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ATTORNEY GENERAL

October 10, 2025

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Dear Mr. Padgett:

On behalf of the City of Greenwood, as its attorney, you seek our opinion regarding the authority of a municipality to adopt a so-called "hate crimes" ordinance. This is a novel question and has not been addressed by our courts. Of course, our opinion is advisory and non-binding. We are able, in an opinion, to identify constitutional concerns, but only a court may determine the legality of such an ordinance.

Moreover, as you are aware, "[a] municipal ordinance is a legislative enactment and is presumed to be constitutional." Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals, 440 S.C. 266, 278, 890 S.E.2d 748, 754 (2023) (quoting Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991)). As our Supreme Court has stated,

> [c]ourts must make every presumption in favor of the constitutionality of a legislative enactment. McMaster v. Columbia Bd. Of Zoning Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (per curiam) (quoting City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011)). Thus, courts may only declare a municipal ordinance unconstitutional "when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." Id. at 504, 719 S.E.2d at 663 (quoting Harris, 391 S.C. at 154, 705 S.E.2d at 55).

Ani Creation, Id. Accordingly, any so-called "hate crimes" ordinance, which has been adopted, remains operative, unless and until a court concludes otherwise.

While a municipal ordinance is entitled to a strong presumption of validity, any opinion we issue concerning that ordinance simply points out constitutional concerns that a court may consider if the validity of the ordinance is challenged in court. As you request, we do so in this opinion. In that regard, your letter takes the form of an excellent legal memorandum, which we greatly appreciate. We fully agree with your analysis, but will comment a bit further. Therein, you state the following:

[t]he City has been requested to debate a municipal hate crimes ordinance almost identical to the form of that of Cayce, SC Ordinance 2024-04. This proposed legislation for the City would make it unlawful to intimidate another (clearing invoking free speech) based on possession of a listed protected status, is chargeable as a crime as a separate offense (but only if triggered by violation of another part of the City Code, or an enhancement charge), and is punishable under the general penalty section of the City Code (providing for a fine of up to $500.00 and/or 30 days in jail).

This type of ordinance seems to run afoul of several principles set down long ago to ensure consistent application of criminal law throughout the State. The Cayce ordinance is affected by the First Amendment right to free speech. The Cayce Ordinance seems to be unconstitutionally vague on its face. Further, it becomes necessary to review the content of the expression to determine if it is intimidation based on a listed protected status. This content review is also problematic.

Under the South Carolina Constitution, "[i]n enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: [...] criminal laws and the penalties and sanctions for the transgression thereof[...]." See S.C. Const. art. VIII, § 14(5). Municipal hate crimes ordinances have created, or will further create, a patchwork of criminal laws throughout the state setting up unpredictable outcomes for those that travel the State for lack of uniformity. See Martin v. Condon, 324 S.C. 183,478 S.E.2d 272, 274 (1996) ("Article VIII, § 14(5) [...] of our [SC] constitution requires statewide uniformity of general law provisions regarding 'criminal laws and the penalties and sanctions for the transgression thereof.'"); Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997) (per Burnett's dissent); Foothills Brewing Concern, Inc. v. City of Greenville 377 S.C. 355, 660 S.E.2d 264 (2008); Beachfront Entertainment, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 666 S.E.2d 912 (2008).

As repulsive, despicable, and unnecessary as hate of any kind is, such has not been outlawed throughout the State. It has, however, been discussed in the State Legislature. The seeming lack of willingness of the State Legislature to take up the bills indicates that such "hate" conduct is not unlawful in the State as a separate offense. See 2022 WL 527839, at *8 (S.C.A.G. Feb. 16, 2022) ("[discussing nude dancing] the Court concluded that Art. VIII, § 14 of the State Constitution, which provides that state criminal laws and penalties and sanctions not be set aside by local governments, would be construed "to prohibit a municipality from proscribing conduct that is not unlawful under State criminal laws governing the same subject. (internal citation omitted). Inasmuch as 'Town has criminalized conduct that is not unlawful under relevant State law, we conclude Town has exceeded its power in enacting the ordinance in question."'); 2011 WL 5304080, at *14 (S.C.A.G. Oct. 11,2011) ("As the Court made clear in Foothills Brewing and Beachfront, local governments may not criminalize conduct which is otherwise lawful under State law.")

