edisto Beach Ordinance § 58-138 clearly violates the Constitution of this State by criminalizing conduct otherwise permitted by state law.

This Court has consistently held efforts by municipalities to criminalize acts otherwise permitted by state law are unconstitutional. Most recently, in Diamonds, supra and Connor, supra, this Court held municipal ordinances which attempted to prohibit nude dancing unconstitutional. In both cases, this Court relied upon the conflict between acts permitted by state law and those prohibited by the local ordinances. Because this Court has declared gaming vessels legal and recognized a clear legislative intent not to declare gaming vessels illegal under the then existing laws of our State, Code § 58-138 clearly violates Article VIII, § 14(5) of the South Carolina Constitution.

**i. Appellant incorrectly argues §58-138 does not conflict with the criminal laws of the state.**

Appellant urges this Court to rule that because the then existing criminal statutes were silent as to gambling vessels, a local ordinance governing the subject does not conflict with the criminal laws of the state. As the lower court noted, this argument is simply unsupported by this Court's prior holdings, and this Court has specifically rejected this argument. (R. p. 8).

In Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) and Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997), this Court has consistently construed Article VIII, § 14 to prohibit a local government from regulating conduct that is not unlawful under state criminal laws governing the same subject. In Diamonds, this court stated:

Ordinance 2727 has the same effect of making it unlawful to appear nude in public, even if no state laws addressing the same subject are violated in the process. For this reason the ordinance cannot stand.

The dissent argues Connor's interpretation of Article VIII, § 14 is too broad. In the dissent's view, the existence of state criminal laws addressing nudity is not enough; a local ordinance would only "set aside" a state law when it is actually inconsistent with the state law. We disagree.

Diamonds, 325 S.C. at 158, 480 S.E.2d at 719. The majority opinion in Diamonds clearly rejected the argument now advanced by Appellant.

In Diamonds, this Court further noted that "[o]ne of the Committee's major concerns regarding this constitutional provision was the 'local government's making an act a crime that was not a crime under state law.'" Diamonds, 325 S.C. at 158, 480 S.E.2d at 721, *citing* 2 James L. Underwood, The Constitution of South Carolina, 133, 134 (1989). The Legislature, under the

then existing law, created a statutory scheme designed to criminalize certain gambling activities.

As noted below, the Legislature clearly did not intend to prohibit day cruises. The Town of Edisto Beach, in enacting § 58-138, entered a field already regulated by state law. Therefore, Appellant's argument that the Legislature's silence regarding gambling vessels permits the enactment of §58-138 is without merit.

**ii. The South Carolina Legislature has regulated gambling and expressly refused to prohibit gambling vessels.**

Appellant further argues that because there is no affirmative right to operate a "day cruise" in the State's statutory scheme governing gambling, the lower court erred in determining the Legislature extended an affirmative right to operate gambling vessels. This Court, in Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001), exhaustively examined the statutory scheme governing gambling and determined that gambling vessels did not violate the state's then existing gambling laws.

In Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001), this Court determined that "day cruises" like those prohibited by § 58-138 do not violate state statutes prohibiting gambling. The Stardancer court, while analyzing the history of our state gambling legislation, held that the Legislature did not intend to make "day cruises" illegal. Stardancer, 347 S.C. at 385, 556 S.E.2d at 361. The Court quoted the relevant portion of 1999 Act. No. 125 § 22(B):

The General Assembly by enactment of this act has no intent to enact any provision allowed by 15 U.S.C. 1175, commonly referred to as the Johnson Act, or to create any state enactment authorized by the Johnson Act.

Id. In concluding that day cruises do not violate any state gambling statute, the Stardancer court

further stated:

Our decision rests on the intent of the Legislature expressed in 1999 Act No. 125: nothing in that Act is indicative of any intent to otherwise restrict the scope and application of laws criminalizing gambling activities in this State.

Stardancer, 347 S.C. at 386 - 387, 556 S.E.2d at 362. As this Court recognized in Stardancer, the Johnson Act empowers states to regulate the activity at issue in the present case. Our Legislature chose not to do so. There can be no dispute that gaming vessels, like the vessel the Respondent seeks to set sail, do not violate the criminal laws of the State of South Carolina. Appellant's assertion that state law must create an affirmative right to perform a particular act before the local enactment violates Article VIII, § 14 is without merit and contrary to prior precedents set by this Court.

**B. Appellant incorrectly argues that this Court's holdings in Diamonds and Connor are restricted to matters involving fundamental rights.**

Additionally, Appellant urges this Court to restrict its holdings and interpretation of Article VIII, § 14 to matters involving fundamental rights. However, no opinion of this Court limits the determination of the constitutionality of a local government's ordinance to whether or not the provision addresses fundamental rights. As this court noted in Quality Towing:

Determining if a local ordinance is valid is a two-step process:  
(1) Did the municipality have the power to enact the ordinance?, and  
(2) Is the ordinance inconsistent with the Constitution or general law of the State?

Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 355, 530 S.E.2d 369, 272 (2000)

*citing* Hospitality Ass'n of S.C. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116 (1995).



This test does not require an infringement upon fundamental rights. While Diamonds did involve fundamental rights, the Diamonds court noted that: “. . . the only issue now before this court is whether the ordinance is within the constitutional power of Appellant to enact.” Diamonds, 325 S.C. at 156, 480 S.E.2d at 719. Admittedly, Quality Towing did not involve fundamental rights. However, the ordinance in Quality Towing focused on the conduct of the property owner and towing company whereas the state statute at issue focused on the conduct of the vehicle owner. Quality Towing, 340 S.C. at 36, 530 S.E.2d at 372. Quality Towing is distinguishable from Connor and Diamonds in that the State had already prescribed when, where and how a person could or could not appear nude in public. In the present case, the State determined when, where and how a person could or could not engage in gambling activities. The Connor court noted that “[s]ince Town has criminalized conduct that is not unlawful under **relevant** State law, we conclude Town exceeded its power in enacting the ordinance in question. Connor, 314 S.C. at 254, 442 S.E.2d at 610 (emphasis added). The ordinance in Quality Towing did not conflict with the **relevant** state statute. In fact, the State apparently had no statute governing towing companies or property owners.

However, in the present case, the State has a comprehensive statutory scheme governing gambling and this Court has determined that the Legislature had no intent to prohibit the gambling activities at issue in the present case. The issue in Diamonds, as in the present case, centered on the constitutionality of the local government’s actions in the context of Article VIII, § 14. The Diamonds court used the identical analysis used by the Quality Towing court which did not involve a question of fundamental rights. Thus, any assertion that this Court’s analysis of the constitutionality of local criminal enactments must implicate fundamental rights is hollow.

Consequently, § 58-138 is void and the lower court's ruling should be affirmed.

**CONCLUSION**

Based upon the foregoing, this Court should affirm the lower court's ruling filed March 25, 2005.

Respectfully submitted,

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