ALAN WILSON
ATTORNEY GENERAL

September 8, 2023

Sarah Lyles
Executive Director
PalmettoPride
2700 Middleburg Drive, Suite 216
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Dear Ms. Lyles:

We received your letter requesting an opinion of this Office concerning a provision in the Solid Waste Policy Management Act (the "Act"). S.C. Code Ann. § 44-96-10 et seq. (2018 & Supp. 2022). Specifically, you inquire as to who may enforce section 44-96-170(H) of the South Carolina Code (2018) pertaining to waste tires. You ask for "clarification as to whether all litter control and code enforcement officers are allowed to enforce this law or if it is intended that only SCDHEC enforcement officers enforce this law." Additionally, you ask whether "violations of the Act are considered criminal or civil?"

LAW/ANALYSIS

A. Who may enforce section 44-96-170(H)?

Section 44-96-170(H) provides as follows:

> Eighteen months after this chapter is effective, a person shall not:
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> (1) maintain a waste tire collection site unless such site is an integral part of the person's permitted waste tire treatment facility or that person has entered into a contract with a permitted waste tire treatment facility for the disposal of waste tires;
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> (2) knowingly dispose of waste tires in this State, unless the waste tires are disposed of at a permitted solid waste disposal facility; or

> (3) knowingly dispose of or discard waste tires on the property of another in a manner not prescribed by this chapter.
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> For an interim period to be determined by the department, waste tires may be disposed of at a solid waste disposal facility, a waste tire recycling or processing facility, or a waste tire collection center seeking a permit from the department pursuant to this section. Notwithstanding any other provision of law, a person violating this subsection shall be subject to a fine not to exceed two hundred dollars. This provision may be enforced by a state, county, or municipal law enforcement official, or by the department. Each tire improperly disposed of must constitute a separate violation.

(emphasis added).

As specifically stated, section 44-96-170(H) may be enforced by "a state, county, or municipal law enforcement official, or by the department." While the South Carolina Department of Health and Environmental Control ("DHEC") can enforce the statute, the Legislature included others who may do so as well including local law enforcement officials. The status of litter control and code enforcement officers as "law enforcement officials" determines whether they may enforce section 44-96-170(H). The Act does not define "law enforcement officials" for purposes of this provision or any other provision under the Act although state, county, and municipal law enforcement officials are authorized to enforce multiple sections of the Act. See S.C. Code Ann. §§ 44-96-160 (used oil); 44-96-180 (lead-acid batteries); 44-96-190 (yard trash; compost); 44-96-200 (white goods). Therefore, we look to the authority given to litter control and code enforcement officers under South Carolina law to determine if they are law enforcement officials.

Section 4-9-145 of the South Carolina Code (2021) allows counties to appoint litter control officers and provides:

> (A) Except as provided in subsection (B), the governing body of a county may appoint and commission as many code enforcement officers as may be necessary for the proper security, general welfare, and convenience of the county. These officers are vested with all the powers and duties conferred by law upon constables in addition to duties imposed upon them by the governing body of the county. However, no code enforcement officer commissioned under this section may perform a custodial arrest, except as provided in

> subsection (B). These code enforcement officers must exercise their powers on all private and public property within the county. The governing body of the county may limit the scope of a code enforcement officer's authority or the geographic area for which he is authorized to exercise the authority granted.
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> (B)(1) The number of litter control officers vested with custodial arrest authority who are appointed and commissioned pursuant to subsection (A) must not exceed the greater of:
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> > (a) the number of officers appointed and commissioned by the county on July 1, 2001; or
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> > (b) one officer for every twenty-five thousand persons in the county, based upon the 2000 census. Each county may appoint and commission at least one officer, without regard to the population of the county.
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> (2)(a) A litter control officer appointed and commissioned pursuant to subsection (A) may exercise the power of arrest with respect to his primary duties of enforcement of litter control laws and ordinances and other state and local laws and ordinances as may arise incidental to the enforcement of his primary duties only if the officer has been certified as a law enforcement officer pursuant to Article 9, Chapter 6, Title 23.
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> > (b) In the absence of an arrest for a violation of the litter control laws and ordinances, a litter control officer authorized to exercise the power of arrest pursuant to subitem (a) may not stop a person or make an incidental arrest of a person for a violation of other state and local laws and ordinances.
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> (3) For purposes of this section, the phrase "litter control officer" means a code enforcement officer authorized to enforce litter control laws and ordinances.