Even passing legislation for a "good purpose" may be incongruent with the rule of law. Legislation must be correct in substance and procedure under the rule of law, not for popularity's sake or to "send a message." 2022 WL 527839, at *10 (S.C.A.G. Feb. 16, 2022) ("While we appreciate and respect the efforts of the City of Columbia in protecting equal dignity for all persons [referring to conversion therapy], the City cannot adopt an ordinance that likely violates the State and federal Constitutions. The right to free speech and free expression and thought cannot be undermined or violated, even for a salutary purpose.")

The Cayce ordinance clearly has criminal implications by making reference to its general penalty section in the Cayce Code sec. 1-6. This cannot be under at least two South Carolina cases and previous opinions of your Office. See Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008) (upholding a smoking ban because it was not criminal in nature) ("An ordinance which merely declares certain conduct to be "a public nuisance" or "an infraction" and imposes a 'civil fine' is not the same as a criminal ordinance."); Beachfront Entertainment, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 666 S.E.2d 912 (2008) ($500 file was too great, therefore criminal in nature and ordinance was struck down as unconstitutional); 2011 WL 5304080, at *14 (S.C.A.G. Oct. 11, 2011) ("Consistent with Foothills Brewing and Beachfront, a civil penalty can be achieved by language indicating a violation is an "infraction" and/or a "public nuisance." However, an ordinance will be construed as imposing a criminal penalty if it characterizes a violation as a "misdemeanor," is punishable by jail time, or imposes a fine which is too severe in comparison to that imposed for a similar State law violation.").

It seems that for a municipal hate crimes ordinance to pass muster, it would have to:

1. be consistent with the First Amendment to the US Constitution;
2. only be issued as an enhancement to the charge and conviction of another crime (therefore hate crime is not a crime by itself).
3. only be a civil "infraction" because the act is a "public nuisance" and not independently criminal in nature (therefore, a hate crime is not a crime by itself);
4. subject only to a fine, but not too great of a fine to be considered "criminal" in nature; and,
5. have limited application to municipal court with no application outside the particular municipality or in the court of general sessions (thereby increasing the confusion of the public).

Local government does not seem equipped to pass the type ordinance the City is being asked to debate. What the local level of government might be empowered by state law to provide would further disappoint, and possibly infuriate, the public simply because it is too weak to address the serious nature of the problem and would be extremely limited in its scope of jurisdiction. A weak ordinance would degrade and trivialize the very principles of fairness and justice the public wants this law to promote.

> I would very much appreciate the opinion of your Office on the constitutionality of the Cayce Ordinance. It appears that many other local governments have copied the same form. . . .

You have also enclosed a copy of Section 28-27 (Cayce Ordinance).

Law/Analysis

We turn now to analysis of the proposed ordinance in question. One major concern regarding the adoption of a so-called "hate crimes" ordinance by a municipality or county is Article VIII, § 14(5) of the State Constitution. That provision prohibits a county or municipality under its Home Rule powers from "setting aside the criminal laws and the penalties for the transgression thereof. . . ." In Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718, 719-20 (1997), our Supreme Court elaborated upon this constitutional provision at considerable length, relying upon its previous decision in Connor v. Town of Hilton Head, 314 S.C. 251, 442 S.E.2d 608 (1997). The Court in Diamonds analyzed Art. VIII, § 14(5) as follows with respect to an ordinance prohibiting public nudity:

> [u]nder state law, counties have the authority to enact ordinances "in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. S.C. Code Ann. § 4-9-25 (Supp. 1995). An ordinance addressing public nudity would fall within this broad grant of power.
>
> In declaring the ordinance invalid, the trial judge found a conflict with Article VIII, Section 14 of the State Constitution, which reads:
>
> > [i]n enacting provisions required or authorized by this article, general law provisions applicable to the following matter shall not be set aside:
> >
> > (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; (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 State government or which requires statewide uniformity.
>
> (emphasis added).

