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September 1, 1988

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Dear Motte:

In a letter to this Office you indicated that the City of Isle of Palms has adopted ordinances dealing with the possession of marijuana and the possession of drug paraphernalia. You have questioned whether the assessments provided by Sections 14-1-210(1), 23-23-70, and 24-23-210(A) of the Code should be collected in addition to the fines imposed by the ordinances when an individual is convicted pursuant to the ordinances. Both offenses established by the ordinances are triable in the municipal court and provide penalties for violations of imprisonment for a term not to exceed thirty (30) days or a fine of not more than two hundred (\$200.00) dollars.1/

1/ You have not raised additional possible questions as to the authority of the City to adopt such ordinances in the manner set forth. However, certain points should be noted. Both ordinances provide for the prosecution of violators by means of the issuance of a city citation. It is particularly stated in the ordinances that "... prosecution may be effected without an arrest warrant or transporting of a defendant to the ... jail for booking." An Order issued by former Chief Justice Lewis dated August 30, 1979 stated in part

... numbered arrest warrants ... shall be used for violations of municipal ordinances, statutory law and the common law except in cases where a Uniform Traffic Ticket is used for traffic offenses.

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Section 23-23-70 of the Code states in part

(e)very fine levied on a criminal ... viola-
tion in this State shall have sums added
to it ... and every bond for violations

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Referencing such Order, in an opinion dated June 11, 1982 this Office determined that an arrest warrant must be issued for a violation of a city ordinance in order for a court to have jurisdiction to hear a particular case. A municipal summons ticket is not recognized as a valid charging paper. See also: Opinion of the Attorney General dated December 9, 1982 (the violation of a non-traffic municipal ordinance ... could not be disposed of through magistrate's court or municipal court using a town summons) Of course, in 1984, Section 56-7-10 of the Code was amended to provide for the use of the uniform traffic ticket for certain specified State offenses. No reference, however, was made to the use of such ticket for violations of municipal ordinances. Therefore, the provisions in the ordinances of the Isle of Palms pertaining to the use of a city citation for violations of such ordinances is in conflict with the above.

Also, as noted, the ordinance dealing with the possession of drug paraphernalia provides for a penalty of a fine of two hundred (\$200.00) dollars or imprisonment for thirty (30) days. Section 44-53-391 of the Code, the State statute prohibiting the possession of drug paraphernalia, provides a civil fine of not more than five hundred (\$500.00) dollars for such offense. Pursuant to Section 5-7-30 of the Code "... municipalities ... shall ... have authority to enact regulations, resolutions and ordinances, not inconsistent with the Constitution and general law of this State" In an opinion dated October 25, 1976, this Office stated that a municipality could not enact an ordinance with a penalty in conflict with State law. It is generally recognized that a criminal penalty of a fine or imprisonment is distinguishable from a civil fine. See: U.S. v. Blue Sea Line et al., 553 F.2d 445 (5th Cir. 1977); 36 Am. Jur.2d Forfeitures and Penalties, Section 4, pp. 613-614. Therefore, there is a conflict between the City ordinance which provides a criminal penalty for the possession of drug paraphernalia and the State statute which provides a civil fine for such act.

Officials with the Isle of Palms may wish to review these points with their city attorney.

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must have added the same amounts which shall be set apart on forfeiture... In addition to ... (such) ... amounts ... twenty-five cents must be added to each fine or forfeiture.... (emphasis added.)

The sums collected pursuant to such provisions are to be used for law enforcement and criminal justice training and for the State Law Enforcement Hall of Fame.

Section 24-23-210(A) of the Code states in part

(w)hen any person is convicted, pleads guilty or nolo contendere and is sentenced to payment of a fine, or when any person forfeits bond, including the assessment hereinafter provided, to any offense within the jurisdiction of a municipal, recorder's or magistrate's court other than a nonmoving traffic violation, there is imposed an assessment, in addition to any other costs or fines imposed by law in the sum of four dollars. (emphasis added.)

Such assessment is to be utilized for funding of the community corrections program.

Clearly, the assessments provided by Sections 23-23-70 and 24-23-210(A) should be collected where appropriate when an individual is convicted of violating the referenced ordinances dealing with the possession of marijuana and drug paraphernalia. As to the assessments provided by Section 14-1-210 of the Code, such statute states:

... each conviction for an offense against the State must be assessed a cost of court fee ...

Every such conviction must, in addition to any other assessments provided by law, be assessed a cost of court fee in accordance with the following schedule:

(1) Every conviction for an offense in the magistrates' courts or municipal courts of this State must be assessed a cost of court

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fee ... (which) ... must be collected by the municipal and magistrate's court regardless of the amount of fine or bond imposed.

As referenced, the assessment is to be collected upon a conviction "for an offense against the State." Here, of course, the question relates to the applicability of such to a municipal ordinance.