Shortly after the enactment of section 4-9-145, this Office noted the Legislature's intent in enacting section 4-9-145 was to allow "state and local governmental units and agencies [to]

assist in the litter control effort . . .." Op. Att'y Gen., 1990 WL 599348 (S.C.A.G. Dec. 10, 1990). Over the years, we issued several opinions addressing the authority of code enforcement officers appointed pursuant to section 4-9-145. In 1991, we issued an opinion concluding security officers appointed via section 4-9-145 were entitled to a subsistence allowance available to "commissioned law-enforcement officers." Op. Att'y Gen., 1991 WL 474752 (S.C.A.G. Apr. 1, 1991). In another 1991 opinion, we determined:

> Section 4-9-145 was enacted as a means of providing law enforcement authority for individuals in salaried county positions such as animal control and litter control. Because of their law enforcement authority, these officers are required to attend the State Criminal Justice Academy. See: Section 23-23-40 of the Code.

Op. Att'y Gen., 1991 WL 474786 (S.C.A.G. Oct. 16, 1991). In 1993, we addressed whether litter control officers could use blue lights. We conclude they could based on the following:

> Pursuant to Section 4-9-145 county code enforcement officers are granted law enforcement authority inasmuch as these officers are granted "all the powers and duties conferred by law upon constables." See: State v. Luster, 178 S.C. 199, 182 S.E. 427 (1935). See also: Opins. of the Atty.Gen. dated February 9, 1981, July 12, 1976, and July 17, 1975. Presumably, therefore, the vehicles used by these officers would qualify as vehicles used "primarily for law enforcement purposes" or as "police vehicles." Therefore, it appears that such officers would be authorized to use blue lights on their county vehicles.

Op. Att'y Gen., 1993 WL 439030 (S.C.A.G. Sept. 13, 1993).

In 1997, we were asked whether a code enforcement officer appointed pursuant to section 4-9-145 could be issued and carry a weapon or pistol during the performance of his or her duties. Op. Att'y Gen., 1997 WL 255969 (S.C.A.G. Apr. 24, 1997). We analyzed whether code enforcement officers are exempt from the concealed weapons law, which specifically exempts regular, salaried law enforcement officers. Id. We noted a prior opinion that determined code enforcement officers are "officers" for purposes of dual office holding. Id. We also noted our 1993 opinion relying on the powers afforded to code enforcement officers to determine their vehicles were law enforcement vehicles. Id. Citing to the statute defining "law enforcement officer" for purposes of the Law Enforcement Officers Act, we stated:

> Section 23-6-400(D)(1) defines the term "[l]aw enforcement officer" for purposes of the Law Enforcement Officers Act. A "law enforcement officer" is defined as
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> > . . . an appointed officer or employee hired by and regularly on the payroll of the State or any of its political subdivisions, who is granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State and who possesses, with respect to those laws, the power to effect arrests for offenses committed or alleged to have been committed.

Id. We also considered the fact that a code enforcement officer

> possesses "all the powers and duties conferred by law upon constables," even though at the same time no such officer "may perform a custodial arrest." We have recognized that
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> > . . . a state constable is clearly recognized as a state officer, possessing statewide law enforcement authority as a peace officer. Our Supreme Court has stated that constables perform all the duties of law enforcement officers and in particular "a constable stands on the same footing as a sheriff." State v. Franklin, 80 S.C. 332, 338, 60 S.E. 953, 955 (1908). In Allen v. Fidelity and Depos. Co. of Md., 515 F.Supp. 1185, 1189 (D.S.C. 1980), the Court noted that in 1870 constables with general law enforcement powers existed at the city, local, county and state levels together with county sheriffs and to a lesser extent coroners, were the principal providers of law enforcement for the State of South Carolina.
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> Op. Atty. Gen., January 25, 1996 (Informal Opinion).