The trial judge relied on Connor in holding appellant could not enact a general ban on public nudity when state law did not make such conduct unlawful. The State Supreme Court found this reliance was "correctly placed." The Diamonds Court then proceeded to discuss

Connor in even greater detail, and to note the background which had led to the framing of Article VIII, § 14:

> [i]n Connor, a municipality enacted an ordinance making it unlawful to participate in nude or semi-nude dancing or to owner operate a sexually-oriented business (defined to include a nightclub or bar where such dancing is performed). The Court stated the scope of a municipality's power to enact ordinances was a question of state law.
>
> While under state law a municipality has general power to enact ordinances, the Court construed Article VIII, Section 14(5)'s mandate that state criminal laws not be "set aside" to "prohibit a municipality from proscribing conduct that is not unlawful under state criminal laws governing the same subject." 314 S.C. at 254, 442 S.E.2d at 609 (emphasis added). Because state criminal laws addressing the subject of public nudity do not prohibit nude dancing alone, the ordinance conflicted with this constitutional section and therefore was invalid. In this case, the same rationale applies. Ordinance 2727 has the 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. . . . Connor's holding is supported by the comments of the drafters of the proposed section, which was added as part of the major revisions made to the State Constitution in the early 1970's. A special committee was created, headed by John C. West (the "West Committee"), to recommend these revisions. Regarding proposed Article VIII, Section 14 (which was adopted by the legislature verbatim), the West Committee commented, "There are certain fundamentals related to freedom which should be treated only by the State and should not be left to local variation or abuse." Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 91 (1969) (emphasis added). One 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." 2 James L. Underwood, The Constitution of South Carolina, 133, 134 (1989). Finally, our language regarding Article VIII, Section 14 in other cases show that we have consistently interpreted that section broader than only prohibiting local governments from adopting ordinances that conflict with state general law. See Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). . . . (Construing Article VIII. Section 14(4) as effectively withdrawing the subject "from the field of local concern"); Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987) (stating Article VIII, Section 14 "precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subject encompassed by that section.").
>
> We thus hold the trial court was correct in finding Appellant's enactment of Ordinance 2727 was unconstitutional and therefore invalid.

Diamonds, 325 S.C. 154, 480 S.E.2d 718, 719-20 (1997).

Other decisions of the Court have reached the same conclusion as Connor and Diamonds. For example, in Palmetto Princess LLC v. Town of Edisto Beach, 369 S.C. 50, 53, 631 S.E.2d

76, 78 (2006), the Court concluded that "[b]ecause a gambling day cruise was a legal activity allowed by the State, Edisto's Ordinance is unconstitutional because it makes a legal activity unlawful. . . . Where the General Assembly has occupied the field in a particular area, i.e. gambling, by describing what is and what is not proscribed, local governments are not free to alter the standards established by the General Assembly." And, in Beachfront Entertainment, Inc. v. Town of Sullivans Island, 379 S.C. 602, 666 S.E.2d 912 (2008), the Court held that "Town's ordinance is invalid in that imposes a criminal penalty for smoking in places where smoking is not illegal under State law." 379 S.C. at 606, 666 S.E.2d at 914.

Further, in Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272, 274-75 (1996), the Court struck down a referendum which allowed counties to criminalize video poker, which, at that time, was legal. There, the Court stated:

> Article VIII, § 14(5) of our Constitution requires statewide uniformity of general law provisions regarding "criminal laws and the penalties and sanctions for the transgression thereof." Accordingly, local governments may not criminalize conduct that is legal under a statewide criminal law. Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) (municipality cannot criminalize nude dancing where relevant State law does not; see also City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) (local government cannot impose different penalties for possession of marijuana than those established under State law). Here, the effect of § 12-21-2806 is to criminalize in twelve counties conduct that is legal under a State criminal law. This effect conflicts with the constitutional requirement of uniformity in the area of State criminal laws. . . .

Justice Burnett, in his concurring opinion in Martin, however, disagreed with the majority that Connor was correctly decided to the extent that it held that "all conduct is lawful unless made unlawful by enactment of the General Assembly." He was of the view that Art. VIII, § 14 "does not yield to such an interpretation." In his concurrence in Diamonds, Connor should be overruled "insofar as it holds that local governments may not criminalize conduct that is not unlawful under statewide criminal law." 478 S.E.2d at 275-76. As he also emphasized in his Diamonds dissent, "Article VIII, § 14 of the South Carolina Constitution does not prohibit local governments from criminalizing conduct which is not unlawful under State law." 480 S.E.2d at 721. Justice Burnett's opinion is, of course, the minority view regarding Art. VIII, § 14(5), but his is a plausible reading of the provision and is one undoubtedly which would be asserted by local governments in any court challenge to a hate crimes ordinance.