The distinction between municipal ordinances and a state statute has been recognized. It is generally noted that a municipal ordinance is operative only within the boundaries of the municipality and is inapplicable to the state. See: McQuillin Municipal Corporations vol. 5, §§ 15.14, 15.15, 15.19; 56 Am.Jur.2d Municipal Corporations, § 407. Moreover, it is stated that a municipal ordinance is considered inferior in status and subordinate to the laws of the state. Such is consistent with the general consideration that an ordinance cannot hamper the operation or effect of a general state law but instead must be in harmony with the state law. See: McQuillin Municipal Corporations, vol. 5, §§ 15.21 and 15.22; 56 Am.Jur.2d Municipal Corporations, § 374. It is specifically stated that an ordinance

... is a local law of a municipality, emanating from legislative authority, and is both a local law and, in a sense, a law of the state. However, it has been held that ordinarily the term "ordinance" is not included within the meaning of the term "law," and that a municipal ordinance is not a law within every meaning of the term in that it is not in the constitutional sense a public law, since it is a local rule, a public or domestic regulation, devoid in many respects of the characteristics of public or general laws.

62 C.J.S. Municipal Corporations, § 411.

I am unaware of any cases in this State precisely examining the issue of whether a municipal ordinance constitutes "an offense against the State". However, courts in other jurisdiction have dealt with this issue. Some courts have analogized municipal offenses to state offenses. See: City of Charleston v. Deller, 30 S.E. 152 (1898). In State v. Police Court, 283 P. 430 at 433 (1929) the Montana Supreme Court determined that city ordinances have "... the same force, and are to be treated as,

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legislative acts of the State." In State ex rel. Marquette v. Police Court of City of Deer Lodge et al., 283 P. 430 at 433 (1929) the Montana Supreme Court stated that

(v)alid ordinances, passed by the municipality with the design of the Legislature, have, within the territorial jurisdiction of the municipality, the same force, and are to be treated as, legislative acts of the state.

Similarly, in Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (1971), a California district court determined that a county gambling ordinance qualified as a criminal law of the State of California. See also: State v. Melendrez, 572 P.2d 1267 (N. Mex. Ct. App., 1977) (violation of an ordinance prohibiting shoplifting constituted a "crime" for purposes of a state evidence rule); Wheatley v. State, 139 P.2d 809 (Ok. Ct. App., 1943) (violation of municipal ordinance prohibiting possession or sale of liquor constituted a "crime" for purposes of a state statute.) However, in City of Clovis v. Hamilton, 62 P.2d 1151 (1936) the New Mexico Supreme Court stated that "... a violation of a city ordinance is not an offense against the state." In Clovis the Court determined, therefore, that the governor's pardon authority did not reach to a violation of a city ordinance inasmuch as such did not constitute a state offense. See also: People v. Rogers, 408 N.E.2d 769 (Ill. 1980) (the term "offense" which was defined as "a violation of any penal statute of this State" does not include municipal ordinance violations); Perry v. City of Birmingham, 88 So.2d 577 (Ala. 1956) (the violation of a municipal ordinance or regulation is not a crime or criminal offense against the state, but only against the municipal corporation enacting the ordinance or regulation.) While not dealing with the precise issue noted above, prior decisions by the South Carolina Supreme Court have recognized the distinction between municipal offenses and State offenses. See: State v. Butler, 230 S.C. 159, 94 S.E.2d 761 (1956); City of Spartanburg v. Gossett, 228 S.C. 464, 90 S.E.2d 645 (1955). In State v. Sanders, 68 S.C. 192 at 195, 47 S.E. 55 (1904), the State Supreme Court referred to the distinction between municipal ordinances and State offenses as

(o)ne is an offense committed by a corporation and the other is as a citizen of the State. The one offense is a breach of a corporate regulation and the other is a breach of a general law for the whole State.

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Even in light of possible questions that may be raised due to current rulings regarding double jeopardy, the decision of the State Supreme Court in Greenville v. Kemmis, 58 S.C. 427, 36 S.E. 727 (1900) is useful in noting the distinction between the two types of offenses. In such case the Court stated that

... State legislation ... and the municipal legislation ... can both stand together, and there is no conflict whatever. The utmost that can be said is that the municipal corporation ... has seen fit to make an act done within the corporate limits a criminal offense, which the legislature has not seen fit to constitute such an offense. Indeed, it is well settled ... that the same act may be made an offense both against the State and the municipal law.

58 S.C. at 433. In City Council of Anderson v. O'Donnell, 29 S.C. 355 at 369, 7 S.E. 523 (1888), the Court determined that

... offenses against the ... (municipal) ... corporation and the State ... are distinguishable and wholly disconnected, and the prosecution of the suit of each proceeds upon a different hypothesis: the one contemplates the peace and good order of the city; the other has a more enlarged object in view, the maintenance of the peace and dignity of the State.