Id. As such, we concluded "a Code Enforcement Officer could be deemed exempt from the concealed weapons law pursuant to Subsection (1) of [section 16-23-20]." Id.

On numerous occasions, we have also determined a code enforcement officer appointed pursuant to section 4-9-145 is a Class 3 officer requiring certification by the South Carolina Law Enforcement Training Council. Ops. Att'y Gen., 2012 WL 4836949 (S.C.A.G. Oct. 2, 2012);

2012 WL 1561867 (S.C.A.G. Apr. 19, 2012); 2009 WL 1649232 (S.C.A.G. May 6, 2009). In one of the 2012 opinions, we noted "[a]lthough Class 3 officers do not have the same powers and duties of regular police officers such as deputies or state troopers, Class 3 officers are nonetheless certified law enforcement officers with some, albeit limited, powers of arrest." Op. Att'y Gen., 2012 WL 4836949 (S.C.A.G. Oct. 2, 2012).

These opinions indicate various circumstances under which litter control and code enforcement officers are considered law enforcement officers. We only found one opinion coming to the opposite conclusion. In 2000, we considered whether code enforcement officers could issue uniform traffic tickets ("UTTs"). Op. Att'y Gen., 2000 WL 1803586 (S.C.A.G. Nov. 8, 2000). First, we considered the law creating and prescribing the use of UTTs. Id. Section 56-7-10 of the South Carolina Code requires the use of UTTs by law enforcement officers in the arrest for traffic offenses and certain other offenses listed in the statute, including litter offenses. Id. In determining whether code enforcement officers are law enforcement officers for purposes of issuing UTTs, we considered section 23-6-400(D)(1)[1] defining "law enforcement officer" for purposes of requiring certification by the Department of Public Safety.

> Section 23-6-400 (D)(1) provides that "law enforcement officer means an appointed officer or employee hired by and regularly on the payroll of the State or any of its political subdivisions, who is granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State and who possesses, with respect to those laws, the power to effect arrests for offenses committed or alleged to have been committed." The definition is broad with regard to the potential duties outlined for such an officer but without exception, the officer must have the power to arrest offenders.

Id. We also considered prior opinions of this Office finding private security guards are law enforcement officers for purposes of issuing UTTs because they have the authority to effectuate arrests. Id. However, we acknowledged our prior opinions finding code enforcement officers are law enforcement officers for purposes of utilizing blue lights and being exempt from concealed weapons laws. Id. We concluded, "While there seems to be conflicting authority, it is my opinion that given the specific proscriptions of § 4-9-145, § 56-7-10 and other related statutes, Code Enforcement Officers are not 'law enforcement officers' for the purposes of issuing uniform traffic tickets." Id.

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[1]The Legislature repealed this provision in 2006 and replaced it with section 23-23-10 of the South Carolina Code, which contains the same definition of "Law Enforcement Officer" for purposes of requiring certification by the Law Enforcement Training Council.

UTTs give a magistrate's or municipal court jurisdiction to hear the offense without taking the person into custody. S.C. Code Ann. § 56-7-10(C). In essence UTTs serve as a substitution for a custodial arrest. Our 2000 opinion primarily relied on our understanding that the Legislature intended those using UTTs have the authority to arrest. Op. Att'y Gen., 2000 WL 1803586 (S.C.A.G. Nov. 8, 2000). At the time of that opinion, section 4-9-145 prohibited code enforcement officers from performing custodial arrests.[2] Not long after we issued the opinion, the Legislature amended section 4-9-145 to add subsection (B) giving litter control officers limited power to make custodial arrests. 2001 S.C. Acts 109. We have not had the occasion to revisit our 2000 opinion since the amendments to section 4-9-145, but we note the basis for our 2000 opinion has changed.

Additionally, we note that section 44-96-170(H), unlike the UTT statute, does not indicate it may only be enforced by those with the authority to make arrest. To the contrary, enforcement of this statute involves the imposition of a fine. Moreover, as explained in our prior opinions, while code enforcement officers and some litter enforcement officers do not have the authority to make arrest, they are hired by counties to enforce some portion of the law. They also are "vested with all the powers and duties conferred by law upon constables." A county may limit the scope of their authority, but we believe a court would likely find that code enforcement and litter enforcement officers have authority to enforce section 44-96-170(H) because of the law enforcement authority vested in them by the Legislature.