By contrast, in Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), the Court distinguished for purposes of Art. VIII, § 14 the "criminalization" of conduct from simply making such conduct "illegal." According to the Court in Foothills, Art. VIII, § 14 of the State Constitution "requires" 'statewide uniformity' regarding the criminal law of this State, and therefore, 'local governments may not criminalize conduct that is legal under a statewide criminal.'" 377 S.C. at 365, 660 S.E.2d at 269. (quoting Martin v. Condon, supra). In that instance, the Court opined,

> [w]hile the Ordinance in this case does make smoking in certain areas "unlawful" where the Clean Indoor Air Act does not, it is our opinion the Ordinance does not criminalize such behavior. Instead, the Ordinance states that a violation constitutes "an infraction." "Infraction" is defined as:
>
> > A breach, violation, or infringement; as of a law, a contract, a right or a duty. A violation of a statute for which the only sentence authorized is a fine and which violation is expressly designated as an infraction.
>
> Black's Law Dictionary 537 (6th ed. 1992).
>
> Put simply, the plain language of the Ordinance is non-criminal in nature. This contrasts with the Clean Indoor Air Act's "misdemeanor" language which clearly indicates that a violation of the State law is considered a criminal offense. . . .
>
> In the instant case, however, where the violation of the Ordinance constitutes an infraction or a public nuisance, the conclusion is inescapable that the City does not seek to criminalize any conduct. As such, the Ordinance does not "set aside" the criminal laws of this State. Accordingly, we find the trial court erred in finding that the Ordinance violates Article VIII, Section 14 of the South Carolina Constitution.

377 S.C. at 365-66, 660 S.E.2d at 269-70. Thus, the Court upheld the City's Home Rule powers under Article VIII of the South Carolina Constitution. So long as the ordinance was not criminal in nature, it presented no constitutional issue based upon Art. VIII, § 14(5).

Another major concern regarding the ordinances in question is, of course, the First Amendment. As the South Carolina Supreme Court has recognized,

> [t]he First Amendment generally prevents government from proscribing expressive conduct because of disapproval of the ideas expressed. R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L. Ed.2d 305 (1992). Content-based regulations are presumptively invalid. Id..

Connor v. Town of Hilton Head Island, supra. As noted, the Court in Connor held that the ordinance in question not only prohibited nude dancing, pursuant to Art. VIII, § 14(5) of the South Carolina Constitution, but also that "Town's ordinance violates the First Amendment because it totally suppresses a protected form of expressive conduct." 314 S.C. at 256, 442 S.E.2d at 610.

R.A.V. cited by Connor, is the leading case regarding "hate crimes" legislation. In that instance, the City of St. Paul had adopted an ordinance similar to the ones in question here. It banned any

> Plac[ement] on public or private property [of] a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.

The Minnesota Supreme Court interpreted the St. Paul ordinance as prohibiting "fighting words."

In R.A.V., a cross was burned in an African-American person's yard. The perpetrator was prosecuted under St. Paul's "hate crimes" ordinance. The United States Supreme Court, however, notwithstanding the Minnesota Supreme Court's construction, struck down the ordinance as violative of the First Amendment. The Court concluded that the ordinance singled out particular speech based upon its content and point of view:

> . . . the ordinance applies only to "fighting words" that insult or provoke violence, "on the basis of race, color, creed, religion or gender. Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed in one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speaker who express views on disfavored subjects.

505 U.S. at 391 (emphasis added) (citations omitted).

The R.A.V. Court continued in its analysis as follows:

> [i]n its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion or gender-aspersions upon a person's mother, for example – would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.