Referencing the above, there is obviously a split of authority as to whether a municipal ordinance should be considered to be "an offense against the State" for purposes of Section 14-1-210. Citing the decision of the State Supreme Court in State et al. v. Wilder, 198 S.C. 390, 18 S.E.2d 324 (1941), this Office in an opinion dated September 18, 1985 stated that costs and fees "... are in the nature of penalties and the statutes granting them have always been strictly construed." See also: Opinions of the Atty. Gen. dated April 19, 1979 and April 26, 1978. Moreover, as stated in an opinion of this Office dated September 25, 1985 "... statutes providing for fees are to be strictly construed against allowing a fee by implication...." Inasmuch as the issue of whether municipal ordinance violations constitute state offenses is not settled and recognizing the referenced rules of strict construction against the allowing of fees, or in this situation an assessment, it appears that the assessments established by Section 14-1-210 should not be collected for a violation of the particular ordinance of the

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Isle of Palms at issue here. Of course, legislative clarification could be sought to resolve the issue.

You also asked whether individuals convicted of violating any city or county ordinance are liable for the assessments provided by Sections 14-1-210(1), 23-23-70 and 24-23-210(A). Consistent with the above response, the assessments provided by Sections 23-23-70 and 24-23-210(A) should be collected where appropriate for violations of all city and county ordinances. However, for the reasons stated above, the assessments provided by Section 14-1-210 should not be collected in such circumstances. (Discussion set forth above concerning municipal ordinances is similarly applicable to county ordinances. See: Opinion of the Attorney General dated June 11, 1984; Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985).)

In your last question you asked whether fines for violating the Isle of Palms ordinance dealing with the possession of marijuana should be distributed pursuant to Section 44-53-370 of the Code. Such provision states that fines collected pursuant to such statute shall be distributed as follows:

(f) or a first offense, the first one hundred dollars shall be distributed pursuant to the provisions of § 44-53-580 and all monies in excess of that amount shall be distributed to the unit of government whose law enforcement officers initiated the investigation which resulted in the conviction.

Section 44-53-580 states:

(a) all fines collected by any court or agency resulting from any violation of any provision of this article must be remitted to the State Treasurer under terms and conditions as he may determine. All fines must be used by the Department of Mental Health exclusively for the treatment and rehabilitation of drug addicts within the department's addiction center facilities.

In examining the ordinance of the Isle of Palms dealing with marijuana the authority of the municipality to enact such an ordinance is called into question. As noted in the prior footnote, pursuant to Section 5-7-30 of the Code "... municipalities ... shall ... have authority to enact regulations, resolutions and ordinances, not inconsistent with the Constitution and

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general law of this State" Consistent with Section 5-7-30, it has been noted that

... police ordinances in conflict with statutes, unless authorized expressly or by necessary implication, are void. A charter or ordinance cannot lower or be inconsistent with a standard set by law.

McQuillin Municipal Corporations (3rd Ed.) vol. 6, § 24.54. Similarly stated,

(a)ny municipal control or prescribing of offenses must conform to, and not conflict with, the constitution, statutes and public policy of the state ... A statute prevails over or supersedes an ordinance relative to an offense, where the statute is intended to have that effect. Even where the scope of municipal power is concurrent with that of the state and where an ordinance may prohibit under penalty an act already prohibited and punishable by statute, an ordinance may not conflict with or operate to nullify state law.... Ordinances lowering or relaxing statutory standards relative to offenses are void as in conflict with state law and policy.

McQuillin Municipal Corporations vol. 6, § 23.07.

Here the ordinance does not distinguish the offense of marijuana based upon the amount in possession. It simply provides a penalty of a term of imprisonment of not more than thirty days or a fine of not more than two hundred (\$200.00) dollars for the offense of possession of marijuana. While the ordinance makes the possession of marijuana a criminal offense within the jurisdiction of the municipal court, State law, as set forth in Section 44-53-370(d)(3) provides that for the offense of possession of marijuana to be within the jurisdiction of a magistrate's or municipal court, the amount of marijuana involved must be twenty-eight grams or less. The penalty for such violation is imprisonment for a term not to exceed thirty days or a fine of not less than one hundred (\$100.00) dollars or more than two hundred (\$200.00) dollars. Also, State law provides for the possible conditional discharge of an offender in such circumstances. Therefore, there is obvious inconsistency between the Isle of Palms ordinance and State law.

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In an opinion dated October 25, 1976 this Office indicated that an ordinance issued by a municipality in this State prohibiting simple possession of marijuana was "unauthorized." The opinion particularly noted the following:

... municipal control of offenses against the state is limited to offenses of peculiar concern to the people within a particular municipal corporation although of fundamental and ultimate concern to the people of the state as a whole, whereas offenses dealt with and punishable by state statute are those of primary and direct concern to the people of the state as a whole.

The opinion concluded that "... the control of drugs ... by criminal sanction is a state-wide concern and, thus, the State has, in effect, pre-empted the field of legislation relating thereto." Therefore, inasmuch as the validity of the referenced ordinance is doubtful, a specific response to your question as to whether the fine for violating the particular ordinance should be distributed in accordance with State law appears unnecessary.

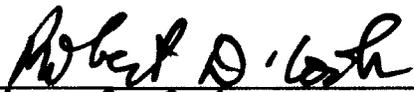
If there is anything further, please advise.

Sincerely,


Charles H. Richardson
Assistant Attorney General

CHR/an

REVIEWED AND APPROVED BY:



Robert D. Cook
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