B. Are violations of the Act criminal or civil?

You also inquired as to whether violations of the Act are criminal or civil. Our Court of Appeals explained the test for determining whether a penalty is criminal or civil in State v. Cuccia, 353 S.C. 430, 435-36, 578 S.E.2d 45, 48 (Ct. App. 2003) as follows citing State v. Price, 333 S.C. 267, 510 S.E.2d 215 (1998):

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[2] In 2000, section 4-9-145 stated as follows:

> The governing body of a county may appoint and commission as many code enforcement officers as may be necessary for the proper security, general welfare, and convenience of the county. These officers are vested with all the powers and duties conferred by law upon constables in addition to duties imposed upon them by the governing body of the county. However, no code enforcement officer commissioned under this section may perform a custodial arrest. These code enforcement officers shall exercise their powers on all private and public property within the county. The governing body of the county may limit the scope of a code enforcement officer's authority or the geographic area for which he is authorized to exercise the authority granted.

1996 S.C. Acts 373 (emphasis added).

To determine whether a penalty is criminal or civil, a court must look to the face of the statute and then determine if the statutory scheme is so punitive in purpose or effect as to transform what was intended as a civil sanction into a criminal penalty. Id. at 271, 510 S.E.2d at 218.

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."

Hudson, 522 U.S. at 99, 118 S.Ct. at 493, 139 L.Ed.2d at 459 (internal citations omitted); see also In re Matthews, 345 S.C. 638, 648, 550 S.E.2d 311, 316 (2001) ("As the United States Supreme Court recently reiterated, the determination whether a statute is civil or criminal is primarily a question of statutory construction, which must begin by reference to the act's text and legislative history."). "Only the clearest proof will suffice to override legislative intent and transform what has been denominated as a civil remedy into a criminal penalty." Price, 333 S.C. at 271, 510 S.E.2d at 218; accord In re Matthews, 345 S.C. at 648, 550 S.E.2d at 316. The Hudson Court enunciated seven factors for determining if a statute constitutes a criminal penalty:

> (1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Hudson,522 U.S. at 99-100, 118 S.Ct. at 493, 139 L.Ed.2d at 459.

According to the Court of Appeals, we must look first to the statute itself to determine if the Legislature expressly or impliedly intended to establish a penalizing mechanism. Although your question is posed in terms of the Act, we believe you are specifically concerned with a violation of section 44-96-170(H), which imposes a fine "not to exceed two hundred dollars." The fine is not explicitly designated as either civil or criminal, thus we attempt to understand the Legislature's intent to create either a civil or criminal penalty for violating this statute. Looking to the seven factors set forth by the Supreme Court in Hudson and adopted by the Court of Appeals in Cuccia, we note historically fines have been regarded as a form of punishment. See Jackson v. State, 331 S.C. 486, 489, 489 S.E.2d 915, 916 (1997) ("A sentence is not limited to a term of imprisonment; instead, it may be either a term in prison or a fine or both."). Furthermore, this fine would promote the traditional aims of punishment-retribution and deterrence as the threat of being fined would deter people from violating this statute. Portions of section 44-96-170(H) also require scienter as the person may be held liable under the statute for "knowingly" disposing of waste tires other than at a permitted solid waste disposal facility or "knowingly" disposing of waste tires on the property of another outside of the manner described in chapter 96. However, a person can be subject to a fine for maintaining a waste tire collection site without an element of scienter. Additionally, section 44-96-170(H) does not involve an affirmative disability or restraint, the behavior to which it applies is not already a crime, and we are not aware of an alternative purpose to which it may rationally be connected that is assignable for it. Therefore, using the Hudson factors, we are unsure as to whether a court would find violating section 44-96-170(H) is criminal or civil.