Id. at 391-92. The concurring opinions in R.A.V. agreed the St. Paul ordinance violated the First Amendment, but on a different basis – that of overbreadth. Justice White, for example, argued that the ordinance is "fatally overbroad because it criminalizes not only unprotected expression, but expression protected by the First Amendment." 505 U.S. at 397 (White, J., concurring). As noted, R.A.V. has been followed by our own Supreme Court. See e.g., State v. Ramsey, 311 S.C. 555, 559-60, 430 S.E.2d 511, 514 (1993) ["The government may not selectively limit

speech that communicates, as does a burning cross, messages of racial or religious intolerance.... (citing R.A.V.). We conclude that Section 16-7-120 is facially unconstitutional...."].

Similarly, the ordinances in question single out intimidation "because of the actual or perceived race, color, creed, religion, ancestry, sexual orientation, gender, gender identity, physical or mental disability or national origin of the other person or persons, including any act of antisemitism. . . ." Thus, based upon the Court's analysis in R.A.V., the ordinance would apply only to certain expression based upon its content and point of view. According to the R.A.V. Court, "the manner of confrontation cannot consist of selective limitations upon speech." 505 U.S. at 392.

Shortly after R.A.V. was decided, in Wisconsin v. Mitchell, 508 U.S. 476 (1993), the United States Supreme Court upheld a statute which increased sentences if the perpetrator "intentionally selects" the victim or targeted property "because of the race, religion, color, disability, sexual orientation, national origin of that person or the owner or occupant of that property." See Bader, Penalty Enhancement For Bias-Based Crimes: Wisconsin v. Mitchell, 113 S.Ct. 2194, 17 Harv. J.L. & Pub. Pol'y 253 (1994). The Court, in Mitchell, distinguished R.A.V. as follows:

> [n]othing in our decision last term in R.A.V. compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "'fighting words" that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" 505 U.S. at 391, 112 S.Ct., at 2547 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city – i.e. those "that contain . . . messages of 'bias-motivated' hatred, 505 U.S. at 392, 112 S.Ct., at 2547 we held that it violated the rule against content-based discrimination." See id., at 392-394, 112 S.Ct., at 2547-2548. But whereas the ordinance struck down in R.A.V. was explicitly directed at expression (i.e. "speech" or "messages"), id., at 392, 112 S.Ct. at 2547, the statute in this case is aimed at conduct unprotected by the First Amendment.

Wisconsin v. Mitchell, 508 U.S. at 487. Thus, enhancement of sentences for other crimes, based upon the "hate" factors, such as race or religion, are valid.

Scholars have questioned whether Wisconsin v. Mitchell applies to so-called "mixed crimes" which combine both speech and conduct. As one authority has commented,

> [t]he Court's distinction between speech and unprotected conduct fails when applied to a large portion of crimes: bias-inspired crimes that mix elements of speech and non-expressive conduct. These "mixed crimes" such as property defacement and trespassing produce some "harms" distinct from their communicative impact, "but cause most of their harms directly through their communicative impact. "For example, painting a swastika on a synagogue harms worshippers chiefly through its communicative impact, but it also inflicts the property damage typical of all kinds of

> defacement. . . ." Thus Mitchell does not make clear whether penalties may be enhanced for missed crimes.

Bader, supra at 259.

And, in Virginia v. Black, 538 U.S. 343, 362-63 (2003), the United States Supreme Court upheld a statute prohibiting cross-burning with intent to intimidate. The Court viewed its analysis as consistent with that of R.A.V., stating the following:

> [u]nlike the statute at issue in R.A.V., the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics."…. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership or homosexuality."…. Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities….
>
> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subject of intimidating messages in light of cross burnings' long and pernicious history as a signal of impending violence. Thus, just as a state may regulate only that obscenity which is the most obscene due to its prurient content, so too may a state choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in R.A.V. and is proscribable under the First Amendment.

Conclusion

As our Supreme Court has recognized repeatedly, "Article VIII of the South Carolina Constitution mandates 'home rule' for local governments and requires 'all laws concerning local government [to] be liberally construed in their favor.'" S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 402-03, 629 S.E.2d 624, 631 (2006). Thus, "[w]here an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law." Id. at 403, 629 S.E.2d at 631. An ordinance of a municipality (or county) has a strong presumption of constitutionality. Ani Creation, Inc. v. City of Myrtle Beach Bd. Of Zoning Appeals, supra. The ordinance remains valid unless and until a court sets it aside. Even so, it is our opinion that a court could well conclude that the ordinances in question are inconsistent with the state and federal Constitutions.