In South Carolina State Highway Department v. Southern Railway Company, 239 S.C. 227, 122 S.E.2d 422 (1961), our Supreme Court considered a similar question of whether a statute imposing a fine on railroads for failure to maintain crossings could be imposed by a civil or action or required a criminal prosecution. The act imposing the fine stated:

> 'Any persons failing to comply with the provisions of this act, after having been notified by the proper authorities, in writing, and after the lapse of thirty days from the date of such notice, shall, upon conviction, pay a fine of ten dollars per day for each day's delay. It shall be the duty of the State Highway Department to make a complaint to any court of competent jurisdiction within the county where the offense is committed, and to furnish evidence before such court whenever a violation of this act may occur.'

Id. at 228, 122 S.E. 2d. at 423 (quoting 1956 S.C. Acts 627). The railroad argued the "upon conviction" language required a criminal prosecution, but the Court disagreed explaining:

> We are of the opinion that the Act in question imposes a penalty upon a railroad violating its terms, which may be collected in a civil action at the

> instance of the State Highway Department, and that the lower Court was in error in striking the allegations appropriate to the recovery thereof.
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> Section 3 of the Act, quoted above, provides that upon failure of any person to comply with the provisions thereof, upon conviction, a fine of ten dollars per day for each day's delay shall be imposed, but does not make the violation of its terms a criminal offense. While this section provides for the imposition of a fine, we do not think that the word is used in the sense of punishment for violation of a criminal statute. Rather, the word 'fine' is used in the broader sense of a penalty. A fine is usually a sum of money exacted from a person guilty of a crime as pecuniary punishment; while a penalty is a sum of money exacted, by way of punishment for doing some act that is prohibited, or omitting to do some act that is required to be done, which may or may not be a crime. State v. Liggett & Myers Tobacco Co., 171 S.C. 511, 172 S.E. 857; 70 C.J.S. Penalties, p. 387, Section 1; 23 Am.Jur. 624, Sec. 28. The failure to make a violation of the terms of the Act a criminal offense is indicative of the legislative intent to use the word 'fine' in the sense of a penalty, and not in its restricted sense as punishment for a crime. A similar conclusion was reached in the foregoing case of State v. Liggett & Myers Tobacco Company.
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> Proceedings for the recovery of penalties can be either civil or criminal in nature, and the mode in which penalties shall be enforced is a matter resting within the discretion of the legislature, in each case to be determined from the provisions of the particular statute in question. 70 C.J.S. Penalties, p. 397, Section 8; 23 Am.Jur. 627, Section 34. However, where the statute fails to designate the procedure for collection of the penalty, it may be collected by a civil action. State v. Mathews, 3 S.C.L. (2 Brev.) 82; 23 Am.Jur. 644, Section 54; 70 C.J.S. Penalties, p. 398, Section 8(e).

Id. at 230-31, 122 S.E.2d at 424. (stating).

As we concluded in a 1996 opinion, "the use of the word 'fine' in a statute does not inevitably lead to the conclusion that a criminal proceeding is contemplated." Op. Att'y Gen., 1996 WL 494765 (S.C.A.G. July 25, 1996). Moreover, the Legislature does not refer to a violation of section 44-96-170 as a criminal offense. Following Southern Railway Company, failure to make a violation of the statute a criminal offense is indicative of the Legislative's intent to use the word "fine" in the sense of a penalty rather than punishment for a crime. Therefore, based on the Supreme Courts holding in Southern Railway Company, we believe a court would likely find the

fine imposed for violating section 44-96-170(H) is a civil violation.[3] However, this determination is not free from doubt, and we suggest you seek guidance from a court or clarification from the Legislature.

CONCLUSION

Based on the authority given to code enforcement and litter control officers, we believe a court would likely find they are law enforcement officials for purposes of enforcing section 44-96-170(H) and therefore, able to enforce its provisions. Based on our Supreme Court's holding in Southern Railway Company, we believe a court is likely to find the fine imposed under section 44-96-170(H) is a civil fine rather than a criminal penalty. However, this determination is not free from doubt, and we suggest you seek clarification from a court or the Legislature.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[3] We note section 44-96-100 specifies both civil and criminal penalties for violation of regulations promulgated by DHEC pursuant to section 44-96-170(H). However, the Legislature specifies in which cases the violation of those regulations is civil or criminal.