For purposes of Article VIII, § 14(5), the framers considered state criminal laws unique and in need of uniformity. In other words, they wished to avoid a "patchwork" of criminal laws. The West Committee, which drafted Art. VIII, § 14(5), was particularly concerned about local governments "making an act a crime that was not a crime under state law." See Diamonds,

supra. Our Supreme Court has consistently upheld this principle, in the cases cited herein, seeking to avoid such a "patchwork." We have noted herein that Justice Burnett did not believe the Court's interpretation of Art. VIII, § 14(5) went nearly so far. However, his was a minority view, and the Court's construction of Art. VIII, § 14(5) has continued.

While there exist state crimes on the books which are related to the "hate crimes" ordinances in question, see, e.g. § 16-15-10 et seq., we are aware of no state law crime making as a separate offense the intent to "intimidate" because of race, color, creed, religion, etc. As you say, "[a]s repulsive, despicable , and unnecessary as hate of any kind is, such has not been outlawed throughout the State. . . ." Further, you note "it has, however, been discussed in the State Legislature." The seeming lack of willingness of the State Legislature to take up the bills, in your words, indicates that such "hate conduct is not unlawful in the State as a separate offense." We fully agree with your analysis. Apparently, a hate crimes law has passed in the House, but not the Senate. In short, there is no state "hate crimes" law currently on the books.

Accordingly, while we strongly support Home Rule, in this particular instance, we share your concerns that a court could well conclude that the ordinances in question are preempted by State law. Our Supreme Court has made it clear that uniformity in the area of criminal law is mandated by Art. VIII, § 14(5) of the State Constitution. Criminal laws, such as enactment of a "hate crimes" prohibition are solely within the province of the General Assembly. Local governments may not make criminal such conduct which has not been made criminal by the General Assembly – conduct which our Supreme Court thus considers "legal." While Justice Burnett, in concurrence in Martin v. Condon, disagreed with this analysis, still, it is the opinion of the Court and remains so today. Therefore, the ordinances in question are at considerable risk of being found by a court to be violative of Art. VIII, § 14(5) of the Constitution. We note that hate by intimidation on the basis of the "disfavored" factors set forth in the proposed Ordinance constitutes a "separate offense." In our view, this makes the proposed Ordinance especially subject to challenge. Of course, a municipality is free to adopt an ordinance regulating "hate crimes" which is not criminal in nature. Foothills Brewing, supra (smoking ordinance upheld, which made smoking in certain areas "unlawful," but not criminal).

Likewise, pursuant to the R.A.V. case, a court may well conclude that the ordinances in question violate the First Amendment. According to R.A.V., the ordinances may be held by a court to be content-based, as well as viewpoint-based. As was said in Virginia v. Black, in upholding a cross-burning statute, a hate crimes law may not "single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'" [race, gender, religion, etc.] 538 U.S. at 362-63. While subsequently Wisconsin v. Mitchell ruled valid a statute which enhanced a sentence based upon these "disfavored topics," such as race, religion, etc., here, the ordinance appears to be founded as a separate offense, based simply upon intimidation, using these "disfavored" factors to constitute a "separate offense." Thus, the ordinances are subject to a strong First Amendment and preemption challenge.

The use of hatred to intimidate others is repulsive and has no place in society. Our opinion herein in no way intends to undermine the importance of Home Rule or the ability of local governments to condemn racial, religious, or other forms of hatred. We condemn these as well and fully support Home Rule. We are required, however, to set forth the legal standards enunciated by our Supreme Court concerning preemption under the State Constitution and by the United States Supreme Court regarding the First Amendment under the federal Constitution. We do so herein. In our opinion, criminal hate crimes ordinances have been rendered "off limits" by our State Constitution and this form of criminal behavior may be addressed only by the General Assembly. Our Supreme Court has made it clear that local governments may not make criminal what remains "legal" under statewide criminal law. Such ordinances also may well violate the First Amendment for the reasons set forth in R.A.V. Thus, we fully agree with your analysis, articulated in your letter.

Sincerely,

Robert D. Cook
Solicitor General Emeritus